Case No. 22-30303

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Louisiana; State of Arizona; State of Missouri; State of West Virginia; State of South Carolina, *et al.*,
Plaintiffs-Appellees,
v.
Centers for Disease Control and Prevention; Rochelle Walensky; United States Department of Health and Human Services; Xavier Becerra; United States Department of Homeland Security, *et al.*,
Defendants-Appellants,

Innovation Law Lab,
Movant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

OPENING BRIEF OF APPELLANT INNOVATION LAW LAB

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. Additionally, as required by Rule 26.1, Movant-Appellant Innovation Law Lab states that it is a nonprofit corporation which does not have a parent corporation, and does not issue stock, so no publicly held corporation owns ten percent (10%) or more of its stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-002572

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-002574

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-002575

STATEMENT REGARDING ORAL ARGUMENT

Appellant Innovation Law Lab respectfully requests oral argument, which could significantly aid the Court's adjudication of Innovation Law Lab's appeal in this case.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002576

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i
STATEMENT REGARDING ORAL ARGUMENT vi
TABLE OF AUTHORITIES viii
STATEMENT OF JURISDICTION 1
ISSUES PRESENTED 2
STATEMENT OF THE CASE 3
BACKGROUND 6
SUMMARY OF THE ARGUMENT 10
ARGUMENT 13
I. Standard of review 13
II. Law Lab has organizational standing to appeal the nationwide scope of the preliminary injunction. 13
III. The district court erred in denying intervention as of right. 16
A. Law Lab's motion was timely 17
B. Law Lab has legally protectable interests in this case. 18
C. This case will impair or impede Law Lab's ability to protect its concrete interests. 19
D. Federal Defendants do not adequately represent Law Lab's protectable interests 20
IV. The district court erred in issuing a nationwide injunction. 24
A. The district court ignored the limits on its equitable authority by failing to balance the interests of nonparties. 25
B. The district court overstepped its equitable powers by issuing a nationwide injunction that is unsupported by the record evidence. 29
C. The alleged need for uniformity in immigration policy does not justify nationwide relief. 32
D. The APA does not require nationwide relief. 36
CONCLUSION 39
CERTIFICATE OF SERVICE 40
CERTIFICATE OF COMPLIANCE 41

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. Biden,
31 F.4th 469 (6th Cir.), *rev'd and remanded*, 2022 WL 2437870
(6th Cir. July 5, 2022) ..... *passim*

Barr v. E. Bay Sanctuary Covenant,
140 S. Ct. 3 (2019) 36

Biden v. Texas,
142 S. Ct. 2528 (2022) 12, 28

Brumfield v. Dodd,
749 F.3d 339 (5th Cir. 2014) 19

Califano v. Yamasaki,
442 U.S. 682 (1979) 25

California v. Texas,
141 S. Ct. 2104 (2021) 30

Damus v. Nielsen,
313 F. Supp. 3d 317 (D.D.C. 2018) 35

Dayton Board of Education v. Brinkman,
433 U.S. 406 (1977) 26, 28

DeOtte v. Nevada,
20 F.4th 1055 (5th Cir. 2021) 1, 13, 14, 18

Dep't of Homeland Sec. v. New York,
140 S. Ct. 599 (2020) 5, 25, 34

Doe v. Wolf,
432 F. Supp. 3d 1200 (S.D. Cal. 2020), *remanded by Doe v. Mayorkas*, 854 F. App'x 115 (9th Cir. 2021) 35

E. Bay Sanctuary Covenant v. Barr,
391 F. Supp. 3d 974 (N.D. Cal. 2019) 36

AMERICAN OVERSIGHT

E. Bay Sanctuary Covenant v. Barr,
934 F.3d 1027 (9th Cir. 2019) 36

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994 F.3d 962 (9th Cir. 2020) 36

E.T. v. Paxton,
19 F.4th 760 (5th Cir. 2021) 26

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006).....26

Edwards v. City of Houston,
78 F.3d 983 (5th Cir. 1996) 13, 20

Fiber Sys. Int'l, Inc. v. Roehrs,
470 F.3d 1150 (5th Cir. 2006) 25

Garland v. Aleman Gonzalez,
142 S. Ct. 2057 (2022).....12

Hecht Co. v. Bowles,
321 U.S. 321 (1944).....38

Huisha-Huisha v. Mayorkas,
560 F. Supp. 3d 146 (D.D.C. 2021),
aff'd and remanded by 27 F.4th 718 (D.C. Cir. 2022) 8

Innovation Law Lab v. Wolf,
951 F.3d 986 (9th Cir. 2020) 27, 35

La. ACORN Fair Hous. v. LeBlanc,
211 F.3d 298 (5th Cir. 2000) 16

La Union del Pueblo Entero v. Abbott,
29 F.4th 299 (5th Cir. 2022) 22

Lewis v. Casey,
518 U.S. 343 (1996).....26, 27, 28

Louisiana v. CDC,
No. 22-30303 (5th Cir. June 16, 2022).....9

AMERICAN OVERSIGHT

Louisiana v. CDC,
No. 6:22-CV-00885-RRS-CBW (W.D. La. May 27, 2022).....9

Miller v. French,
530 U.S. 327 (2000).....37, 38

Miller v. Vilsack,
2022 WL 851782 (5th Cir. Mar. 22, 2022) 22, 23

Milliken v. Bradley,
418 U.S. 717 (1974).....26

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010).....36

NAACP v. City of Kyle,
626 F.3d 233 (5th Cir. 2010) 15

New York v. DHS,
969 F.3d 42 (2d Cir. 2020) 27

Nken v. Holder,
556 U.S. 418 (2009).....38

OCA-Greater Houston v. Texas,
867 F.3d 604 (5th Cir. 2017) 14, 15, 19

P.J.E.S. ex rel. Escobar Francisco v. Pekoske,
2021 WL 9100552 (D.C. Cir. Jan. 29, 2021) 8

P.J.E.S. ex rel. Escobar Francisco v. Wolf,
502 F. Supp. 3d 492 (D.D.C. 2020).....8, 36

Scott v. Schedler,
826 F.3d 207 (5th Cir. 2016) 26

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18 F.3d 1202 (5th Cir. 1994) .....*passim*

Stallworth v. Monsanto Co.,
558 F.2d 257 (5th Cir. 1977) 17

AMERICAN OVERSIGHT

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805 F.3d 653 (5th Cir. 2015) .....*passim*

Texas v. United States,
14 F.4th 332 (5th Cir. 2021), *vacated*, 24 F.4th 407 (5th Cir. 2021),
appeal dismissed, 2022 WL 517281 (5th Cir. Feb. 11, 2022).....13, 27, 37

Texas v. United States,
809 F.3d 134 (5th Cir.), *as revised* (Nov. 25, 2015) 13, 33, 34

Trump v. Hawaii,
138 S. Ct. 2392 (2018).....5, 25

Trump v. International Refugee Assistance Project,
137 S. Ct. 2080 (2017).....26

Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n,
834 F.3d 562 (5th Cir. 2016) 16, 17, 18

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982).....26, 27

Statutes

5 U.S.C. § 706.....37, 38

8 U.S.C. § 1182.....6

8 U.S.C. § 1225.....6

8 U.S.C. § 1226.....6

8 U.S.C. § 1229a.....6

8 U.S.C. § 1252.....12

28 U.S.C. § 1292.....1

42 U.S.C. § 265.....32

42 U.S.C. § 268.....32

Cal. Educ. Code § 68130.5 29

AMERICAN OVERSIGHT

Rules

Fed. R. Civ. P. 24 ..... 16, 17

Regulations

8 C.F.R. § 208.30 6

8 C.F.R. § 235.3 6

85 Fed. Reg. 16,559 (Mar. 24, 2020) ..... *passim*

85 Fed. Reg. 16,567 (Mar. 24, 2020) 7

85 Fed. Reg. 56,424 (Sept. 11, 2020) 7

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-002582

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-002583

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292 because it is an appeal of an order that denied Innovation Law Lab's motion for limited intervention. Innovation Law Lab may appeal the nationwide scope of the preliminary injunction together with the denied motion for limited intervention. *DeOtte v. Nevada*, 20 F.4th 1055, 1066-67 (5th Cir. 2021) (holding denied intervenors may appeal intervention and merits simultaneously).

Innovation Law Lab timely appealed by filing its notice of appeal within 60 days of the district court's orders of May 13, 2022 (limited intervention) and May 20, 2022 (nationwide injunction) in a case where a federal agency is a party.

AMERICAN OVERSIGHT

ISSUES PRESENTED

1. Whether the district court erred in denying Innovation Law Lab's timely motion for limited intervention as of right where Innovation Law Lab has a unique protectable interest—to ensure any injunction is appropriately tailored to run only in Plaintiff States—that Federal Defendants do not adequately represent.
2. Whether the district court erred in issuing a nationwide injunction where nationwide relief was not justified by the record evidence nor the need for uniformity in immigration law where the program at issue is a public health policy that has been characterized by dis-uniformity.

AMERICAN OVERSIGHT

STATEMENT OF THE CASE

For over two years, the CDC's Title 42 order has blocked access to asylum at the southern border by authorizing the summary expulsion of individuals who lack proper entry documents without allowing them an opportunity to present their claims for protection. The order, which was entered pursuant to public health law, allegedly seeks to mitigate risks posed by the COVID-19 pandemic, but the claimed public health justification for the order has been repeatedly debunked. After Federal Defendants announced their plans to terminate the Title 42 order and resume normal processing at the border in May 2022, Plaintiff States—only two of which share an international border with Mexico—sued to keep it in place, seeking a preliminary injunction blocking the termination order on a nationwide basis. Federal Defendants have defended their right to terminate Title 42 generally, but have failed to oppose the nationwide scope of any relief. The district court granted Plaintiff States' motion for a nationwide injunction, relying on two primary justifications: that the operation of Title 42 along any part of the border would harm the Plaintiff States; and that immigration law must be uniform nationwide. As explained below, neither rationale justifies the extraordinary relief the district court ordered.

Innovation Law Lab ("Law Lab"), a legal services organization that serves people seeking asylum along the entire southern border, has sought to intervene in this case to defend against the nationwide injunction blocking the termination of the Title 42 expulsion order in California and New Mexico. Although Federal Defendants explicitly declined to argue, even in the alternative, that the injunction be limited to the Plaintiff States, the district court denied Law Lab's motion for

AMERICAN OVERSIGHT

limited intervention on the ground that Federal Defendants adequately represented Law Lab's interests. The district court issued its nationwide injunction shortly thereafter.

The district court erred in denying Law Lab's motion to intervene on the grounds of adequate representation. In reality, the federal government has *never* sought to obtain the relief that Law Lab seeks: a limitation on the injunction that would prevent it from operating in California and New Mexico, neither of which are parties to this case. Indeed, the district court interpreted the government's failure to seek that relief as opposition to it, but inexplicably found its interests aligned with Law Lab's anyway. Under this Court's rules strongly favoring intervention in this context, this was error.

The district court also erred in issuing a nationwide injunction where the justifications it relied on—namely, the record evidence and the alleged need for a uniform immigration policy—are deeply flawed.

Not a shred of record evidence supports the factual premise for nationwide relief: that the termination of Title 42 in *non*-plaintiff states, including California and New Mexico, will harm the Plaintiff States. In contrast, there is no dispute that the district court's order causes serious harm to many non-parties who will never set foot in the Plaintiff States, let alone cause them cognizable injury. The district court ignored the gaping holes in the evidentiary record, and entirely failed to balance the equities of non-parties—people and states—harmed by its injunction.

The district court's rationale based on the alleged need for uniformity in immigration policy is equally faulty. That reasoning ignores the fact that the

AMERICAN OVERSIGHT

government has never justified the Title 42 order as immigration policy; rather, the legal authority for it derives entirely from public health law. And as virtually everyone living in this country knows, the public health policies in response to the COVID-19 pandemic have varied drastically from region to region. Moreover, the rationale based on the alleged need for uniformity also ignores that, in practice, the Title 42 order has been characterized by dis-uniformity, just like other policies governing asylum processes at the border.

Given the inadequate record evidence and the nature of the policy at issue, the district court committed grave legal error in ordering a nationwide injunction. Assuming injunctive relief was warranted at all, the district court should have tailored that relief to run only in the states that are parties to this action. As Chief Judge Sutton recently explained in a concurring opinion reversing a nationwide injunction in a case about another immigration policy, "[e]ven if it turns out that the … States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick." *Arizona v. Biden*, No. 22-3272, 2022 WL 2437870, at *14 (6th Cir. July 5, 2022) (Sutton, C.J., concurring); *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring). Such is the case here.

Because the district court erred in issuing them, this Court should reverse the district court orders denying Law Lab's motion for limited intervention and granting Plaintiff States' motion for a nationwide preliminary injunction.

AMERICAN OVERSIGHT

BACKGROUND

Before the implementation of Title 42, individuals apprehended at or near the southern border who did not have proper entry documents were typically processed pursuant to Title 8 of the U.S. Code, including by being subjected to expedited removal under Immigration and Nationality Act § 235 or full removal proceedings under § 240.[1] *See* 8 U.S.C. §§ 1225(b)(1), 1229a. Individuals subjected to expedited removal who expressed a fear of persecution or torture were given a Credible Fear Interview to assess whether they had a significant possibility of establishing eligibility for asylum. *See* 8 U.S.C. § 1225(b)(1)(A)(i). Individuals who passed the Credible Fear Interview were placed into full removal proceedings, where they were permitted to present their cases before an immigration judge. *See* 8 U.S.C. §§ 1229a(c)(4), 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30, 235.3. Individuals who passed the Credible Fear Interview remained in the U.S. pending completion of removal proceedings. Some were jailed by Immigration and Customs Enforcement ("ICE"), while others were released pursuant to conditions of bond or parole. *See* 8 U.S.C. §§ 1182(d)(5); 1226(a).

That process was changed at the beginning of the COVID-19 pandemic, when the CDC and the U.S. Department of Health and Human Services ("HHS")

[1] Following the January 2019 implementation of the Migrant Protection Protocols, nearly 70,000 people who would have been subject to the expedited removal and Credible Fear Interview process were instead put directly in § 240 proceedings and forced to wait in Mexico for the duration of their asylum proceedings. U.S. Dep't of Homeland Security, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

AMERICAN OVERSIGHT

implemented Title 42, an emergency Interim Final Rule that largely suspends asylum procedures at the southern border due to claimed risks posed by COVID-19. 85 Fed. Reg. 16,559 (Mar. 24, 2020) ("Title 42"). Concurrently, the CDC Director ordered the "suspen[sion] [of] the introduction" of certain individuals seeking to enter the United States via land borders without entry documents, whose entry is otherwise contrary to law, or those who seek to unlawfully enter between ports of entry. 85 Fed. Reg. 16,567 (Mar. 24, 2020). On September 11, 2020, the CDC and HHS published the final rule, which took effect on October 13, 2020. 85 Fed. Reg. 56,424 (Sept. 11, 2020) (to be codified at 42 C.F.R. pt. 71). The CDC renewed Title 42 after the final rule took effect. 85 Fed. Reg. 65,806 (Oct. 16, 2020).

Customs and Border Protection began implementing Title 42 by halting all processing of asylum-seeking individuals at ports of entry, and U.S. Border Patrol began expelling most Mexican, Guatemalan, Honduran, and Salvadoran families and adults to Mexico without an opportunity to seek asylum.[2] Since Title 42 has been in effect, Border Patrol has expelled individuals of other nationalities to Mexico or their countries of origin without an opportunity to seek asylum.[3]

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[2] Stephanie Leutert, et al., *Metering & COVID-19* (Apr. 2020), https://usmex.ucsd.edu/_files/MeteringCovid-19.pdf; Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law*, ProPublica (Apr. 2, 2020), https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law.

[3] Jose Luis Gonzalez & Lizbeth Diaz, *U.S. expels dozens of Haitian asylum seekers to Mexico*, Reuters (Feb. 3, 2021), https://www.reuters.com/article/us-usa-immigration-border/u-s-expels-dozens-of-haitian-asylum-seekers-to-mexico-idUSKBN2A40FM; Camilo Montoya-Galvez, *U.S. launches deportation operation*

AMERICAN OVERSIGHT

Both federal courts and the CDC itself have limited Title 42's scope during the two years that it has been in effect. Courts have enjoined its implementation against particularly vulnerable groups, including children and families. *See P.J.E.S. ex rel. Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020); *P.J.E.S. ex rel. Escobar Francisco v. Pekoske*, 2021 WL 9100552 (D.C. Cir. Jan. 29, 2021); *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146 (D.D.C. 2021), *aff'd and remanded by* 27 F.4th 718 (D.C. Cir. 2022). Later, CDC orders exempted unaccompanied children from the application of Title 42, *see* 86 Fed. Reg. 38,717 (July 22, 2021), and then terminated Title 42 as to unaccompanied children.[4]

On April 1, 2022, the CDC Director announced the termination of Title 42, effective May 23, 2022 ("Termination Order"). ROA.140-169. On April 3, 2022, three states (the "Plaintiff States") filed this lawsuit challenging the Termination Order. ROA.97-138. On April 27, 2022, the district court granted Plaintiff States' motion for a nationwide temporary restraining order enjoining implementation of the Termination Order. ROA.1972-1975. On May 5, 2022, Plaintiff States amended their complaint to include other states as plaintiffs. ROA.3156-3225. Only two Plaintiff States actually share a border with Mexico: Arizona and Texas.

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[4] U.S. Centers for Disease Control, U.S. Department of Health and Human Services, Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children (Mar. 11, 2022), https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren-update.pdf.

AMERICAN OVERSIGHT

On May 9, 2022, Law Lab, a legal services organization that serves asylum-seeking individuals along the southern border in states including California and New Mexico, along with two asylum-seeking individuals who were blocked by the Title 42 order, moved to intervene for the limited purpose of raising an alternative defense to the nationwide preliminary injunction Plaintiff States sought. ROA.3528-3558. Plaintiff States and Federal Defendants opposed intervention as of right and permissive intervention. ROA.3665-3676, 3678-3689. On May 13, 2022, at the preliminary injunction hearing, the district court orally denied intervention based on its finding that Federal Defendants adequately represented Proposed Intervenors' interests, without allowing Proposed Intervenors an opportunity to present argument on the issue or otherwise reply to the parties' respective oppositions to its intervention motion, ROA.3696-3697, but invited Proposed Intervenors to present oral argument and submit a brief on the scope of the injunction as *amici curiae*, which Proposed Intervenors did, ROA.3731-3751.

On May 20, 2022, the district court granted Plaintiff States' motion for a nationwide preliminary injunction. ROA.3758-3804, 3852-3853. Both Federal Defendants and Law Lab filed timely notices of appeal. Law Lab sought a stay of the nationwide scope of the injunction before the district court and this Court, both of which were denied. Order, *Louisiana v. CDC*, No. 6:22-CV-00885-RRS-CBW (W.D. La. May 27, 2022); Order Denying Stay Application, *Louisiana v. CDC*, No. 22-30303 (5th Cir. June 16, 2022). Federal Defendants declined to seek a stay of the nationwide preliminary injunction.

AMERICAN OVERSIGHT

SUMMARY OF THE ARGUMENT

The district court clearly erred in denying Law Lab's motion for limited intervention. Contrary to the district court's summary finding, Federal Defendants do not adequately represent Law Lab's concrete, protectable interests in this litigation. The outcome of this case will affect whether and how Law Lab can fulfill its mission and expend its resources in service of people seeking asylum along the southern border, including at the California and New Mexico borders.

The district court's ruling to the contrary ignores this Court's precedent governing intervention; this Court's decisions in *Texas v. United States* and *Sierra Club v. Epsy* require reversal. In *Texas*, this Court held that even when the government defends a policy benefiting proposed intervenors, the government's interest may still diverge from intervenors' due to the government's overriding interest in "expansive… executive authority" and "efficiently enforcing the immigration laws." 805 F.3d 653, 663 (5th Cir. 2015). Similarly, in *Sierra Club*, this Court found that the government's need to represent the "broad public interest" did not adequately represent the economic concerns of groups representing the timber industry, thus requiring intervention. 18 F.3d 1202, 1208 (5th Cir. 1994).

Here, Federal Defendants do not adequately represent Law Lab's interests. This is most clearly demonstrated by Federal Defendants' failure to seek the relief for which Law Lab sought limited intervention: a limitation on the geographic scope of the injunction blocking Federal Defendants' Termination Order. Indeed, the district court interpreted Federal Defendants' decision not to present any argument for limiting the scope of the preliminary injunction as *agreement* with the injunction's

AMERICAN OVERSIGHT

nationwide scope. ROA.3803 ("The Defendants do not appear to contest the entry of a nation-wide preliminary injunction …."). Thus, the difference between Federal Defendants and Law Lab is not merely about litigation strategy. Law Lab asserts a unique defense to the nationwide aspect of the injunction, supported by arguments for remedial tailoring that no other party has advanced, the results of which would lead to a unique result that Federal Defendants have not pursued. Such differing objectives and divergence of interests clearly satisfy the inadequate representation requirement of Federal Rule of Civil Procedure 24.

The district court also erred in issuing a nationwide injunction. That sweeping remedy is inconsistent with the district court's equitable powers and unsupported by the record, which did not contain *any* evidence establishing that the termination of Title 42 in non-plaintiff states, including California and New Mexico, will harm the Plaintiff States, let alone enough evidence to justify extraordinary nationwide relief. In contrast, it is undisputed that the district court's order imposes significant burdens on people who will never even *enter* the Plaintiff States, let alone cause them harm, because it bars access to the asylum system for people who have no intention of ever leaving California or New Mexico. The imbalance in the record on this point is striking. It contains sworn declarations of individuals barred from accessing the asylum system who have no intention of leaving California, *see* ROA.3559-3563 ¶ 15, 3569-3573 ¶ 20, but not a single document concerning harm to Plaintiff States caused by the termination of Title 42, let alone enough to justify a nationwide injunction.

The nationwide scope of the injunction in this case also cannot be justified by the alleged need for uniformity in immigration policy because Title 42 is, at its core,

AMERICAN OVERSIGHT

a public health policy. While it of course has dramatic effects on immigration policy, the Title 42 order has been justified only on public health grounds, and it derives its authority from public health law. *See* 85 Fed. Reg. 16559, 16,560-16,563. Plaintiffs have cited no authority requiring nationwide uniformity in public health policy, and COVID-19 responses have never been uniform nationwide. Indeed, states have taken different approaches to how COVID-19 rules should be implemented.

Moreover, even if the Title 42 order could be justified by reference to immigration policy, that still would not support nationwide relief here. The Title 42 order itself, like virtually every border immigration policy, has not been implemented uniformly across the entire Southern border. Instead, it has been characterized by disuniformity—implemented differently in different regions based on various considerations.

The district court correctly declined to rely on the Administrative Procedure Act ("APA") as providing independent support for its nationwide injunction. Courts retain equitable authority—indeed, they are obligated—to order remedies that are appropriately tailored to the needs of the cases before them. Put simply, the district court here was not required to issue nationwide relief simply because Plaintiff States present a claim under the APA.[5] This is entirely consistent with this Court's recent

[5] Law Lab has sought intervention exclusively to defend against the scope of injunctive relief in this case, but it bears noting that recent Supreme Court decisions interpreting 8 U.S.C. § 1252(f)(1) to deprive lower courts of jurisdiction to enjoin or restrain the federal government's enforcement of immigration statutes call into question the propriety of injunctions like the one entered on behalf of Plaintiff States more broadly. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022); *see also Biden v. Texas*, 142 S. Ct. 2528 (2022).

AMERICAN OVERSIGHT

decision in *Texas v. United States*, in which this Court clearly distinguished between vacatur under the APA and injunctive relief like that ordered below, expressly declining to consider whether nationwide *injunctive* relief would have been appropriate in that case. 2022 WL 2466786, at *5 (5th Cir. 2022).

For these reasons, this Court should reverse the order denying Law Lab's motion for limited intervention and vacate the order granting Plaintiff States' motion for a nationwide injunction.

ARGUMENT

I. Standard of review

A ruling denying intervention as of right is reviewed *de novo*. *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed. Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Texas*, 805 F.3d at 656–57 (cleaned up).

An order granting a preliminary injunction is reviewed for abuse of discretion, but "[a]s to each element of the district court's preliminary-injunction analysis … findings 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." *Texas v. United States*, 809 F.3d 134, 150 (5th Cir.), *as revised* (Nov. 25, 2015) (citation omitted).

II. Law Lab has organizational standing to appeal the nationwide scope of the preliminary injunction.

Law Lab may appeal the nationwide scope of the preliminary injunction together with the denied motion for limited intervention. *See DeOtte v. Nevada*, 20

AMERICAN OVERSIGHT

F.4th 1055, 1066-67 (5th Cir. 2021) (holding denied intervenors may appeal intervention and merits simultaneously). Law Lab has suffered (and will continue to suffer) harm from the nationwide scope of the injunction, which establishes its standing to appeal. *Id.* at 1070 ("Standing to appeal requires injury from the judgment of the lower court," and requires appellant to show injury in fact, causal connection, and redressability); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 610-12 (5th Cir. 2017) (voting rights organization satisfied injury-in-fact requirement for standing purposes where it was required to divert resources to explain challenged voter law changes to people with limited English proficiency, which frustrated and complicated its routine community outreach activities).

Law Lab's organizational mission is, *inter alia*, to advance migrant and refugee justice, including by providing legal services to individuals seeking asylum along the California and New Mexico borders with Mexico. ROA.3580-3588 ¶¶ 2, 10. Title 42's wholesale suspension of the asylum system at the border has frustrated Law Lab's mission "on multiple levels." *Id.* ¶¶ 14-16. Title 42 has "stalled certain core aspects" of Law Lab's mission-related programming, *id.* ¶ 14, including by impeding its ability to engage in collaborative legal representation projects in California and New Mexico, *id.* ¶ 16. In addition, Law Lab has had to interrupt its routine programming and divert resources to meet the needs of individuals on the Mexican side of the California-Mexico border who are blocked from seeking asylum or have been expelled without the opportunity to undergo even a preliminary fear-based interview. This includes distributing accurate information and explaining the options

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002597

that such individuals have. *Id.* ¶¶ 20-21. Law Lab has also had to "respond to a flood of inquiries and community uncertainty." *Id.* ¶ 22.

The nationwide injunction extended the life of Law Lab's harms, and has already worsened them by creating yet another layer of uncertainty and opportunity for harm to asylum-seeking individuals that Law Lab must now address. *Id.* ¶¶ 20-21. "If Title 42's termination does not take effect," this "would compel Law Lab … to continue diverting resources to combat another prime opportunity for misinformation and exploitation of asylum-seeking individuals on the border." *Id.* ¶ 20. But for the nationwide injunction, Law Lab would have been permitted to resume its services to individuals seeking asylum at the southern border in California and New Mexico on May 23, 2022. ROA.318-347. The nationwide scope of the injunction thus stymied Law Lab's operations by blocking access to the asylum system for individuals who intend to seek asylum along the southern border in California and New Mexico *even if they have no intent to reside in Plaintiff States*. ROA.3580-3588 ¶¶ 10, 12, 13. An order tailoring the scope of this injunction and allowing it to run only in the Plaintiff States' geographic boundaries would permit Law Lab to resume its mission-driven work in states that are not parties to this litigation. Thus, Law Lab can establish injury in fact, causal connection, and redressability in support of its standing to appeal the geographic scope of the preliminary injunction.

Law Lab's concrete examples of resource diversion and mission frustration fall squarely within the injuries this Court has held sufficient for organizational standing. *See OCA-Greater Houston*, 867 F.3d at 610-12. Below, Plaintiff States argued that *NAACP v. City of Kyle* forecloses Law Lab's standing. 626 F.3d 233,

AMERICAN OVERSIGHT

238 (5th Cir. 2010) ("[T]he mere fact that an organization redirects some of its resources to *litigation and legal counseling* in response to actions or inactions of another party is insufficient to impart standing upon the organization." (quoting *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000) (emphasis added)). But this argument ignores the fact that Law Lab does not rely on its litigation in this or any other case challenging Title 42 to establish standing. The reality on the ground is that Law Lab's mission-driven work, which includes providing direct services to asylum-seeking individuals in California and New Mexico, has been stalled, and it has been forced to move part of its U.S.-based work to Mexico. Having to shift one's services in this way, including to a foreign country, is plainly a sufficient interest for purposes of standing or intervention.

III. The district court erred in denying intervention as of right.

The district court erroneously denied Law Lab's motion for limited intervention. It did so without issuing a written denial, instead orally explaining that Federal Defendants adequately represent Proposed Intervenors' interests and declining to give Proposed Intervenors an opportunity to present argument on their motion. ROA.4014:6-4016:5. That ruling contravened this Court's governing law.

Rule 24 allows nonparties to move to intervene as of right. Fed. R. Civ. P. 24. "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (citation omitted). Intervention should be permitted "where no one would be hurt and greater justice could be attained." *Sierra Club*, 18 F.3d at 1205 (citation omitted).

AMERICAN OVERSIGHT

Law Lab demonstrated that it is entitled to intervene as of right by showing (1) that its application to intervene was timely; (2) that it has an interest related to the policy that is the subject of the action; (3) that the disposition of the action may "as a practical matter, impair or impede [its] ability to protect that interest"; and (4) that its interest is inadequately represented by existing parties to the suit. Fed. R. Civ. P. 24(a); *see Wal-Mart*, 834 F.3d at 565 (citation omitted).

A. *Law Lab's motion was timely.*

When considering whether a motion to intervene is timely, courts should consider four factors: (1) the length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties may suffer as a result of failure of the proposed intervenor to apply sooner; (3) the extent of the prejudice that the proposed intervenor may suffer if the petition is denied; and (4) any unusual circumstances militating for or against the determination of whether the application is timely. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977). Law Lab satisfied the timeliness factors—an issue no party contested. *See* ROA.3665-3675, 3678-3689.

Law Lab filed its motion for limited intervention less than two weeks after Federal Defendants first made clear that Law Lab's "interests would no longer be protected by the original parties" because Federal Defendants did not intend to argue that any relief the district court ordered should have been limited geographically in their response to Plaintiff States' motion for a preliminary injunction. *Sierra Club*, 18 F.3d at 1206; ROA.3055-3109, ROA.3528-3558. Because an earlier motion

AMERICAN OVERSIGHT

would have run the risk of being "premature" and "wast[ing] judicial resources," no party was prejudiced by the timing of Law Lab's motion. *Sierra Club*, 18 F.3d at 1206. Indeed, at the same time that Law Lab moved for intervention, it included briefing on the geographic scope of the injunction in order to ensure its motion would cause no undue delay in the proceedings. ROA.3528-3558. Finally, Law Lab made clear it would be prejudiced if the motion was denied as it properly predicted that absent intervention, no party would pursue geographic limitations to any relief the district court ordered.

Thus, Law Lab's motion for limited intervention was timely.

B. *Law Lab has legally protectable interests in this case.*

Proposed intervenors must show a "direct, substantial, legally protectable interest in the proceedings." *Texas*, 805 F.3d at 657-58 (citation omitted). "[A]n interest that is concrete, personalized, and legally protectable is sufficient to support intervention." *Id.* at 658. In other words, "the inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Id.* at 657. Intervenors need not have an interest that would give rise to standing: "[A]n interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Wal-Mart*, 834 F.3d at 566 (cleaned up); *see also DeOtte*, 20 F.4th at 1068.

As described in Section II, Law Lab's organizational mission is to advance migrant and refugee justice, in part by providing legal services to individuals who seek asylum at the border under Title 8, including near the California and New

AMERICAN OVERSIGHT

Mexico borders with Mexico. ROA.3580-3588 ¶¶ 2, 10. That mission has been frustrated during the period that Title 42 has barred access to asylum at the border. *Id.* ¶ 16. In addition, Law Lab has had to divert resources from its routine programming to meet the needs of individuals on the Mexican side of the border who are blocked from seeking access to asylum, including by distributing and explaining accurate information about the options that such individuals have. *Id.* ¶¶ 20-21. This case will therefore determine the extent to which it can fulfill its mission and also dictate how it will expend resources. That establishes Law Lab's protectable interests in the case's outcome. *Cf. OCA-Greater Houston*, 867 F.3d at 610-12.

C. *This case will impair or impede Law Lab's ability to protect its concrete interests.*

Once a proposed intervenor establishes a protectable interest, it must "demonstrate that disposition of that action may, as a practical matter, impair or impede [its] ability to protect that interest." *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (citation omitted). The impairment must be "practical," not merely "theoretical." *Id.* For example, in *Brumfield*, the Fifth Circuit held that parents of children receiving school vouchers through a program that was challenged in litigation could intervene under Rule 24 because the lawsuit's outcome might have put some parents at risk of losing vouchers or their full range of school choices. *Id.*

Law Lab's ability to protect its interests in serving people seeking asylum at the southern border, including in California and New Mexico—and thus its ability to fulfill its mission and expend its resources—has been and will continue to be impaired by the outcomes of this case. As discussed, Law Lab has had to divert

AMERICAN OVERSIGHT

resources from its routine programming to meet the needs of individuals on the Mexican side of the California-Mexico border, including by distributing and explaining accurate information about asylum and responding to uncertainty about the shifting state of the law. The nationwide injunction has both extended the life of those harms and worsened them by creating yet another layer of uncertainty and harm to Law Lab and asylum-seeking individuals.

Law Lab's interests are protectable, and the outcome of this case has impeded and will continue to impede Law Lab's ability to protect those interests.

D. *Federal Defendants do not adequately represent Law Lab's protectable interests.*

The burden of proving inadequate representation is "minimal." *Sierra Club*, 18 F.3d at 1207. However, the Fifth Circuit has held that a presumption of adequate representation applies in two situations. First, where the proposed intervenor has the same ultimate objective as a party to the lawsuit, then the proposed intervenor must show "adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption," *Texas*, 805 F.3d at 661-62 (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)), such as by showing that the respective parties' interests diverge "in a manner germane to the case," *id.* at 662. Second, when the existing party is a governmental body charged by law with representing the interest of the intervenor, the proposed intervenor must show that their respective interests in fact differ and the government will not adequately represent those of the proposed intervenor. *Id.* Indeed, where there is a "lack of unity in all objectives," it is sufficient for Law Lab to show that it plans to advance "real and

AMERICAN OVERSIGHT

legitimate additional or contrary arguments" to meet Rule 24(a)'s requirement that the government's representation "*may* be inadequate." *Id.* (cleaned up).

The district court erred in finding that Federal Defendants adequately protect Law Lab's interests. First, Law Lab and Federal Defendants plainly do not share the same ultimate objective in this litigation. Whereas Law Lab seeks to limit the geographic scope of relief ordered, Federal Defendants seek to defend the Termination Order as a whole, as a function of its authority to efficiently enforce public health and immigration laws. Second, no mandate charges Federal Defendants with representing Law Lab's interests in serving asylum-seeking individuals along the southern border. But to the extent there is any presumption that Federal Defendants adequately represent Law Lab's interests, Law Lab has rebutted it.

This Court's decisions in prior cases illustrate the district court's error in its finding of adequate representation. In *Texas v. United States*, this Court held that even when the government defends a policy benefiting proposed intervenors, the government's interest may still diverge from intervenors' due to the government's overriding interest in "expansive … executive authority" and "efficiently enforcing the immigration laws," rebutting the presumption of adequate representation. *Id.* at 663. Similarly, in *Sierra Club*, this Court found that the government's need to represent the "broad public interest" did not adequately represent the economic concerns of groups representing the timber industry. 18 F.3d at 1208 (reversing district court order denying timber purchasers' association's motion to intervene as of right).

This Court has applied these principles in at least two recent cases, both reversing district court orders denying intervention as of right under analogous

AMERICAN OVERSIGHT

circumstances. In *La Union del Pueblo Entero v. Abbott*, a case brought to challenge a Texas voting law, this Court reversed the denial of intervention to Republican Party committees where both the state government and the committees shared the objective of upholding the state law, but where the respective parties' interests diverged over "how to carry out the ultimate objective." 29 F.4th 299, 308 (5th Cir. 2022). There, the state government sought to dispose of the case on jurisdictional and standing grounds, whereas the committees sought to have the constitutionality of the state law upheld on the merits. *Id.* at 309. In concluding that the committees overcame the presumption of adequate representation, this Court relied on the committees' "private interests" in the "expenditure of their resources to equip and educate their members" and on the state government's "relationship with the federal government and with the courts." *Id.* (citation omitted). "Though we cannot say for sure that the state's more extensive interests will *in fact* result in inadequate representation, we can say that surely they might, which is all that Rule 24(a)(2) requires." *Id.* (cleaned up).

The district court's ruling also contravenes this Court's decision in *Miller v. Vilsack*, a case brought to challenge a federal law that provides financial support to socially disadvantaged farmers. 2022 WL 851782, at *1 (5th Cir. Mar. 22, 2022). There, the district court had found the federal government would adequately represent the interests of a nonprofit cooperative association of Black farmers. This Court reversed, holding that even where the cooperative and the federal government shared the same ultimate objective of upholding the constitutionality of a federal law, their respective interests in the litigation were adverse because the cooperative sought to

AMERICAN OVERSIGHT

advance a unique argument about ongoing discrimination against its members that conflicted with the position of the federal government in a manner "germane to the case." *Id.* at *3.

This case is indistinguishable from the ones discussed above. First, Federal Defendants' interests diverge sharply from those of Law Lab, which seeks to advance migrant and refugee justice, including by expending its resources to assist and provide *pro bono* legal services to individuals seeking asylum at the California and New Mexico southern borders. ROA.3580-3588 ¶¶ 2, 10, 12-13. Law Lab has no interest in expanding Federal Defendants' immigration authority or the efficient enforcement of immigration or public health laws. Moreover, as the district court noted, Federal Defendants have made their divergent interests manifest by declining to present *any* argument for limiting the scope of the preliminary injunction to the Plaintiff States, which the district court interpreted as *agreement* with the injunction's nationwide scope. ROA.3803 ("The Defendants do not appear to contest the entry of a nation-wide preliminary injunction ...."). The issue around which these interests diverge—remedial scope—is unequivocally germane to this case.

Thus, it is no answer that Law Lab merely seeks to pursue a litigation strategy that Federal Defendants have rejected. Law Lab's unique objective, which no other party has pursued, is to ensure any relief the district court orders is appropriately tailored by geography. This does not amount to a litigation strategy in pursuit of a shared objective with Federal Defendants. While Law Lab no doubt opposes the Title 42 order as a general matter, the purpose of its intervention in this litigation is not to defend the Federal Defendants' Termination Order as a whole. Instead, Law

AMERICAN OVERSIGHT

Lab asserts a unique defense to the nationwide injunction, supported by arguments for remedial tailoring that no other party has advanced, the results of which would lead to an outcome that Federal Defendants have not pursued or suggested they will pursue. Thus, any potential presumption that might apply here is easily rebutted by reference to Federal Defendants' own actions, which illuminate their divergent government interests. *See Texas*, 805 F.3d at 663.

Federal Defendants do not adequately represent Law Lab's interests in this case and the district court erred in denying Law Lab's motion for limited intervention. This Court's precedent necessitates reversal.

IV. The district court erred in issuing a nationwide injunction.

The district court also erred in issuing a nationwide injunction based on its findings that the record evidence and the alleged need for uniformity in immigration policy justify nationwide relief in a case featuring a policy that derives its authority from public health law. *First*, the district court exceeded its equitable powers in granting nationwide relief in this case, where not a single piece of record evidence supports the central premise for the nationwide scope of the preliminary injunction: that the termination of Title 42 in non-plaintiff states, including California and New Mexico, will harm the Plaintiff States. On the other hand, it is undisputed that the district court's order imposes significant burdens on non-parties, including people who will never reside in the Plaintiff States, because it bars access to the asylum system for people who have no intention of ever leaving California or New Mexico. *Second*, neither the alleged need for uniformity in immigration policy, in this case

AMERICAN OVERSIGHT

challenging a public health order, nor the fact that this is an APA case mandate a nationwide injunction here.

A. *The district court ignored the limits on its equitable authority by failing to balance the interests of nonparties.*

As Justice Gorsuch explained in his concurring opinion in *DHS v. New York*, "[e]quitable remedies … are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court … goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies." 140 S. Ct. at 600 (Gorsuch, J., concurring); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring). In other words, "a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government. Even if it turns out that the … States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick." *Arizona*, 2022 WL 2437870, at *14 (Sutton, C.J., concurring) (concurring in an opinion reversing an order granting nationwide injunction on behalf of several states challenging federal immigration policy). Here, as in *Arizona*, a nationwide injunction is unnecessary to remedy—and entirely out of proportion with—Plaintiff States' alleged harms.

Injunctions must be tailored to take account of case-specific factors. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1159 (5th Cir. 2006) ("[A]n injunction must be narrowly

AMERICAN OVERSIGHT

tailored to remedy the specific action necessitating the injunction."). Such tailoring requires consideration of the precise injury that gave rise to the suit and modulating relief accordingly. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also E.T. v. Paxton*, 19 F.4th 760, 763 (5th Cir. 2021) (state-wide injunction should have been narrowed to address only the harms to the plaintiffs). Where the injury to the prevailing party is slight, equitable relief should typically be correspondingly modest. *See Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (in "any equity case, the nature of the violation determines the scope of the remedy") (citation omitted); *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (an injunction "is overbroad if it is not narrowly tailored to remedy the specific action which gives rise to the order" (cleaned up)). To apply this principle of proportionality, courts must weigh the harm suffered by the plaintiff against the burdens of imposing injunctive relief on the defendant and the public at large, including parties not before the court. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Courts must also consider the viability of narrower alternatives. In *Trump v. International Refugee Assistance Project*, the Supreme Court trimmed an injunction that swept "much further" than would have been necessary to redress the injuries of the plaintiffs and others "similarly situated." 137 S. Ct. 2080, 2087-88 (2017) (per curiam). Likewise, in *Dayton Board of Education v. Brinkman*, the Supreme Court reversed the lower court because "instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." 433 U.S. 406, 417 (1977). Similarly, in *Lewis,* the Supreme

AMERICAN OVERSIGHT

Court struck down a sweeping injunction because the "violation ha[d] not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to [plaintiffs] was therefore improper." 518 U.S. at 360.[6] And the Sixth Circuit recently stayed and later struck down a nationwide injunction entered on behalf of several states challenging federal immigration policy. *See Arizona v. Biden*, 31 F.4th 469 (6th Cir.) (granting stay), *rev'd and remanded*, 2022 WL 2437870 (6th Cir. July 5, 2022) (vacating preliminary injunction). As Chief Judge Sutton noted, "Left unchecked, such nationwide injunctions have become a springing easement on the customary deliberative process for dealing with issues of national importance." *Arizona*, 2022 WL 2437870, at *16 (Sutton, C.J., concurring).

By refusing to even consider the severe harm that nationwide relief imposes on thousands of individual non-parties who will never impose any burden on Plaintiff States, the district court erred in failing to balance non-party interests, in contravention of equitable principles. *See Weinberger*, 456 U.S. at 312. There is no dispute that the Title 42 order, which is kept in place by the preliminary injunction, bars access to asylum for people who have *no* intention of leaving California or New Mexico prior to their cases being resolved, much less travelling to Plaintiff States.

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[6] *See also New York v. DHS*, 969 F.3d 42, 87-88 (2d Cir. 2020) (limiting geographic scope of injunction against Trump Administration's public charge rule to three plaintiff states); *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020) (limiting geographic scope of injunction against Trump Administration's Migrant Protection Protocols to Ninth Circuit); *Texas v. United States*, 14 F.4th 332, 341 (5th Cir. 2021) (partially staying injunction against Biden Administration's enforcement priorities, citing its nationwide scope), *vacated*, 24 F.4th 407 (5th Cir. 2021) (mem.), *appeal dismissed*, 2022 WL 517281 (5th Cir. Feb. 11, 2022).

AMERICAN OVERSIGHT

The record already includes evidence proving the existence of at least two such people, and no one has disputed that there are many more. *See, e.g.*, ROA.3559-3563 ¶ 15, 3569-3573 ¶ 20. The nationwide injunction unduly harms those individuals forced to stay on the other side of the border by barring them from accessing the asylum system even though they will never do anything that harms the Plaintiff States. This stark discrepancy illuminates what the district court failed to do: balance the various interests and fashion an injunction that is tailored to redress the proven harms to the particular plaintiffs in this case.

Thus, under basic principles of remedial proportionality, even if the evidence on which the district court relied suffices to warrant a preliminary injunction in *Plaintiff* States (a view Law Lab does not share, as discussed below), it did not warrant extending that injunction to apply in states that are not parties to this case. *See Dayton*, 433 U.S. at 420; *Lewis*, 518 U.S. at 361.

Moreover, ordering nationwide relief for Plaintiff States without considering the countervailing interests of other states effectively permitted fewer than half the states to set nationwide immigration policy at the expense of those that did not participate in these proceedings. Plaintiff States' economic interests are no more compelling than other states' countervailing interests in, for example, expanding their tax bases and labor forces by welcoming people seeking asylum, or their interest in reunifying family members who would otherwise be expelled under Title 42. *See* Brief of Illinois, *et al.*, as *Amici Curiae in Support of Petitioners*, *Biden v. Texas*, No. 21-954 (U.S. Mar. 21, 2022), 2022 WL 876862, at * 16 (noting the "wide range of benefits" to states arising from the federal government's decision to parole

AMERICAN OVERSIGHT

asylum seekers into the country, "from access to safe living conditions to family reunification"). To give another example, Plaintiff States' stated interest in not expending costs associated with "educat[ing] [undocumented] children," ROA.1074, runs directly counter to California's interest to do just the opposite by funding extended educational opportunities for undocumented students, *see* Cal. Educ. Code § 68130.5 (allowing qualifying undocumented students to pay in-state tuition at state community colleges and universities). The nationwide injunction improperly privileges the Plaintiff States' interests, while disregarding core structural principles of interstate equality.

By failing to balance the interests of nonparties, the nationwide injunction ordered below contravenes these foundational principles of equity.

B. *The district court overstepped its equitable powers by issuing a nationwide injunction that is unsupported by the record evidence.*

The district court erroneously held Plaintiff States established irreparable injury in support of their request for a nationwide injunction "based on the government's own predictions[] the Termination Order will result in an increase in daily border crossings," potentially as high as "18,000," and on "evidence supporting the Plaintiff States' position that such a rise in border crossings will increase their costs for healthcare reimbursements and education services" that are not recoverable. ROA.3801. That evidence does not come close to justifying a nationwide injunction leaving the Title 42 order in effect, demonstrating the district court's equitable overreach once more.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002612

First, the 18,000 figure (itself just a projection for purposes of emergency planning, *see* ROA.1133-1135) says nothing about how many, if any, individuals will (1) enter non-plaintiff states as a result of the Termination Order; (2) later move to and reside in Plaintiff States; and then (3) impose economic costs on those Plaintiff States once there. The projection does not describe any injury "directly traceable" to the Termination Order taking effect in non-plaintiff states, let alone sufficient injury to justify the nationwide scope of the preliminary injunction, particularly given the manifest harm to non-parties that the order imposes. *Cf. California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (plaintiff states failed to establish standing where they "failed to show how this injury is directly traceable to any actual or possible unlawful Government conduct").

Second, the evidence of increased healthcare costs is based on examples not traceable to the implementation of the Termination Order *anywhere*, let alone in non-plaintiff states. Plaintiff States' assertion that "Yuma Regional Medical Center ("YRMC") in Arizona was forced to provide $546,050 in unreimbursed medical care for unauthorized [immigrants]," ROA.1075, is entirely unrelated to the termination of Title 42, as it refers to costs associated with providing services to individuals who are detained "while in ICE custody," ROA.1237, not individuals who enter through non-plaintiff states and freely move to Plaintiff States because of the Termination Order. Similarly, evidence of increased healthcare costs to Missouri refers to the costs of treating "ineligible [immigrants]" generally. ROA.1677. It says nothing about the hypothetical group of people who would have been expelled pursuant to Title 42 but for the Termination Order, let alone the subset of such individuals who

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002613

would enter the United States through California or New Mexico and later move to Plaintiff States. Plaintiff States' evidence of education costs is also untraceable to the operation of Title 42 in non-plaintiff states. *See* ROA.1676, 1075.

The evidence the district court relied on to issue a nationwide injunction relates exclusively to the impacts of unlawful immigration generally. But that justification is wholly irrelevant to this case, which is not about remedying the alleged harms of unlawful immigration to Plaintiff States and instead is about the termination of the Title 42 order, which blocks processing of people seeking asylum at the southern border pursuant to Title 8 procedures described above. If the Title 42 order is terminated and Federal Defendants resume processing individuals through Title 8 procedures, such processing is not somehow the equivalent of unlawful immigration; individuals who are permitted to enter the United States pursuant to Title 8 processing are not unlawful immigrants. Thus, it should come as no surprise that there is no evidence in the record proving that Title 42's rescission will increase unlawful immigration *at all*, let alone enough to cause irreparable harm to Plaintiff States that is directly traceable to people who would enter through California or New Mexico and reside in Plaintiff States absent the injunction. Plaintiff States' paltry evidence comes nowhere near establishing the justification for nationwide relief against the order pertaining to Title 42 at issue here.

Thus, the district court overstepped its equitable powers where the record in this case does not justify the nationwide injunction.

AMERICAN OVERSIGHT

C. *The alleged need for uniformity in immigration policy does not justify nationwide relief.*

The district court also relied on the alleged need to "promot[e] uniformity in immigration enforcement," ROA.3804, but that consideration does not justify the nationwide scope of the injunction it entered.

First, the Title 42 order (like the order terminating it) derives from the Public Health Services Act, 42 U.S.C. §§ 265, 268, which the federal government read to provide authority to suspend the entry of certain individuals due to the "danger of the introduction of COVID-19 into the United States." 85 Fed. Reg. 65,806 (Oct. 16, 2020). Title 42 must therefore be analyzed as a public health measure for doctrinal purposes—not as immigration policy. As DHS Secretary Mayorkas has stated, "Title 42 is a public health authority and not an immigration policy."[7] Given that Title 42 derives its authority from public health law, there is no requirement that it be implemented uniformly nationwide. COVID-19 public health measures have varied from state to state and region to region throughout the pandemic. Accordingly, the district court erred in relying on the need for uniformity in immigration enforcement.

Second, even if understood as immigration policy, there is no rationale for uniformity with respect to the Title 42 order specifically. Like border policies more generally, Title 42 has been characterized by dis-uniform implementation since its

[7] The White House, Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas (Sept. 24, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021.

AMERICAN OVERSIGHT

inception. As the record reflects, Federal Defendants apply Title 42 differently at some ports of entry than others, and to some nationalities and not others.[8]

For that reason, the district court erred in relying on this Court's holding in *Texas*, which upheld a nationwide injunction as to a very different immigration policy. 809 F.3d 134. *Texas* relied upon the need for uniformity in the implementation of the deferred action program at issue, which was characterized by standardized eligibility criteria and would have conferred uniform benefits upon successful applicants across the country. *Id.* at 147-49. No comparable uniformity has ever existed here, where Title 42 has been implemented differently across different ports of entry. Thus, any alleged need for uniformity is insufficient to justify nationwide relief with respect to a policy that is already implemented differently across different regions along the border.

Additionally, in *Texas*, no party raised a factual dispute before the district court over whether the millions of potential beneficiaries of that immigration benefits program would move from one state to another. *Id.* In contrast, Law Lab has raised that issue here. It is the burden of the Plaintiff States to prove that they will suffer harm in *this* case, which they have failed to do. Notably, the district court's assertion that a tailored preliminary injunction "will likely do nothing more

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[8] *See, e.g.*, ROA.3602-3603 (listing only six ports of entry at which different numbers of individuals have been excepted from Title 42 pursuant to the NGO-supported humanitarian exception process); *see also* Kate Morrissey, *Ukrainians only: Racial disparities in U.S. border policies grow more obvious*, San Diego Union Tribune (Mar. 19, 2022), https://www.sandiegouniontribune.com/news/immigration/story/2022-03-19/ukrainians-border-title-42.

AMERICAN OVERSIGHT

than shift border crossings from the Plaintiff States to states not covered by the preliminary injunction," ROA.3804, is mere speculation unsupported by the record in this case.

Third, even in cases involving immigration policies rather than public health policies with immigration-related effects, the need for uniformity is but one factor among many that courts should consider in tailoring relief. While "[i]t is not beyond the power of a court, *in appropriate circumstances*, to issue a nationwide injunction," *Texas*, 809 F.3d at 188 (emphasis added), it hardly follows that virtually every case affecting immigration law requires nationwide relief. That is not how our system of distributed federal adjudicative power works. *See DHS*, 140 S. Ct. at 600 (Gorsuch, J., concurring) ("The traditional system of … courts issuing interlocutory relief limited to the parties at hand … encourages multiple judges and … circuits to weigh in only after careful deliberation, a process that permits the airing of competing views ….."). Here, the district court utterly failed to consider the strong factors counseling against nationwide relief—including, in particular, the dramatic harm to non-parties that the injunction imposed.

Finally, the district court's brief remark that a tailored injunction "would only further complicate DHS's operations," does not warrant the sweeping relief it issued. ROA.3804. Federal Defendants have not advanced that position. *See* ROA.3678-3689. Even if it had, that is "the National Government's problem, not [the court's]" to address. *Arizona*, 2022 WL 2437870, at *15. Moreover, even putting aside the existing piecemeal implementation of Title 42, splits in the lower courts routinely result in non-uniform immigration policies that the federal government nonetheless

AMERICAN OVERSIGHT

implements, despite some resulting increased complexity. For example, from January 2020 to July 2021, a class-wide preliminary injunction required Customs and Border Protection to provide access to counsel to people in Migrant Protection Protocol nonrefoulement interviews. That order was not binding, and the government did not implement it, outside California. *See Doe v. Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020), *remanded by Doe v. Mayorkas*, 854 F. App'x 115 (9th Cir. 2021). Similarly, since 2018, another class-wide preliminary injunction has required arriving asylum seekers found to have a credible fear of persecution to be considered for parole under a previously-issued parole directive, and has prohibited ICE from detaining them absent an individualized determination on flight risk or danger. *Damus v. Nielsen*, 313 F. Supp. 3d 317, 323 (D.D.C. 2018). But it applies only to people in ICE custody in the jurisdiction of the Detroit, El Paso, Los Angeles, Newark, and Philadelphia field offices. *Id.* at 325. As in those cases, it remains practicable here to limit the scope of the injunction to only some geographic areas.

In prior briefing in this case, Plaintiff States have cited other cases Law Lab has been involved in to support their argument, but these arguments are unpersuasive. In *Innovation Law Lab v. Wolf*, a case about a different policy concerning asylum seekers at the border, the Ninth Circuit first affirmed the district court's nationwide injunction against implementation of that policy. 951 F.3d 1073, 1094 (9th Cir. 2020). The Court later stayed the injunction "insofar as it operate[d] outside of the geographical boundaries of the Ninth Circuit," recognizing that "the proper scope of injunctions against agency action is a matter of intense and active controversy." 951 F.3d 986, 990 (9th Cir. 2020). Law Lab had sought a broader injunction by

AMERICAN OVERSIGHT

demonstrating, with evidence, harm occurring in locations outside the Ninth Circuit—which the Plaintiff States have not done here. But the Ninth Circuit held, and Law Lab acceded to the view, that the injunction should not run nationwide.[9]

Thus, the alleged need for uniformity in immigration policy does not, without more, justify nationwide relief.

D. *The APA does not require nationwide relief.*

The district court rightly chose not to rely on Plaintiff States' assertion that the APA requires nationwide relief. To do so would have been inconsistent with the actual practice in many immigration cases (among others), and contrary to governing Supreme Court precedent concerning Congress's need to speak clearly when displacing courts' traditional equitable authority. *See Monsanto Co. v. Geertson*

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[9] Plaintiff States have also referenced a declaration Law Lab submitted in a case challenging a different asylum policy, but it too does not support their position. In *East Bay Sanctuary Covenant v. Barr*, the Ninth Circuit first stayed the lower court injunction outside of the Ninth Circuit "because the nationwide scope of the injunction [was] not supported by the record as it [stood]," 934 F.3d 1027, 1028 (9th Cir. 2019), requiring the plaintiffs to return to court with evidence for why nationwide relief was warranted, *see E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019), *aff'd sub nom. E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020). But even once the plaintiffs did that, and the district court reinstated the nationwide injunction, the Supreme Court stayed the preliminary injunction in full pending appeal at the Ninth Circuit and disposition of any petition for writ of certiorari. *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). The Ninth Circuit eventually affirmed the nationwide injunction nearly one year later, *before* its decision in *Wolf* casting doubt on the practice. 994 F.3d at 988. *East Bay Sanctuary Covenant* thus illustrates three points: that the Ninth Circuit required evidence to support a nationwide injunction (evidence that is absent here); that it stayed its nationwide scope in the absence of such evidence; and that its view on the appropriate scope of such injunctions has narrowed in the years since.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002619

Seed Farms, 561 U.S. 139, 165-66 (2010); *Miller v. French*, 530 U.S. 327, 340 (2000). Neither the Supreme Court nor this Court has ever held that the phrase "shall . . . hold unlawful and set aside" in 5 U.S.C. § 706(a)(2) mandates district courts to issue nationwide injunctions against the federal government in every case.

This Court's recent decision in *Texas v. United States*, which affirmed nationwide relief in a case in which the district court set aside agency action pursuant to the APA, is not to the contrary. 2022 WL 2466786, at *1. There, after a full trial on the merits, a district court enjoined the federal government's prosecutorial discretion policy prioritizing certain individuals for deportation. The court was careful to make clear that it did *not* issue injunctive relief, and this Court's affirmance clearly distinguishes between vacatur under the APA and injunctive relief, expressly declining to consider whether nationwide *injunctive* relief would have been appropriate. *Id.* at *5. In contrast, here the district court issued a preliminary injunction, thus necessarily invoking its equitable authority. It did not purport to issue a preliminary injunction under the APA.

Indeed, the APA does not displace traditional principles of equitable remedial discretion to *require* nationwide injunctions whenever a court finds agency action unlawful. As Chief Judge Sutton noted,

> The Administrative Procedure Act, it is true, says that a reviewing court may "hold unlawful and set aside" agency actions that violate the law. But that raises a question; it does not answer it. The question is whether Congress meant to upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power through this unremarkable

AMERICAN OVERSIGHT

> language … it is far from clear that Congress intended to make such a sweeping change.

Arizona, 2022 WL 2437870, at *15 (Sutton, C.J., concurring) (citations omitted).

In *Hecht Co. v. Bowles*, the Supreme Court confronted an analogous situation in which a lower court interpreted the Emergency Price Control Act to require an injunction once a violation was found. 321 U.S. 321, 321-22, 326 (1944). Emphasizing that "equity practice with a background of several hundred years of history" was distinguished by "[f]lexibility rather than rigidity," the Court declined to adopt the view that under all circumstances in which a violation is found, the court must issue an injunction, holding that "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Id.* at 329. More recently, the Supreme Court recognized it "should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." *Miller v. French*, 530 U.S. 327, 340 (2000) (citations omitted); *see also Nken v. Holder*, 556 U.S. 418, 433 (2009).

The plain text of Section 706's grant of authority to "set aside" an order says nothing about whether a court's ruling should govern the federal government's conduct as to nonparties. And nothing in the legislative background of the APA's enactment suggests the APA's "set aside" language requires mandatory nationwide injunctions in all APA cases. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 313-14 (2003).

AMERICAN OVERSIGHT

Without a clear command to the contrary, this Court retains equitable authority to order a remedy that is appropriately tailored to the needs of this case; it is not required to issue a nationwide injunction simply because Plaintiff States present a claim under the APA. Courts must still apply equitable principles to tailor the remedy to the case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court order denying Law Lab's motion for limited intervention and vacate the order granting Plaintiff States' motion for a nationwide preliminary injunction.

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-002622

CERTIFICATE OF SERVICE

I, Monika Y. Langarica, hereby certify that on July 25, 2022, I caused the foregoing Opening Brief of Appellant Innovation Law Lab to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the CM/ECF system, which will send a notice of this filing to counsel for Defendants-Appellants and Plaintiffs-Appellees.

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-002623

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify the following:

1. The foregoing brief complies with the type-volume limitations of Rule 32(a)(7)(B). The brief contains 10,281 words according to the Microsoft Word word-counting function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman type style.

Dated: July 25, 2022

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-002624

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

STATE OF LOUISIANA, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.*, Defendants.	Civil Action No. 6:22-CV-00885-RRS-CBW

DEFENDANTS' MONTHLY REPORT FOR THE MONTH OF JULY PURSUANT TO THE COURT'S PRELIMINARY INJUNCTION

AMERICAN OVERSIGHT

Pursuant to the Court's May 20, 2022 preliminary injunction order, ECF No. 91, Defendants herein provide, subject to the caveats discussed below, data showing, for the month of July 2022, (1) the number of single adults processed under Title 42 and Title 8 by country, (2) the number of recidivist border crossers for whom the U.S. Customs and Border Protection ("CBP"), Department of Homeland Security ("DHS"), has applied expedited removal, (3) the number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process, and (4) any material changes to policy regarding DHS's application of the Title 42 process.

1. The number of single adults processed under Title 42 and Title 8 by country.

Below is the data for single adult encounters by CBP at the Southwest land border for the period of July 1-31, 2022.

Component	Citizenship	Title 42	Title 8	Total
OFO	AFGHANISTAN	0	8	**8**
	ANGOLA	1	0	**1**
	ARGENTINA	0	2	**2**
	ARMENIA	1	145	**146**
	AUSTRALIA	0	2	**2**
	AZERBAIJAN	0	6	**6**
	BANGLADESH	0	5	**5**
	BELARUS	0	23	**23**
	BELIZE	0	11	**11**
	BOLIVIA	0	3	**3**
	BRAZIL	0	4	**4**
	BURKINA FASO (UPPER VOLTA)	0	3	**3**
	CANADA	5	2	**7**
	CHILE	0	2	**2**
	CHINA, PEOPLES REPUBLIC OF	2	11	**13**
	COLOMBIA	8	23	**31**
	COSTA RICA	0	2	**2**
	CUBA	2	14	**16**
	DOMINICA	1	0	**1**
	DOMINICAN REPUBLIC	0	4	**4**
	ECUADOR	8	3	**11**

AMERICAN OVERSIGHT

	EGYPT	0	1	**1**
	EL SALVADOR	9	128	**137**
	ETHIOPIA	0	1	**1**
	FRANCE	0	1	**1**
	GEORGIA	0	13	**13**
	GERMANY	1	0	**1**
	GHANA	0	11	**11**
	GUATEMALA	18	86	**104**
	HAITI	1	2,653	**2,654**
	HONDURAS	43	461	**504**
	INDIA	0	6	**6**
	IRAN	0	2	**2**
	ISRAEL	0	2	**2**
	ITALY	2	0	**2**
	IVORY COAST	0	1	**1**
	JAMAICA	0	8	**8**
	JAPAN	0	1	**1**
	KYRGYZSTAN	0	8	**8**
	MEXICO	1,611	2,699	**4,310**
	MOLDOVA	0	7	**7**
	NICARAGUA	1	23	**24**
	PAKISTAN	0	1	**1**
	PANAMA	0	3	**3**
	PERU	4	16	**20**
	PHILIPPINES	0	2	**2**
	PORTUGAL	2	0	**2**
	REPUBLIC OF SOUTH AFRICA	0	1	**1**
	ROMANIA	4	4	**8**
	RUSSIA	12	420	**432**
	SLOVENIA	1	0	**1**
	SOUTH KOREA	0	2	**2**
	SPAIN	6	3	**9**
	TAJIKISTAN	0	4	**4**
	TURKEY	1	2	**3**
	UGANDA	0	2	**2**
	UKRAINE	6	15	**21**
	UNITED KINGDOM	0	1	**1**
	UNKNOWN	1	10	**11**
	URUGUAY	1	0	**1**

AMERICAN OVERSIGHT

	UZBEKISTAN	1	2	**3**
	VENEZUELA	5	17	**22**
	YEMEN	0	1	**1**
OFO Total		**1,758**	**6,891**	**8,649**
USBP	AFGHANISTAN	0	75	**75**
	ALBANIA	0	8	**8**
	ALGERIA	0	6	**6**
	ANGOLA	0	76	**76**
	ARGENTINA	0	13	**13**
	ARMENIA	0	10	**10**
	AZERBAIJAN	0	25	**25**
	BANGLADESH	0	130	**130**
	BELARUS	0	17	**17**
	BELIZE	0	18	**18**
	BENIN	0	3	**3**
	BOLIVIA	0	57	**57**
	BRAZIL	282	1,659	**1,941**
	BURKINA FASO (UPPER VOLTA)	0	25	**25**
	CAMBODIA	0	1	**1**
	CAMEROON	0	113	**113**
	CAPE VERDE, REPUBLIC OF	0	1	**1**
	CENTRAL AFRICAN REPUBLIC	0	1	**1**
	CHILE	0	10	**10**
	CHINA, PEOPLES REPUBLIC OF	0	270	**270**
	COLOMBIA	64	6,793	**6,857**
	COSTA RICA	0	29	**29**
	CUBA	94	15,017	**15,111**
	DEMOCRATIC REPUBLIC OF CONGO (ZAIRE)	0	24	**24**
	DOMINICAN REPUBLIC	3	489	**492**
	ECUADOR	93	994	**1,087**
	EGYPT	0	11	**11**
	EL SALVADOR	3,845	447	**4,292**
	EQUATORIAL GUINEA	0	5	**5**
	ERITREA	0	99	**99**
	ETHIOPIA	0	38	**38**
	GAMBIA	0	8	**8**
	GEORGIA	0	744	**744**
	GHANA	0	267	**267**
	GREECE	0	1	**1**

AMERICAN OVERSIGHT

	GUADELOUPE	5	0	**5**
	GUATEMALA	10,241	561	**10,802**
	GUINEA	0	38	**38**
	GUINEA-BISSAU	0	2	**2**
	HAITI	18	147	**165**
	HONDURAS	7,867	867	**8,734**
	INDIA	0	1,093	**1,093**
	IRAN	0	18	**18**
	IRAQ	0	2	**2**
	IRELAND	0	1	**1**
	ISRAEL	0	2	**2**
	IVORY COAST	0	12	**12**
	JAMAICA	0	223	**223**
	JORDAN	0	3	**3**
	KAZAKHSTAN	0	9	**9**
	KENYA	1	2	**3**
	KOSOVO	0	6	**6**
	KYRGYZSTAN	0	25	**25**
	LEBANON	0	4	**4**
	LIBYA	0	1	**1**
	MACAU	1	0	**1**
	MALI	0	25	**25**
	MAURITANIA	0	32	**32**
	MEXICO	40,416	4,369	**44,785**
	MICRONESIA, FEDERATED STATES OF	1	0	**1**
	MOLDOVA	0	4	**4**
	MONGOLIA	0	1	**1**
	MOROCCO	0	3	**3**
	MOZAMBIQUE	0	1	**1**
	NEPAL	0	122	**122**
	NICARAGUA	59	9,885	**9,944**
	NIGER	0	3	**3**
	NIGERIA	0	70	**70**
	PAKISTAN	0	32	**32**
	PANAMA	0	27	**27**
	PARAGUAY	0	3	**3**
	PERU	6	3,456	**3,462**
	REPUBLIC OF CONGO (BRAZZAVILLE)	0	20	**20**
	REPUBLIC OF SOUTH AFRICA	0	1	**1**

AMERICAN OVERSIGHT

	ROMANIA	0	120	**120**
	RUSSIA	0	298	**298**
	SENEGAL	0	146	**146**
	SERBIA	0	2	**2**
	SIERRA LEONE	0	16	**16**
	SOMALIA	0	165	**165**
	SPAIN	0	1	**1**
	SRI LANKA	0	19	**19**
	STATELESS	0	2	**2**
	SUDAN	0	4	**4**
	SURINAME	0	1	**1**
	SYRIA	0	2	**2**
	TAJIKISTAN	0	8	**8**
	TANZANIA	0	5	**5**
	THAILAND	0	1	**1**
	TOGO	0	5	**5**
	TRINIDAD AND TOBAGO	0	1	**1**
	TUNISIA	0	2	**2**
	TURKEY	0	985	**985**
	UKRAINE	0	15	**15**
	URUGUAY	0	2	**2**
	USSR	0	1	**1**
	UZBEKISTAN	0	158	**158**
	VENEZUELA	45	12,126	**12,171**
	VIETNAM	0	25	**25**
	WESTERN SAHARA	0	3	**3**
	YEMEN	0	5	**5**
USBP Total		**63,041**	**62,672**	**125,713**
CBP Total		**64,799**	**69,563**	**134,362**

2. The number of recidivist border crossers for whom DHS has applied expedited removal.

From July 1 - 31, 2022, U.S. Border Patrol ("USBP") applied expedited removal, 8 U.S.C. § 1225(b)(1), to 1,095 single adults who attempted to unlawfully enter the United States between a port of entry and who had previously been encountered by USBP and processed under Title 42 or Title 8 at least one time since March 20, 2020.

AMERICAN OVERSIGHT

3. The number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process.

From July 1 – 31, 2022, CBP's Office of Field Operations processed 11,574 Title 42 exceptions at the 6 ports of entry that utilize the above-referenced NGO-supported humanitarian exception process. The below shows the data broken down by port.[1]

- Hidalgo, TX: 4,452
- Laredo, TX: 1,451
- Eagle Pass, TX: 1,296
- Paso del Norte, El Paso, TX: 1,230
- Nogales, AZ: 387
- San Ysidro, CA: 2,758

4. Any material changes to policy regarding DHS's application of the Title 42 process.

DHS reports that it has made no material changes to its policy on application of the Title 42 process.[2]

Date: August 16, 2022

Respectfully submitted,

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[1] As noted in Defendants' prior report, given a significant increase in the number of individuals who have presented themselves with situations that warrant humanitarian exceptions pursuant to the terms of the CDC's Title 42 public health orders, DHS began on July 13, 2022 to gradually increase the number of humanitarian exceptions it applies, subject to operational constraints.

[2] Defendants note that on August 15, 2022, the plaintiffs in *Huisha-Huisha v. Mayorkas*, No. 21-cv-00100 (D.D.C.), a class action challenging the application of the Title 42 policy to family units, filed a motion for partial summary judgment on their claim that the Title 42 policy is arbitrary and capricious. The *Huisha-Huisha* plaintiffs seek entry of an order vacating and setting aside Defendants' "Title 42 policy," declaring that the Title 42 policy is arbitrary and capricious, and permanently enjoining Defendants from applying the Title 42 policy to class members. The court has set a hearing on plaintiffs' motion for October 11, 2022.

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

STATE OF ARIZONA, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.*, Defendants.	Civil Action No. 6:22-CV-00885-RRS-CBW

DEFENDANTS' MONTHLY REPORT FOR THE MONTH OF MAY PURSUANT TO THE COURT'S PRELIMINARY INJUNCTION

AMERICAN OVERSIGHT

Pursuant to the Court's May 20, 2022 preliminary injunction order, ECF No. 91, Defendants herein provide, subject to the caveats discussed below, data showing, for the period of May 1-31, 2022,[1] (1) the number of single adults processed under Title 42 and Title 8 by country, (2) the number of recidivist border crossers for whom the U.S. Customs and Border Protection ("CBP"), Department of Homeland Security ("DHS") has applied expedited removal, (3) the number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process, and (4) any material changes to policy regarding DHS's application of the Title 42 process.

1. The number of single adults processed under Title 42 and Title 8 by country.

Below is the data for single adult encounters by CBP at the Southwest land border for the period of May 1-31, 2022.

Component	Citizenship	Title 42	Title 8	Total
OFO	AFGHANISTAN	0	4	**4**
	ARMENIA	5	180	**185**
	AUSTRALIA	0	1	**1**
	AZERBAIJAN	0	5	**5**
	BELARUS	5	51	**56**
	BELGIUM	1	1	**2**
	BELIZE	0	7	**7**
	BOLIVIA	0	2	**2**
	BRAZIL	0	5	**5**
	CAMEROON	0	1	**1**
	CANADA	5	2	**7**
	CHILE	1	3	**4**
	CHINA (MAINLAND)	2	21	**23**

1 The Court's preliminary injunction order stated that "DHS shall file monthly reports." ECF No. 91. As explained in Defendants' prior weekly reports required by the Court's temporary restraining order (TRO), final verification of DHS's border data takes place at the end of every month. Due to the TRO's weekly reporting requirement, Defendants have been providing preliminary data subject to change. *See, e.g.*, ECF No. 89. In light of the preliminary injunction order's monthly reporting requirement, counsel for Defendants informed Plaintiffs on June 9, 2022, that starting on June 16, 2022, and each month thereafter, DHS would supply monthly reports on the prior month's final data as long as the preliminary injunction order remains in place. Plaintiffs did not object to Defendants' proposal.

AMERICAN OVERSIGHT

	COLOMBIA	2	24	**26**
	COSTA RICA	0	3	**3**
	CUBA	7	176	**183**
	CZECH REPUBLIC	1	0	**1**
	DENMARK	0	1	**1**
	DOMINICAN REPUBLIC	0	3	**3**
	ECUADOR	2	2	**4**
	EL SALVADOR	8	155	**163**
	FRANCE	1	0	**1**
	GEORGIA	0	13	**13**
	GERMANY	3	1	**4**
	GUATEMALA	24	87	**111**
	GUYANA	0	2	**2**
	HAITI	5	1,044	**1,049**
	HONDURAS	9	386	**395**
	INDIA	0	4	**4**
	IRAN	0	3	**3**
	IRAQ	0	1	**1**
	ITALY	0	2	**2**
	JAMAICA	0	38	**38**
	JAPAN	0	1	**1**
	JORDAN	1	0	**1**
	KAZAKHSTAN	0	3	**3**
	KYRGYZSTAN	0	28	**28**
	MEXICO	1,777	2,549	**4,326**
	MOLDOVA	0	22	**22**
	NICARAGUA	8	18	**26**
	NIGERIA	0	1	**1**
	PERU	3	9	**12**
	POLAND	1	1	**2**
	PORTUGAL	1	0	**1**
	REPUBLIC OF SOUTH AFRICA	0	1	**1**
	ROMANIA	1	9	**10**
	RUSSIA	37	946	**983**
	SOMALIA	1	0	**1**
	SOUTH KOREA	0	2	**2**
	SPAIN	3	4	**7**
	SWITZERLAND	0	1	**1**
	TAJIKISTAN	0	1	**1**
	THAILAND	0	1	**1**

AMERICAN OVERSIGHT

	TRINIDAD AND TOBAGO	0	1	**1**
	TURKEY	3	4	**7**
	UKRAINE	54	52	**106**
	UNITED KINGDOM	0	1	**1**
	UNKNOWN	2	6	**8**
	UZBEKISTAN	0	4	**4**
	VENEZUELA	2	10	**12**
	YEMEN	0	1	**1**
OFO Total		**1,975**	**5,904**	**7,879**
	AFGHANISTAN	0	27	**27**
	ALBANIA	0	10	**10**
	ANGOLA	0	68	**68**
	ARGENTINA	0	27	**27**
	ARMENIA	0	9	**9**
	ARUBA	0	1	**1**
	AZERBAIJAN	0	22	**22**
	BANGLADESH	0	95	**95**
	BELARUS	0	24	**24**
	BELIZE	1	20	**21**
	BENIN	0	9	**9**
	BOLIVIA	0	71	**71**
	BRAZIL	32	1,234	**1,266**
	BULGARIA	0	1	**1**
	BURKINA FASO	0	10	**10**
USBP	BURMA	0	1	**1**
	CAMEROON	7	111	**118**
	CANADA	1	0	**1**
	CAPE VERDE	0	1	**1**
	CHILE	0	6	**6**
	CHINA, PEOPLES REPUBLIC OF	0	179	**179**
	COLOMBIA	59	9,361	**9,420**
	CONGO	0	24	**24**
	COSTA RICA	0	38	**38**
	CUBA	1,788	18,187	**19,975**
	DEM REP OF THE CONGO	0	20	**20**
	DOMINICA	0	1	**1**
	DOMINICAN REPUBLIC	1	350	**351**
	ECUADOR	118	1,138	**1,256**
	EGYPT	0	4	**4**
	EL SALVADOR	4,160	378	**4,538**

AMERICAN OVERSIGHT

	EQUATORIAL GUINEA	0	2	**2**
	ERITREA	0	76	**76**
	ETHIOPIA	0	23	**23**
	GAMBIA	0	11	**11**
	GEORGIA	0	849	**849**
	GHANA	5	106	**111**
	GUADELOUPE	4	0	**4**
	GUATEMALA	11,734	576	**12,310**
	GUINEA	0	24	**24**
	GUINEA-BISSAU	0	5	**5**
	GUYANA	1	0	**1**
	HAITI	1,928	1,182	**3,110**
	HONDURAS	7,662	791	**8,453**
	HUNGARY	0	1	**1**
	INDIA	1	1,906	**1,907**
	IRAN	0	9	**9**
	IRAQ	0	2	**2**
	ISRAEL	0	2	**2**
	ITALY	0	1	**1**
	IVORY COAST	0	3	**3**
	JAMAICA	0	379	**379**
	KAZAKHSTAN	0	16	**16**
	KOSOVO	0	4	**4**
	KUWAIT	0	1	**1**
	KYRGYZSTAN	0	17	**17**
	LEBANON	0	2	**2**
	LIBERIA	0	1	**1**
	LIBYA	0	1	**1**
	MALI	0	11	**11**
	MAURITANIA	0	21	**21**
	MEXICO	60,062	5,475	**65,537**
	MOLDOVA	0	3	**3**
	MOROCCO	0	2	**2**
	NEPAL	0	136	**136**
	NICARAGUA	1,071	14,441	**15,512**
	NIGER	1	4	**5**
	NIGERIA	1	51	**52**
	PAKISTAN	0	30	**30**
	PANAMA	0	16	**16**
	PARAGUAY	0	3	**3**

AMERICAN OVERSIGHT

	PERU	15	4,759	**4,774**
	PHILIPPINES	1	3	**4**
	ROMANIA	0	147	**147**
	RUSSIA	0	458	**458**
	RWANDA	0	1	**1**
	SENEGAL	0	172	**172**
	SERBIA	0	6	**6**
	SIERRA LEONE	0	9	**9**
	SOMALIA	1	103	**104**
	SOUTH KOREA	1	0	**1**
	SPAIN	0	1	**1**
	SRI LANKA	0	11	**11**
	ST. LUCIA	0	1	**1**
	SUDAN	0	4	**4**
	SWEDEN	0	1	**1**
	SYRIA	0	9	**9**
	TAIWAN	0	1	**1**
	TAJIKISTAN	1	8	**9**
	TOGO	0	9	**9**
	TRINIDAD AND TOBAGO	0	2	**2**
	TUNISIA	0	1	**1**
	TURKEY	0	1,770	**1,770**
	UKRAINE	0	47	**47**
	URUGUAY	0	5	**5**
	UZBEKISTAN	2	107	**109**
	VENEZUELA	17	3,393	**3,410**
	VIETNAM	0	2	**2**
	YEMEN	0	4	**4**
	ZAMBIA	0	1	**1**
	ZIMBABWE	0	1	**1**
USBP Total		**88,675**	**68,646**	**157,321**
CBP Total		**90,650**	**74,550**	**165,200**

2. The number of recidivist border crossers for whom DHS has applied expedited removal.

From May 1 - 31, 2022, U.S. Border Patrol ("USBP") applied expedited removal, 8 U.S.C. § 1225(b)(1), to 2,017 single adults who attempted to unlawfully enter the United States between a port

AMERICAN OVERSIGHT

of entry and who had previously been encountered by USBP and processed under Title 42 or Title 8 at least one time since March 20, 2020.

3. **The number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process.**

From May 1 - 31, 2022, CBP's Office of Field Operations processed 8,247 Title 42 exceptions at the 6 ports of entry that utilize the above-referenced NGO-supported humanitarian exception process. The below shows the data broken down by port.

- Hidalgo, TX: **3,651**
- Laredo, TX: **655**
- Eagle Pass, TX: **483**
- Paso del Norte, El Paso, TX: **920**
- Nogales, AZ: **390**
- San Ysidro, CA: **2,148**

4. **Any material changes to policy regarding DHS's application of the Title 42 process.**

DHS reports that it has made one material change to its policy on its application of the Title 42 process beyond compliance with the Court's preliminary injunction order. As explained in Defendants' opposition to Plaintiffs' motion for preliminary injunction, *see* ECF No. 40 at 7-8, on March 4, 2022, the D.C. Circuit affirmed in part a previously stayed preliminary injunction enjoining the application of Title 42 orders to family units. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). The court found that although 42 U.S.C. § 265 likely authorizes the expulsion of covered noncitizens, pursuant to the Immigration and Naturalization Act, such expulsion may not be "to places where [the noncitizens] will be persecuted or tortured." *Id.* at 722. On May 23, 2022, the D.C. Circuit issued its mandate in *Huisha-Huisha*. In preparation for the mandate's issuance, DHS issued guidance to its field operators on May 21, 2022, attached hereto as Exhibits 1 & 2, specifying that "covered noncitizens who are part of a family unit and who have manifested a fear of returning

AMERICAN OVERSIGHT

or being sent to the country to which they would be expelled should not be expelled without an appropriate screening by United States Citizenship and Immigration Services (USCIS) to determine whether they are more likely than not to be persecuted or tortured." This guidance went into effect on May 23, 2022.

Date: June 16, 2022

Respectfully submitted,

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-002640

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

STATE OF ARIZONA, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.*, Defendants.	Civil Action No. 6:22-CV-00885-RRS-CBW

DEFENDANTS' MONTHLY REPORT FOR THE MONTH OF JUNE PURSUANT TO THE COURT'S PRELIMINARY INJUNCTION

AMERICAN OVERSIGHT

Pursuant to the Court's May 20, 2022 preliminary injunction order, ECF No. 91, Defendants herein provide, subject to the caveats discussed below, data showing, for the month of June 2022, (1) the number of single adults processed under Title 42 and Title 8 by country, (2) the number of recidivist border crossers for whom the U.S. Customs and Border Protection ("CBP"), Department of Homeland Security ("DHS") has applied expedited removal, (3) the number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process, and (4) any material changes to policy regarding DHS's application of the Title 42 process.

1. The number of single adults processed under Title 42 and Title 8 by country.

Below is the data for single adult encounters by CBP at the Southwest land border for the period of June 1-30, 2022.

Component	Citizenship	Title 42	Title 8	Total
OFO	ARGENTINA	0	3	**3**
	ARMENIA	0	100	**100**
	AZERBAIJAN	0	3	**3**
	BELARUS	0	29	**29**
	BELIZE	0	12	**12**
	BOLIVIA	0	1	**1**
	BRAZIL	0	3	**3**
	CAMEROON	0	1	**1**
	CANADA	3	6	**9**
	CHILE	1	4	**5**
	CHINA, PEOPLES REPUBLIC OF	1	20	**21**
	COLOMBIA	5	31	**36**
	COSTA RICA	1	3	**4**
	CUBA	12	128	**140**
	DOMINICAN REPUBLIC	3	3	**6**
	ECUADOR	3	3	**6**
	EGYPT	0	1	**1**
	EL SALVADOR	13	111	**124**
	FRANCE	1	1	**2**
	FRENCH GUIANA	1	0	**1**
	GEORGIA	0	2	**2**

AMERICAN OVERSIGHT

	GERMANY	3	2	**5**
	GHANA	0	2	**2**
	GUATEMALA	25	67	**92**
	HAITI	7	1,601	**1,608**
	HONDURAS	11	344	**355**
	INDIA	1	4	**5**
	ITALY	1	1	**2**
	JAMAICA	0	19	**19**
	JAPAN	0	3	**3**
	KAZAKHSTAN	0	1	**1**
	KENYA	0	1	**1**
	KUWAIT	0	1	**1**
	KYRGYZSTAN	0	19	**19**
	MEXICO	1,640	2,409	**4,049**
	MOLDOVA	0	3	**3**
	NETHERLANDS	1	0	**1**
	NICARAGUA	13	18	**31**
	PANAMA	0	2	**2**
	PARAGUAY	0	1	**1**
	PERU	3	10	**13**
	PHILIPPINES	0	1	**1**
	POLAND	0	1	**1**
	REPUBLIC OF SOUTH AFRICA	1	0	**1**
	ROMANIA	0	4	**4**
	RUSSIA	1	452	**453**
	SOUTH KOREA	0	1	**1**
	SPAIN	1	6	**7**
	TAIWAN - REPUBLIC OF CHINA	0	2	**2**
	TAJIKISTAN	0	4	**4**
	TURKEY	1	3	**4**
	UGANDA	0	1	**1**
	UKRAINE	3	15	**18**
	UNITED KINGDOM	0	1	**1**
	UNKNOWN	1	7	**8**
	UZBEKISTAN	0	10	**10**
	VENEZUELA	25	9	**34**
	VIETNAM	0	1	**1**
OFO Total		**1,782**	**5,491**	**7,273**
USBP	AFGHANISTAN	0	57	**57**
	ALBANIA	0	9	**9**

AMERICAN OVERSIGHT

	ANGOLA	0	10	**10**
	ANTIGUA AND BARBUDA	0	1	**1**
	ARGENTINA	0	10	**10**
	ARMENIA	0	7	**7**
	AZERBAIJAN	0	31	**31**
	BANGLADESH	0	124	**124**
	BELARUS	0	27	**27**
	BELIZE	1	27	**28**
	BENIN	0	1	**1**
	BOLIVIA	1	61	**62**
	BRAZIL	31	1,393	**1,424**
	BURKINA FASO (UPPER VOLTA)	0	31	**31**
	CAMEROON	0	119	**119**
	CHILE	1	3	**4**
	CHINA, PEOPLES REPUBLIC OF	0	183	**183**
	COLOMBIA	40	6,234	**6,274**
	COSTA RICA	0	30	**30**
	CUBA	280	12,089	**12,369**
	DEMOCRATIC REPUBLIC OF CONGO (ZAIRE)	0	6	**6**
	DOMINICA	0	1	**1**
	DOMINICAN REPUBLIC	2	453	**455**
	ECUADOR	253	1,071	**1,324**
	EGYPT	0	7	**7**
	EL SALVADOR	3,981	508	**4,489**
	ERITREA	0	45	**45**
	ETHIOPIA	0	23	**23**
	FRANCE	0	1	**1**
	GAMBIA	0	7	**7**
	GEORGIA	0	661	**661**
	GHANA	0	182	**182**
	GUADELOUPE	10	0	**10**
	GUATEMALA	11,646	587	**12,233**
	GUINEA	0	47	**47**
	GUINEA-BISSAU	0	4	**4**
	HAITI	7	72	**79**
	HONDURAS	8,329	898	**9,227**
	INDIA	1	1,753	**1,754**
	IRAN	0	15	**15**
	ISRAEL	0	2	**2**
	ITALY	0	1	**1**

AMERICAN OVERSIGHT

	IVORY COAST	0	4	**4**
	JAMAICA	1	242	**243**
	JORDAN	0	3	**3**
	KAZAKHSTAN	0	9	**9**
	KENYA	0	1	**1**
	KOSOVO	0	9	**9**
	KYRGYZSTAN	0	30	**30**
	LAOS	0	1	**1**
	LEBANON	0	4	**4**
	LIBERIA	0	2	**2**
	MALI	0	13	**13**
	MAURITANIA	0	33	**33**
	MEXICO	51,529	4,994	**56,523**
	MICRONESIA, FEDERATED STATES OF	1	0	**1**
	MOLDOVA	0	2	**2**
	MOROCCO	0	1	**1**
	NEPAL	0	153	**153**
	NICARAGUA	218	9,027	**9,245**
	NIGER	0	2	**2**
	NIGERIA	0	30	**30**
	PAKISTAN	0	34	**34**
	PANAMA	0	18	**18**
	PARAGUAY	0	1	**1**
	PERU	6	2,897	**2,903**
	PHILIPPINES	0	2	**2**
	POLAND	0	1	**1**
	REPUBLIC OF CONGO (BRAZZAVILLE)	1	12	**13**
	REPUBLIC OF SOUTH AFRICA	0	1	**1**
	ROMANIA	0	119	**119**
	RUSSIA	0	316	**316**
	RWANDA	0	2	**2**
	SENEGAL	0	183	**183**
	SERBIA	0	5	**5**
	SIERRA LEONE	0	10	**10**
	SOMALIA	0	150	**150**
	SPAIN	0	1	**1**
	SRI LANKA	0	25	**25**
	SUDAN	0	1	**1**
	SYRIA	0	6	**6**
	TAJIKISTAN	0	5	**5**

AMERICAN OVERSIGHT

	TOGO	0	7	**7**
	TUNISIA	0	1	**1**
	TURKEY	1	1,734	**1,735**
	UGANDA	0	4	**4**
	UKRAINE	0	16	**16**
	URUGUAY	0	3	**3**
	UZBEKISTAN	0	152	**152**
	VENEZUELA	7	9,510	**9,517**
	VIETNAM	0	8	**8**
	YEMEN	0	1	**1**
USBP Total		**76,347**	**56,576**	**132,923**
CBP Total		**78,129**	**62,067**	**140,196**

2. **The number of recidivist border crossers for whom DHS has applied expedited removal.**

From June 1 - 30, 2022, U.S. Border Patrol ("USBP") applied expedited removal, 8 U.S.C. § 1225(b)(1), to 1,427 single adults who attempted to unlawfully enter the United States between a port of entry and who had previously been encountered by USBP and processed under Title 42 or Title 8 at least one time since March 20, 2020.

3. **The number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process.**

From the month of June 2022, CBP's Office of Field Operations processed 8,792 Title 42 exceptions at the 6 ports of entry that utilize the above-referenced NGO-supported humanitarian exception process. The below shows the data broken down by port.[1]

- Hidalgo, TX: **3,781**
- Laredo, TX: **773**
- Eagle Pass, TX: **595**
- Paso del Norte, El Paso, TX: **1,137**

[1] Given a significant increase in the number of individuals who have presented themselves with situations that warrant humanitarian exceptions pursuant to the terms of the CDC's Title 42 public health orders, DHS has, beginning July 13, 2022, begun to gradually increase the number of humanitarian exceptions it applies, subject to operational constraints.

AMERICAN OVERSIGHT

- Nogales, AZ: **357**
- San Ysidro, CA: **2,149**

4. **Any material changes to policy regarding DHS's application of the Title 42 process.**

DHS reports that it has made no material changes to its policy on application of the Title 42 process.

Date: July 15, 2022

Respectfully submitted,

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AMERICAN OVERSIGHT

Delivery Report

From: Microsoft Outlook [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MICROSOFTEXCHANGE329E71EC88AE4615BBC36AB6CE41109E]
Sent: 8/24/2022 11:57:52 AM
To: Justin.Smith@ago.mo.gov
Subject: Undeliverable: RE: SVPs
Attachments: RE: SVPs

Your message

To: Sieren, Madeline; Goodwin, Gregory; Communications
Subject: RE: SVPs
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Delivery has failed to these recipients or groups:

Justin.Smith@ago.mo.gov
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
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Diagnostic information for administrators:

Generating server: AGOPMAIL01.ago.state.mo.us

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Remote Server returned '550 5.7.1 TRANSPORT.RULES.RejectMessage; the message was rejected by organization policy'

Original message headers:

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Received: from AGOPMAIL01.ago.state.mo.us (10.116.8.101) by
 AGOPMAIL01.ago.state.mo.us (10.116.8.101) with Microsoft SMTP Server
 (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_128_GCM_SHA256) id
 15.1.2375.28; Wed, 24 Aug 2022 11:57:52 -0500
Received: from AGOPMAIL01.ago.state.mo.us ([::1]) by
 AGOPMAIL01.ago.state.mo.us ([::1]) with mapi id 15.01.2375.028; Wed, 24 Aug
 2022 11:57:52 -0500
Content-Type: application/ms-tnef; name="winmail.dat"
Content-Transfer-Encoding: binary
From: "Lankford, George" <George.Lankford@ago.mo.gov>
To: "Sieren, Madeline" <Madeline.Sieren@ago.mo.gov>, "Goodwin, Gregory"
        <Gregory.Goodwin@ago.mo.gov>, Communications <Communications@ago.mo.gov>
Subject: RE: SVPs
Thread-Topic: SVPs
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Date: Wed, 24 Aug 2022 11:57:52 -0500
Message-ID: <2a46450bb45c44848c09289404d5996f@ago.mo.gov>
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References: <e053803aaf4441759aa6e675847d2acb@ago.mo.gov>
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ATTORNEY GENERAL OF MISSOURI

ERIC SCHMITT

August 24, 2022

Jack Suntrup
JSuntrup@post-dispatch.com

RE: Sunshine Request – Any and all logs of Sunshine Law requests submitted between Jan. 1, 2022 and Aug. 23, 2022. The logs should include the name of the requestor, the date of the request, the items requested and the disposition of the request.

Dear Mr. Suntrup:

In response to your above-referenced request that was received by our custodian of records, we are enclosing a 21-page PDF of responsive documents.

Sincerely,

Megan Werdehausen

MEGAN WERDEHAUSEN

Supreme Court Building
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
www.ago.mo.gov

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DATE RECEIVED	FIRST NAME	LAST NAME	ENTITY TYPE	EMAIL	ADDRESS	CITY	STATE	ZIP	REQUEST TYPE	REQUEST DESCRIPTION	DATE OF FIRST RESPONSE	DATE OF FINAL RESPONSE	OUTCOME	NUMBER OF RESPONSIVE RECORDS	MULTIMEDIA PROVIDED
1/6/2022	Sarah	Butrymowicz	Media	butrymowicz@hechingerreport.org					Consumer Complaints	CC-2019-01-003560	1/11/2022	1/18/2022	Sent Records	6	
1/7/2022	Lisa	Nagl	Media	120155-45681903@requests.muckrock.com					Security Breach	Security breach notifications submitted to the Office of the Attorney General between the dates of October 1st, 2021 and January 31st, 2022.	1/12/2022	3/1/2022	Sent Records	304	
1/7/2022	Audrey	Smollen	General Public	aesmollen@embarqmail.com					Consumer Complaints	Consumer Complaint No. CC-2016-08-017291.	1/12/2022	1/18/2022	Sent Records	2	
1/10/2022	Jim	Casada	General Public	kidbud72@gmail.com					SL Complaints	Any document that states a resolution was made between the AG and the City of Merriam Woods regarding my complaint.	1/13/2022	1/13/2022	Sent Records	94	
1/10/2022	Elijah	Erlebach	General Public	erlebacheljiah@gmail.com					Other	Any offline or online school curriculum in regards to critical race theory from Bowling Green Elementary and Bowling Green High School. This is a public record request and any and all curriculum that contains environmental justice, decolonization, systemic racism, cultural competence, critical race theory, inclusion, equity, racial justice, bipoc folx, white privilege/supremacy, diversity and social justice.	1/13/2022				
1/10/2022	Kristi	Roth	Other	kroth@acecashexpress.com					Consumer Complaints	All consumer complaints in your information system(s) filed against Populus Financial Group, Inc. d/b/a ACE Cash Express, and ACE Credit Services LLC from November 29,2021 to January 10, 2022.	1/13/2022	6/9/2022	No Records		
1/10/2022	B	Smith	General Public	Rhinosmith82@gmail.com					AGO Staff Emails	Electronic copies of all emails received at the email address, illegalmandates@ago.mo.gov, from the email account's inception until 1/6.	1/13/2022	6/8/2022	Sent Records	13197	
1/10/2022	Steven	Vockrodt	General Public	stvvnb@umsl.edu					Other	(1) Annual reports for the AGO since 2010; (2) Names, positions, salaries and dates of service for any AGO employee who has worked as an assistant attorney general or deputy attorney general since 2014; (3) Vacancies and unfilled positions since 2014; and (4) Quarterly balances for the Missouri Merchandising Practices Act Revolving Fund since 2010.	1/13/2022	5/18/2022	Sent Records	194	
1/10/2022	Scotti	Ward	Attorney's Office	sward@advisen.com					Data Breach	Complete copies of all Data Breach Notifications filed per the Missouri Revised Statutes Section 407.1500 (Breach of Security).	1/13/2022	6/9/2022	Sent Records	182	
1/11/2022	Adam	Pihana	Attorney's Office	apihana@hallansley.com					Consumer Complaints	A complete copy of any complaints about and/or investigation file related to Wyndham Vacation Resorts, Inc. In the past, your office has provided a copy of a 'complaint index' identifying complaints to the AG's office similar to those made by other timeshare clients. Please provide a 'complaint index' for Wyndham. I would ask that you include a business records affidavit for any complaint index provided. Finally, please produce any documentation from Wyndham regarding its registration as a travel club pursuant to R.S.Mo. § 407.1243.	1/13/2022	4/8/2022	Sent Records	63	
1/11/2022	Steven	Vockrodt		stvvnb@umsl.edu					Other	(1) Annual reports for the AGO since 2010; (2) Names, positions, salaries and dates of service for any AGO employee who has worked as an assistant attorney general or deputy attorney general since 2014; (3) Vacancies and unfilled positions since 2014; and (4) Quarterly balances for the Missouri Merchandising Practices Act Revolving Fund since 2010.	1/13/2022	2/28/2022	Sent Records		
1/17/2022	Chelsea	Merta	Attorney's Office	Chelsea@lotuslawllc.com					Other	A complete list of Missouri public school districts to whom the Attorney General's December 7, 2021, letter was sent.	1/20/2022	1/24/2022	Sent Records	2	
1/17/2022	Connie	Moreno	Other	cmoreno@montereyfinancial.com					Consumer Complaints	Consumer complaints against Compass Resort Group LLC.	1/20/2022	6/7/2022	Sent Records	1	
1/18/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints regarding unwanted phone calls from State Farm. Relevant complaints are limited to those received since January 1, 2018	1/21/2022	4/4/2022	Sent Records	1	
1/18/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Do Not Call complaints from October 1, 2021 to December 31, 2021.	1/21/2022	4/4/2022	Sent Records	137	
1/18/2022	Christopher	Lesley	General Public	Chrislesley50@gmail.com					Case Files	The case file and video, audio, notes, interviews, pictures, literally everything for the case of the boy who suffocated in the fridge and was found on Aug 4st 1998, his name is Dustin Noah Gaines.	1/18/2022	1/18/2022	Not Custodian		
1/19/2022	Tawnell	Hobbs	Media	Tawnell.Hobbs@wsj.com					Data Breach	Any data security breach reports, forms and/or information that entities are required to report to the state after a data security breach. I'd like the information dating back to Jan. 1, 2020 to present.	1/24/2022	4/4/2022	Sent Records	1428	
1/20/2022	Richard	Lardner	Media	RLardner@ap.org					Consumer Complaints	I'm looking for copies of any records related to America's Future, Inc., a 501(c)(3) based in St. Louis.	1/25/2022	3/11/2022	No Records		

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1/20/2022	Mehreen	Rasheed	Media	records@americanoversight.org					AGO Staff Emails	All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) and text messages or messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, Twitter direct messages, Facebook messages, WhatsApp, Signal, Telegram, or Parler) between (a) Attorney General Eric Schmitt or anyone communicating on his behalf such a deputy, chief of staff, scheduler, or assistant, and (b) any of the external individuals listed below. External Individuals: A. Virginia "Ginni" Thomas, member of the Third Century Group and Groundswell, including, but not limited to, from an email address ending in @libertyinc.co or a phone number with the last four digits 8983; and B. Supreme Court Justice Clarence Thomas, or anyone communicating on Justice Thomas' behalf such as a clerk, scheduler, or assistant.	1/25/2022				
1/21/2022	Shawn	Boburg	Media	Shawn.Boburg@washpost.com					Consumer Complaints	Complaints received by the AG's office related to O'Hare Clinical Lab Services, Inc.	1/26/2022	4/4/2022	Sent Records	1	
1/21/2022	Erin	Kasten	General Public	Erin.Kasten@gmail.com					AGO Staff Emails	All communications, photos, videos, or documents (including any drafts of such documents) which relate to any discussions or agreement with Mark Milton to provide pro-bono legal services to parents challenging COVID-19 policies in Missouri school districts, from August 1, 2021 to present date; and 2. All communications between the Attorney General's office or its representatives and Mark Milton or any representative from the Milton Law Group from August 1, 2021 to present date.	1/26/2022	4/4/2022	Closed		
1/21/2022	Jessica	Shepherd	General Public	Jessleshepherdbarnes@gmail.com					AGO Staff Emails	1.) Any and all electronic communications between Attorney General Eric Schmitt and Attorney Mark Milton and/or the Milton Law Group sent and received between December 15, 2021 and January 20, 2022; 2.) Additionally, this request includes electronic communications any staff at the Attorney General's Office sent and received with Attorney Mark Milton and/or any staff at Milton Law Group between December 15, 2021 and January 20, 2022 and all records and communications between December 15, 2021 and January 20, 2022 that relate to the Attorney General's Office's efforts to identify pro bono attorneys with any firm in Missouri to represent parents who intend to sue their school districts over mask mandates and/or COVID-19 mitigation measures and plans.	1/26/2022	4/18/2022	Closed		
1/24/2022	Elad	Gross	Attorney's Office	Elad.j.gross@gmail.com					AGO Staff Emails	Any and all communications with Mark Milton since July 1, 2021.	1/27/2022				
1/24/2022	Elad	Gross	Attorney's Office	Elad.j.gross@gmail.com					Other	Any and all internal audits conducted by the Office of the Missouri Attorney General in compliance with the Office's conflict of interest policy from October 28, 2019, until the present.	1/27/2022	1/28/2022	Sent Records	4	
1/24/2022	Elad	Gross	Attorney's Office	Elad.j.gross@gmail.com					AGO Staff Emails	Any and all emails sent by the Missouri Attorney General's Office that includes the phrase: "As you know, our office has been leading the fight against the illegal COVID-19 policies of some Missouri schools".	1/27/2022				
1/24/2022	Elad	Gross	Attorney's Office	Elad.j.gross@gmail.com					AGO Staff Emails	Any and all communications regarding Mark Milton's status as a political donor to Attorney General Eric Schmitt.	1/27/2022	1/27/2022	No Records		
1/24/2022	Jeanne	Kuang	Media	jkuang@kcstar.com					AGO Staff Emails	All written communications, including emails, from the Attorney General's office to parents of students in any school district with a mask mandates, from Dec. 8 2021 through Jan. 21, 2022.	1/27/2022		Cancelled		
1/24/2022	Jeanne	Kuang	Media	jkuang@kcstar.com					AGO Staff Emails	All written communications containing the following keywords: "Kirkwood" from Dec. 8 2021 through Jan. 21, 2022.	1/27/2022		Cancelled		
1/24/2022	Tony	Messenger	Media	TMessenger@post-dispatch.com					Case Files	PDF copies of the contracts or agreements the AGs office signed with the private counsel involved with the school district lawsuits filed last week.	1/27/2022	1/27/2022	No Records		
1/24/2022	Alisa	Nelson	Media	anelson@missourinet.com					AGO Staff Emails	Copies of public records for emails and internal memos sent to and from the Attorney General's Office on January 19, 2022 about mask mandates, directing parents to private counsel and giving them other instructions related to lawsuits about school mask requirements. I'd also like the responses by parents who were emailed this communication.	1/27/2022	6/7/2022	Sent Records	49	

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1/25/2022	Andrea	Knernschield	Attorney's Office	aknernschield@leyhlaw.com					Consumer Complaints	Any and all complaints from Missouri consumers and tenants, including the incident numbers and files, made against Cloverleaf Apartments, Cloverleaf Apartments Investors, LLC and Stonebridge Global Partners, LLC (owner of Cloverleaf Apartments), and Seldin Company (former management company of Cloverleaf Apartments), regarding debt collecting, attempted evictions, and/or rent and possession or unlawful detainer lawsuits from July 2015 to the present.	1/28/2022	4/4/2022	No Records		
1/26/2022	Mehreen	Rasheed	Media	records@americanoversight.org					Case Files	1. Records sufficient to identify the names1 and job titles of each Office of the Attorney General employee (a) temporarily or permanently assigned to cases concerning mask mandates or (b) temporarily or permanently working in support of those employees assigned to cases concerning mask mandates; 2. Records sufficient to identify the total number of pending cases concerning mask mandates; 3. Records sufficient to identify the total number of resolved cases (including, but not limited to, cases resulting in a finding of guilt or liability, cases resolved by plea or stipulation, or dismissed cases) concerning mask mandates; and 4. Records sufficient to identify all costs and expenses incurred for cases concerning mask mandates, including but not limited to legal billing statements.	1/31/2022				
1/26/2022	Jack	Suntrup	Media	JSuntrup@post-dispatch.com					Other	Any spreadsheets or datasets that include any information emailed to illegalmandates@ago.mo.gov.	1/31/2022	2/14/2022	Sent Records	12	
1/26/2022	John	Tyner	Attorney's Office	john@lelaw.com					Consumer Complaints	Records related to Villages of Jackson Creek or Wanda Niccum.	1/31/2022	4/8/2022	No Records		
1/27/2022	Taylor	Goldenstein	Media	Taylor.Goldenstein@chron.com					AGO Staff Emails	Any and all communications to or from Texas Attorney General Ken Paxton, including but not limited to text messages, emails or communications via third-party apps, between Dec. 1, 2020 and Jan. 31, 2021.	2/1/2022				
1/27/2022	Jeanne	Kuang	Media	jkuang@kcstar.com					AGO Staff Emails	All contracts, memoranda of understanding or other written agreements between the AG's office and Mark Milton, Jennifer Cross or Stanley Cox or any affiliated law firms.	2/1/2022	5/17/2022	Closed		
1/27/2022	Adam	Pihana	Attorney's Office	apihana@hallansley.com					Consumer Complaints	Consumer complaints against Branson Car Sales, LLC d/b/a White Motor Company and Mechanical Breakdown Protection, Inc.	2/1/2022	4/8/2022	Sent Records	3	
1/31/2022	Gregg	Palermo	Media	Gregg.Palermo@tvstl.com					Other	Contents of the email account "illegalmandates@ago.mo.gov" from Dec. 8, 2021 through December 10, 2021.	2/9/2022	2/9/2022	Sent Records	13283	
2/4/2022	David	Armiak	General Public	david@prwatch.org					AGO Staff Emails	RAGA and RLDF from 10/1/2021 to 2/9/2022	2/9/2022				
2/4/2022	Galen	Bacharier	Media	gbacharier@news-leader.com					Other	Costs incurred for AG Schmitt trip to Texas on 2/28/22	2/9/2022	2/9/2022	No Records	N/A	
2/4/2022	O.H.	Skinner	Attorney's Office	o.h.skinner@allianceforconsumers.org					Case Files	Copy of a pdf letter from Christ Toth, NAAG Executive Director, to Attorney General Schmitt, dated February 8, 2022, which discusses the recent McKinsey opioids settlement.	2/9/2022	2/9/2022	Sent Records	2	
2/7/2022	David	Dothard	Media	Spd.foia@jupiternet.com					Case Files	State v. Lynlee Renick	2/10/2022	3/25/2022	Sent Records	869	Yes
2/7/2022	Steve	Horn	Media	shorn@thecapitolforum.com					Consumer Complaints	Any and all consumer complaints filed about the company AmeriGas submitted between October 1, 2021 through the date of the fulfillment of this request. Any and all communications documents about, pertaining to, or with the company AmeriGas dated between October 1, 2021 through the date of the fulfillment of this request.	2/10/2022	4/4/2022	Sent Records	5	
2/7/2022	Caitlin	Knute	Media	Caitlin.Knute@KSHB.com					Other	Emails between the Attorney General Eric Schmitt and any campaign staff, particularly those with email addresses ending in "schmittforsenate.com" and schmittformissouri.com," between the dates of 03/01/2021 and 01/31/22.	2/10/2022	2/15/2022	No Records		
2/10/2022	Melike	Arslan	General Public	melikearslan@fas.harvard.edu					Consumer Complaints	All complaints received from the Price Gouging Complaint Form	2/15/2022				
2/10/2022	Ethan	Colbert	Media	ecolbert@emissourian.com					AGO Staff Emails	Emails or other correspondence submitted to office of the Missouri Attorney General and its established tip line illegalmandates@ago.mo.gov) regarding the Meramec Valley R-III School District (colloquially known as Pacific School District) and East Central College or ECC in Union regarding mask mandate and the COVID-19 pandemic.	2/15/2022	3/16/2022	Sent Records	14	
2/10/2022	Dan	Schaefer	Media	dan@democracyonthemove.org					Other	The travel policies and procedures used by the Attorney General's office when traveling on official business.	2/13/2022	2/13/2022	Not Custodian		
2/18/2022	Tony	Messenger	Media	TMessenger@post-dispatch.com					Case Files	Copy of the opioid settlement.	2/23/2022	4/1/2022	Sent Records	7	

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2/21/2022	Brandon	Wright	General Public	Bmichaelwright92@gmail.com					Other	A copy of the complaint filed against several Hickman Mills C-1 School Board Members regarding inappropriate/unapproved spending (possibly among other topics), specifically naming President Byron Townsend and VP DaRon McGee.	2/24/2022				
2/22/2022	Joseph	Becker	DOC Prisoner	#1090720	8200 No More Victims Rd	Jefferson City	MO	65010	SL Complaints	Sunshine Law complaint files for Joseph Becker	2/25/2022	2/25/2022	Sent Records	52	
2/22/2022	Michael	Fitzgerald	General Public	Msfitzgerald2006@gmail.com					Consumer Complaints	A consumer complaint filed by Debra Michaels in Oct. 2021 against Heather Fleming. Case number: CC-2021-10-003155	2/25/2022	4/4/2022	Sent Records	29	
2/22/2022	Gary	Hoffson	General Public	hoffsongary@gmail.com					Other	Total costs incurred by your office revolving around the attorney general suing cities, schools and individuals about mask mandates.	2/25/2022	2/25/2022	Sent Records	24	
2/22/2022	Connie	Moreno	Other	cmoreno@montereyfinancial.com					Consumer Complaints	Consumer complaints against Vacation Ownership Closing Company.	2/25/2022	6/7/2022	Sent Records	25	
2/24/2022	Justine	Arens	Media	justine.arens@investigatetv.com					Consumer Complaints	Insulin Products	3/1/2022				
2/24/2022	Tony	Messenger	Media	TMessenger@post-dispatch.com					AGO Staff Emails	All written communication (including emails) between the AG's office, and the offices of the three private attorneys (Mark Milton, Jennifer Cross and Stanley Cox), from Jan. 1, 2022 until January 27, 2022.	3/1/2022	5/27/2022	Sent Records	1101	
2/24/2022	Noah	Wicks	Media	noah@agri-pulse.com					AGO Staff Emails	Any letters or emails exchanged between the Missouri Attorney General and suspected violators of Missouri's law on foreign land ownership (Titles and Conveyence of Real Estate, section 442.560 to 442.591) about compliance with laws and regulations relating to foreign ownership of agricultural land in the State. The time period for this request would be between Jan. 1, 2013, and the date this request is processed. I request this information be sent to me by email in a digital format.	3/1/2022				
2/24/2022	Hampton	Williams	Attorney's Office	hampton@sfalawfirm.com					Consumer Complaints	All records or statements submitted in compliance with Section 407.610, RSMo., filed by the following entities for the timeshare properties located in Missouri, in any: a.Bayside Vacation Club, LLC b. Bayside Vacation Club Trust c. Stillwaters Vacation Resort Property Owners' Association; and All records or statements submitted in compliance with Section 407.625.5, RSMo., filed by the following entities for the timeshare properties located in Missouri, in any: a.Bayside Vacation Club, LLC b. Bayside Vacation Club Trust c. Stillwaters Vacation Resort Property Owners' Association	3/2/2022	4/8/2022	No Records		
2/24/2022	Kaisha	Young	Media	Kaisha.Young@scripps.com					Consumer Complaints	I'd like to request electronic copies of consumer complaints filed to the AG's office about the rental property company FirstKey Homes (consumers sometimes refer to them as First Key Homes or 1st Key Homes) between Jan. 1, 2020 and the most recent date available.	3/1/2022				
2/25/2022	Tom Mastin	Lee	Media	Tom.mastinlee@arrowmedia.com					Case Files	We are investigating the case of Benjamin Renick, who was murdered in June 2017. We are requesting all police materials pertaining to the case – police reports, search warrants, autopsy, interview footage etc.	2/25/2022	4/4/2022	Sent Records	869	10
2/28/2022	Cory	Johnson	General Public	Johnson.cory27@gmail.com					Other	A log of all public records requested from the Attorney General's office from June 1, 2021 to February 28, 2022.	3/4/2022	6/6/2022	Sent Records	10	
3/1/2022	Angelyn	Mikulec	Attorney's Office	amikulec@clarkhill.com					Consumer Complaints	Copies of any and all complaints filed with the Missouri Attorney General's Office after August 1, 2021-present, pertaining to U.S. Gold Holdings, LLC, USG Intermediate, LLC and U.S. Money Reserve, Inc. and any of that entity's assumed names, including United States Rare Coin & Bullion Reserve; U.S. Rare Coin & Bullion Reserve; United States Money & Bullion Reserve; United States Money and Reserve; United States Gold & Silver Reserve; U.S. Money Reserve; United States Money Reserve; Legendary Precious Metals; and Legendary Precious Metals, presented by U.S. Money Reserve.	3/4/2022	4/12/2022	Sent Records	1	
3/3/2022	Jeremy	Borden	General Public	jsbfoia@gmail.com					AGO Staff Emails	AGO Comms related to harrassment of Officials	3/8/2022	7/18/2022	No Records	N/A	
3/4/2022	Joe	Wilson	General Public	Joe.Wilson@live.com					AGO Staff Emails	Eric Schmitt's emails in relation to suing schools over mask mandates.	3/9/2022	3/11/2022	No Records		
3/7/2022	Nathan	Rinne	General Public	Office@rinnetrimcraft.com					Other	Any and all complaints, documents, e-filed forms, or emails that were given to the AGO leading to the request submitted to Camden County.	3/10/2022	3/17/2022	Sent Records	14	
3/8/2022	Jack	Suntrup	Media	JSuntrup@post-dispatch.com					AGO Staff Calendars	Eric Schmitt's schedule between Oct. 1, 2021 and March 7, 2022.	3/11/2022	4/25/2022	Sent Records	158	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				1	Other	complaint of discrimination, harassment or workplace misconduct filed against Joshua "Josh" Hawley	3/15/2022	5/26/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				2	Other	Copies of all settlements entered into between the Missouri Attorney General's Office and individuals making complaints against the Attorney General's Office	3/15/2022	6/15/2022	No Records	N/A	

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3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				3	Other	A list or index of all contracts awarded by or entered into by the Office of the Attorney General, including the name of the recipient, the value of the contract, and the purpose	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				4	Other	All records of any actual funds expended or projected expenditures for renovations (including furnishing, remodeling, redecorating, purchasing furniture, changes to furniture or other objects in office suites or common areas, or making improvements) of any part of the Attorney General's office	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				5	Other	Copies of all pages of all statements from any official or business credit cards used by Attorney General Josh Hawley, his chief of staff, his scheduler, and his executive assistant or personal aide	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				6	Other	Records of all gifts received by Attorney General Josh Hawley. Please include any available descriptions of the gifts, the dates the gifts were received, the names of the gift givers and the values of the gifts	3/15/2022	5/2/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				7	Other	Record of all staff employed in the Office of the Attorney General, including their first and last names, their positions or titles, their salaries and their employment start and separation dates, a list of all changes to staffers' hourly rates and salaries, promotions, demotions, and transfers	3/15/2022	5/2/2022	Sent Link	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				8	Other	A log or index of all prior public record requests received by the Office of the Attorney General from January 9, 2017 through January 3, 2019	3/15/2022	6/15/2022	Sent Records	23	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				9	Other	Text messages and cell phone bills for Hawley, Evan Rosell and Daniel Hartman	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				10	Other	A copy of visitor logs for the Office of the Attorney General from January 9, 2017 through January 3, 2019	3/15/2022	4/29/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				11	Other	Records of all publicly paid travel by Attorney General Josh Hawley. This includes – but is not limited to – travel itineraries; final hotel folios, including transactions – with incidentals – incurred during the stay; invoices, receipts and record of payment for lodging, meals, transportation, and other travel-related expenses; per diem payments; detailed travel reservations that include seat numbers, class of travel and any added amenities (such as extra leg room or access to a travel lounge)	3/15/2022	5/26/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				12	Other	All requests for authorization for use of a government-owned or private, non-commercial aircraft generated by or on behalf of Attorney General Josh Hawley or the Attorney General's Office from January 9, 2017 through January 3, 2019	3/15/2022	5/26/2022	Sent Records	3	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				13	Other	Record of all outside debt or bill collection vendors used by the Office of the Attorney General.	3/15/2022	4/29/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				14	AGO Staff Calendars	Copies of all calendars, agendas, and any other records of the schedule of Josh Hawley, including each appointment's date, time, place, attendees, and subject or purpose.	3/15/2022	4/29/2022	Sent Records	730	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				15	Other	Entry and exit records from any electric fob, key card or similar device used by or issued to Attorney General Josh Hawley	3/15/2022	5/26/2022	No Records	N/A	
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				16	AGO Staff Emails	All e-mails, including attachments, sent between Attorney General Josh Hawley's government e-mail account and other accounts under the name Josh Hawley or Joshua Hawley; and All e-mails, including attachments, sent between non-government e-mail accounts under the name Josh Hawley or Joshua Hawley and the government e-mail address of any employee of the Office of the Attorney General	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				17	AGO Staff Emails	Records of all emails exchanged between Attorney General Josh Hawley or any employee of the Office of the Attorney General and anyone with an email address ending in the following domain names: '@rga.org,' '@gop.com,' '@republicanags.com,' '@nrsc.org,' '@nrcc.org,' '@mogop.org,' or '@wh.eop.gov.'	3/15/2022				
3/10/2022	Nick	Bauer	General Public	researchinfo@dnc.org				18	AGO Staff Emails	Records of all emails exchanged between Attorney General Josh Hawley, Chief of Staff Evan Rosell, or Chief of Staff Daniel Hartman with Diamon Pet Foods, Emerson Electric, Edward Jones, Herzog, Hunter Engineering	3/15/2022	5/27/2022	No Records	N/A	

AMERICAN OVERSIGHT

3/10/2022	Nicole	Einbinder	Media	neinbinder@insider.com					Other	All publicly releasable records held by your department concerning the implementation of the following state statute, signed in 2019, which will go into effect should the 1973 Supreme Court decision of Roe v. Wade be overturned: — HB 126	3/15/2022				
3/14/2022	Kathleen	Casey	Other	records@duediligencegroupllc.com					AGO Staff Emails	copies of incoming-and-outgoing email correspondence (including attachments) of Missouri Attorney General's Office from January 1, 2017, to Present, that contain certain keywords: "charity law", "The Mission Continues Charity" and "Eric Greitens".	3/17/2022				
3/14/2022	Brianna	Lanham	Media	Brianna.Lanham@fox4kc.com					Other	Information related to the number of black individuals who were found hung in Missouri between 2000 and now, whose deaths were ruled as a suicide.	3/21/2022	3/21/2022	Not Custodian		
3/14/2022	Alisa	Nelson	Media	anelson@missourinet.com					Other	The current amount of money available in the state's legal expense fund and the beginning amount of the fund for this current fiscal year. I am also seeking any reports detailing how the money has been spent this current budget year. For comparison, I would like to know the beginning balance of last fiscal year's legal expense fund, the ending balance and what the money was spent on.	3/21/2022	6/7/2022	No Records		
3/15/2022	Tessa	Weinberg	Media	tweinberg@missouriindependent.com					SL Complaints	Any and all exhibits referenced in the Attorney General Office's March 15, 2022 lawsuit filed in Boone County Circuit Court against the Missouri School Boards' Association, including but not limited to Exhibits A through R; Any and all open records requests the Attorney General's Office sent to the Missouri School Boards' Association and the association's responses to said requests, including but not limited to an Oct. 8, 2021 request and Nov. 4, 2021 request; A copy of the Sunshine Law complaint the Attorney General's Office received Nov. 5, 2021 regarding the Missouri School Boards' Association; and Any and all correspondence, electronic or otherwise, regarding a Nov. 5, 2021, Sunshine Law complaint against the Missouri School Boards' Association.	3/18/2022	3/18/2022	Sent Records	197	
3/17/2022	Juanita	Bradford	General Public	jasb4@sbcglobal.net					Consumer Complaints	Westgate Gifts	3/22/2022	4/8/2022	No Records	N/A	
3/18/2022	Teri	Doerr	Other	billing@webrecon.net					Consumer Complaints	Debt collector complaints from 2-16-21 to 3-15-22.	3/23/2022	7/20/2022	Sent Records	39	
3/21/2022	Andrea	Knernschield	Attorney's Office	aknernschield@leyhlaw.com					Consumer Complaints	CC-2018-02-006005 and CC-2015-11-002392	3/24/2022	5/31/2022	Sent Records	7	
3/22/2022	Pamela	Childress	General Public	pcwash92@gmail.com					Consumer Complaints	MO Attorney General Complaint CC-2022-01-000561.	3/25/2022	3/25/2022	Sent Records	97	
3/22/2022	Kevin	Wayman	Attorney's Office	kevinwayman@msn.com					Consumer Complaints	Please be advise that I represent BHT Motors with respect to the above referenced Complaint. Pursuant to Chapter 610, et al., this writer is making a Sunshine document demand concerning the above referenced Complaint. Please promptly advise.	3/25/2022				
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against AAA Life from April 1, 2018 to March 15, 2022.	4/1/2022	5/27/2022	Sent Records	2	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against American International Group, Inc. (AIG) from April 1, 2018 to March 15, 2022.	4/1/2022	5/27/2022	Sent Records	8	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against Credit Union National Association (CUNA) from April 1, 2018 to March 15, 2022.	4/1/2022	5/31/2022	Sent Records	1	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against John Hancock Financial from April 1, 2018 to March 15, 2022.	4/1/2022	5/31/2022	Sent Records	1	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against Mutual of Omaha from April 1, 2018 to March 15, 2022.	4/1/2022	5/31/2022	Sent Records	2	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints regarding Physicians Mutual. Relevant complaints are limited to those received between April 1, 2018 and March 15, 2022.	4/1/2022	5/31/2022	Sent Records	1	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints regarding USAA. Relevant complaints are limited to those received between April 1, 2018 and March 15, 2022.	4/1/2022	5/31/2022	Sent Records	10	
3/29/2022	Jesse	Kelaidis	Attorney's Office	jessek@turkestrauss.com					Consumer Complaints	Consumer complaints against Colonial Penn from April 1, 2018 to March 15, 2022.	4/1/2022	5/27/2022	Sent Records	1	

AMERICAN OVERSIGHT

3/30/2022	Tom	Hals	Attorney's Office	Thomas.Hals@thomsonreuters.com					AGO Staff Emails	Correspondence since July 21, 2021 that references attorneys' fees or legal costs or a backstop fee fund or a "local government cost and fee fund", to a recipient outside the attorney general's office or from a sender outside the attorney general's office regarding the $26 billion national opioids settlement or a Memorandum of Understanding related to opioids litigation. This correspondence includes letters, email and text messages. Since July 21, 2021, meeting logs or calendar entries referencing in-person meetings or phone calls or video meetings to discuss the $26 billion national opioids settlement or a Memorandum of Understanding related to opioids litigation and involving staff from the attorney general's office.	4/4/2022				
3/30/2022	Charles	Holden	General Public	Morden01@swbell.net					Other	Copy of all submissions to the Students First website established by the Missouri Attorney General's office	4/4/2022	4/6/2022	Sent Records	214	
3/30/2022	Christian	Miller	Attorney's Office	christian.misner@da-lawfirm.com					Consumer Complaints	Original Consumer Complaint files.	4/4/2022	4/4/2022	Sent Records	220	
4/1/2022	Doug	Noland	Attorney's Office	doug@nolandlawfirm.com					Consumer Complaints	Consumer complaints against Prestige Worldwide LS LCC and Prestige Nissan Lee's Summit.	4/6/2022	6/8/2022	Sent Records	2	
4/1/2022	Randy	Ruggeri	Attorney's Office	rruggeri@caldwell-law-firm.com					Other	Complaints regarding police misconduct, abuse of power, any other public complaints and police misconduct for the City of Sugar Creek Police Department in Jackson County or Clay County Missouri. Please also provide all records of any complaints against the City of Sugar Creek	4/5/2022	4/5/2022	No Records		
4/4/2022	Tatiana	Calderon	Other	pia@democracyforward.org					AGO Staff Emails	1. All communications and other records relating to the March 10th letter led by Attorney General Paxton, signed by Attorney General Schmitt, to DirecTV CEO Bill Morrow. 2. All communications between Missouri State elected or appointed officials or employees and those in Louisiana, Mississippi, Montana, South Carolina, and Texas relating to the letter to DirecTV. 3. All records containing or documenting communications sent to or received by State elected or appointed officials or employees relating to the following media outlets: • One America News Network or @oann.com • Fox News or @foxnews.com, @foxbusiness.com • Breitbart News Network or @breitbart.com • Blaze Media or @blazemedia.com • CRTV.com or @crtv.com • The Blaze or @theblaze.com • NewsMax or @newsmax.com • Daily Caller or @dailycaller.com or @dailycallernewsfoundation.org • Daily Wire or @dailywire.com • Sinclair Broadcast Group or @sbgi.net	4/7/2022				
4/4/2022	Kate	Sisil	Attorney's Office	ksisil@kirkendalldwyer.com					Other	The 2019/2020 budget for the Missouri Attorney General's Office; All expenditures by the Missouri Attorney General's Office for the 2019 and 2020 fiscal years; All lawsuits filed by the Missouri Attorney General's Office in 2020 and a breakdown of those costs.	4/7/2022		Sent Link	4	
4/5/2022	Jennifer	Hardy	General Public	jh@tloffice.com					Other	A list of travel clubs registered in Missouri.	4/14/2022	5/27/2022	Sent Records	1	
4/7/2022	George	Shillcock	Media	GShillcock@press-citizen.com					Consumer Complaints	Consumer complaints Jan. 2021 to present on Moxie Solar, a solar installation company based in North Liberty, Iowa.	4/12/2022	4/12/2022	No Records		
4/8/2022	Mehreen	Rasheed	Media	records@americanoversight.org					Other	All text messages or messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, Twitter direct messages, Facebook direct messages, WhatsApp, Signal, Telegram, or Parler) sent or received by Attorney General Eric Schmitt on January 6, 2021.	4/13/2022	4/13/2022	No Records		
4/8/2022	Nathan	Rinne	General Public	Office@rinnetrimcraft.com					AGO Staff Emails	All email communications with prosecuting attorney Caleb Cunningham that have anything to do with me, Nathan Rinne, and commissioner James Gohagan. I am Also asking for any investigation documents and any inter office communications involving myself and James Gohagan.	4/8/2022	6/3/2022	Sent Records	2692	
4/11/2022	Matt	Cook	Attorney's Office	Cookmp21@yahoo.com					Consumer Complaints	Identity theft complaints from December 8, 2021 to April 11, 2022.	4/14/2022	6/13/2022	Sent Records	48	
4/11/2022	Katie	Johnson	Attorney's Office	Katie.Johnson@heplerbroom.com					Consumer Complaints	Any documents related to the Violation of the Missouri Underground Facility Safety and Damage Prevention Act by American Design Builders, LLC.	4/14/2022				
4/14/2022	Jeremy	Kohler	Media	Jeremy.kohler@propublica.org					Consumer Complaints	Consumer complaints related to Missouri Cash Home Buyers and Homevestors.	4/19/2022	4/19/2022	Sent Records	2	
4/14/2022	Hannah	Rappleye	Media	Hannah.rappleye@nbcuni.com					Other	A copy of the "Second Amendment Preservation Act Compliance Memorandum"	4/19/2022	4/19/2022	Closed		
4/14/2022	Gregg	Palermo	Media	Gregg.Palermo@charter.com					Other	Copies of submissions made to the Attorney General's Students First Initiative made through April 7, 2022.	4/19/2022				

AMERICAN OVERSIGHT

4/14/2022	Byard	Duncan	Media	Byard.Duncan@propublica.org					Consumer Complaints	Consumer complaints your office has received since Jan. 1, 2012 that concern or reference the real estate franchise company "HomeVestors of America," a.k.a. "Homevestors of America, Inc." a.k.a. "Homevestors."	4/19/2022	4/19/2022	Sent Records	2	
4/15/2022	Andrew	Hackett	Other	agency@cogencyglobal.com					Consumer Complaints	Consumer complaints from January 1, 2018 to present regarding: CVS Health; CVS; Walgreens; Walmart; Wal-mart; Sam's; Sam's Club; Target; RiteAid; and Rite Aid.	4/20/2022				
4/15/2022	Randy	Noble	General Public	rvnoblework@gmail.com					Consumer Complaints	Consumer complaints related to At Home in Independence.	4/20/2022	6/8/2022	No Records		
4/15/2022	Sheila	Carroll	Attorney's Office	scarroll@cosgrovelawllc.com					Consumer Complaints	Capital Resort Group and Capital Vacations	4/20/2022	5/27/2022	Sent Records	302	
4/15/2022	Patrick	Mann	General Public	mannpt@gmail.com					Consumer Complaints	Complaint No. CC-2021-12-000096 Home of Luxury Games Limited.	4/20/2022	6/2/2022	Sent Records	39	
4/17/2022	Jerry	McCoy	General Public	Jerrymccoy13@gmail.com					SL Complaints	Sunshine Law Complaints submitted by Jerry McCoy.	4/17/2022	6/2/2022	Sent Records	3	
4/19/2022	Lora	Wallander	General Public	lora.petsunlimited@gmail.com					Consumer Complaints	all records that have been filed on me. My name is Lora Wallander, Formally Lora Walters. I would like to request all records under both of my names (Lora Wallander & Lora Walters).	4/22/2022	4/22/2022	No Records		
4/19/2022	Byard	Duncan	Media	Byard.Duncan@propublica.org					Consumer Complaints	Complete files for consumer complaints your office has received since Jan. 1, 2012 that concern or reference the real estate franchise company "HomeVestors of America," a.k.a. "Homevestors of America, Inc." a.k.a. "Homevestors."	4/20/2022	7/21/2022	Sent Records	127	
4/19/2022	Charles	Hatfield	Attorney's Office	Chuck.Hatfield@stinson.com					SL Complaints	Copies of the following public records from 2012-present: 1. All Sunshine Law violation complaints received by the Attorney General's Office about "special purpose bodies", as such term is used on ago.mo.gov; 2. All Sunshine Law violation complaints received by the Attorney General's Office about "nongovernmental bodies", as such term is used on ago.mo.gov; and 3. All Sunshine Law violation complaints received by the Attorney General's Office about any entity formed under Chapter 355 of the Missouri Revised Statutes alleging that any such entity is a "quasi-public governmental body."	4/22/2022	7/29/2022	Sent Records	1879	
4/19/2022	Carl	Herron, Jr	General Public	Carlco184@gmail.com	419 Day Drive	Saint Louis	MO	63135	Consumer Complaints	Consumer Complaint: CC-2020-05-001420	4/22/2022	5/31/2022	Sent Records	38	
4/19/2022	Tiffany	Vaughn	General Public	mother4life2021@gmail.com					SL Complaints	1) Copy of all traffic stops and arrest records reported by Sikeston DPS and Scott County Missouri. The years I am wanting this information for is 2016 and 2019; 2) A list of all cases referred to the AG Office by Scott County Prosecutor Amanda Oesch during the time she has held her position as prosecutor in Scott County Mo; and 3) A copy of all Sunshine Law complaints made against any and all government officials within Scott County elected or employed including all law enforcement staff, for the past 5 years.	4/22/2022	5/2/2022	Sent Records	34	4
4/19/2022	Mark	Walker	Media	Mark.walker@nytimes.com					AGO Staff Emails	An sent email correspondence (along with complete email chain) from the Attorney General with any of the following domain names: @geniussports.com @sportradar.com @geocomply.com @arlstotle.com @mgm.com @fanduel.com @draftkings.com @betmgminc.com @barstoolsports.com @americangaming.org @caesars.com @flutter.com @pngaming.com @underdogfantasy.com @pointsbet.com	4/22/2022	6/9/2022	No Records		
4/19/2022	Mark	Walker	Media	Mark.walker@nytimes.com					AGO Staff Emails	An sent email correspondence (along with complete email chain) from the Attorney General with any of the following domain names: Brian Ballard, Others at Ballard Partners using email addresses that end in "@ballardfl.com", Jeremy Kudon (jkudon@orrick.com)	4/22/2022	6/9/2022	No Records		
4/20/2022	Kurt	Erickson	Media	KErickson@post-dispatch.com					SL Complaints	Attorney General's office Sunshine request log dating to June 1, 2021.	4/25/2022	5/13/2022	Sent Records	10	
4/20/2022	Luz Maria	Henriquez	Other	lhenriquez@aclu-mo.org					Other	For all sexual assault forensic evidence (SAFE) kits that were collected from 2000 until present within the Missouri Attorney General's Office inventory: - The law enforcement agency, healthcare provider or ancillary organization that collected the SAFE kit; - The date of assault for which the kit was collected, or if the date is unavailable, the year of assault; - Reporting status (Reported, Unreported); - Tested Status (Never Tested, Previously Tested); - Victim sex; and - Victim age (if available).	4/25/2022	4/27/2022	Sent Records	6	

AMERICAN OVERSIGHT

4/25/2022	Mehreen	Rasheed	Media	records@americanoversight.org					AGO Staff Emails	All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (a) Attorney General Eric Schmitt and (b) Texas Attorney General Ken Paxton, including but not limited to emails from ken.paxton@oag.texas.gov, Kenneth.paxton@oag.texas.gov, ken@kenpaxtonlaw.com, or Paxton's Chief of Staff Lesley French. Please provide all responsive records from November 1, 2021, through the date the request is received.	4/28/2022	4/28/2022	No Records		
4/26/2022	Cleo	Rank	Other	cleo.rank@influencemap.org					AGO Staff Emails	Any and all documents including but not limited to records, memoranda, meeting notes, emails, and other correspondence relating to the April 15, 2022 letter sent to the Securities and Exchange Commission, Request for Extension of Time to Provide Comments on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" generated between January 1, 2022 through the fulfillment of this request. The letter can be accessed here: https://www.sec.gov/comments/s7-10-22/s71022-20123878-280047.pdf	5/2/2022				
4/26/2022	Helen	Wade	Attorney's Office	hwade@lawmissouri.com					AGO Staff Emails	Any and all records and/or communications regarding or referencing Eric Greitens' access to firearms, removal or limitation on Eric Greitens' access to firearms, or assignment of firearms to Eric Greitens from October 1, 2016 though June 15, 2018 . This includes but is not limited to emails, text messages, other electronic or written communications, recordings, notes, memoranda, reports, licenses, certifications, and/or qualifications, etc.; and Any and all records and/or communications from October 1, 2016 forwards regarding or referencing conduct by Eric Greitens which was characterized as actually or potentially concerning, criminal, abusive, erratic, threatening, creating or tending to create a liability or potential liability for the State of Missouri, inappropriate under then-existing laws or policies, indicative of instability of mind or emotions, indicative of the exercise or contemplated exercise of questionable judgment, or indicative of the potential for self-harm or harm to others.	5/2/2022	5/19/2022	No Records		
4/27/2022	Durim	Berisha	General Public	db@guerrillaeconomics.com					Other	FY2021 Master Settlement Agreement payment to Missouri	5/2/2022				
5/3/2022	Robert	Budelin	General Public	robertrybovich@gmail.com					AGO Staff Emails	Attorney General Schmitt, Hawley and Koster comms re Agape	5/6/2022	7/6/2022	No Records	N/A	
5/3/2022	Kyle	Lackey	General Public	kylelackey7@gmail.com					Consumer Complaints	Public records regarding the number of complains and type of complaints filed on the Assisted Living Facility, Crestwood Health Care Center located at 11400 Mehl Ave, Florissant, MO 63033.	5/6/2022				
5/3/2022	Samantha	Walker	Media	samanthawalker@lawnewz.com					Case Files	I am reaching out to submit this FOIA request under Missouri's Sunshine Law for records and materials pertaining to the Lynlee Renick case. Please see attached letter for further details about this case and my request.	5/6/2022	5/6/2022	Closed		
5/6/2022	Charles	Hatfield	Attorney's Office	Chuck.Hatfield@stinson.com					SL Complaints	All Sunshine Law requests received by the Attorney General's Office in April 2022; and 2. All Sunshine Law responses provided by the Attorney General's Office in April 2022 to Sunshine Law requests made on the Attorney General's Office at any time prior to or during April 2022.	5/11/2022	5/11/2022	Sent Records	112	
5/6/2022	Michael	Hannon	General Public	michael.hannon@att.net					Other	Information about submissions to the Student's First Initiative. The number of submissions, the counties of their origination, and the general subject of the submission (textbooks, classroom activities, students' homework). If there is an standard handout of information, that probably would suffice.	5/11/2022				
5/9/2022	Jennifer		General Public	Mlamidudeflorida@outlook.com					Other	Public record of Rodney V. Retter from Warrensburg and Osage Beach, MO.	5/19/2022	5/19/2022	No Records		
5/10/2022	Michael	Emami	General Public	michaelemami@mail.missouri.edu					Case Files	All persons arrested for all types of murder and out on bond in 2021 and in 2018.	5/13/2022				

AMERICAN OVERSIGHT

5/11/2022	Curtis	Faber	General Public	stlcitygoptreasurer@gmail.com					Other	Missouri Ethics Commission fines paid by or on behalf of the Friends of Christine Ingrassa committee. The MEC said your office was in charge of collecting her fines. I would like the dates, amount, and the name of the person or organization who paid the fines; and a copy of the original court complaint or petition filed by Attorney General Danforth in a Quo Warranto case against the Sheriff of Pemiscot County. The case is State vs. Orton.	5/16/2022	5/27/2022	Sent Records	1	
5/11/2022	Tony	Messenger	Media	TMessenger@post-dispatch.com					SL Complaints	Copy of every Sunshine Law request made by the AG's office to a school district in Missouri between Jan. 1, 2022 and May 10, 2022.	5/16/2022	5/24/2022	Sent Records	15	
5/11/2022	Jack	Newsham	Media	jnewsham@insider.com					AGO Staff Emails	1) Emails and any other electronic messages — for example, messages sent via text, Slack, Skype, Signal, Telegram and WhatsApp — regarding the Missouri Attorney General's requests for recors or information from the National Association of Attorneys General, or NAAG, or the Missouri Attorney General's withdrawal from NAAG, that were sent or received by Eric Schmitt, Josh Foster, Morgan Corder, Jay Atkins, Tom Albus, Todd Scott, Marianna Deal or Chris Nuelle from Jan. 1, 2022 to the date of fulfillment of this request; 2) All emails sent or received by Eric Schmitt, Josh Foster, Morgan Corder, Jay Atkins, Tom Albus or Todd Scott to or from email addresses ending in @naag.org, @ag.iowa.gov, and @oag.texas.gov from Jan. 1, 2022 to the date of fulfillment of this request; 3) Notes from or recordings of any meetings held regarding the relationship between the Missouri AG and NAAG from Jan. 1, 2022 to the date of fulfillment of this request.	5/16/2022				
5/16/2022	Susan	Khoury	Media	Susan.ElKoury@kmov.com					AGO Staff Emails	Any and all records of complaints including by not limited to emails, letters, phone calls, electronic messaging in regards to contractor Terry Marler received from November 21, 2016 to the date this request is returned.	5/19/2022	6/2/2022	Sent Records	67	
5/16/2022	Nancy	Silverman	General Public	Nancysilverwoman@gmail.com					Other	Copies of all documents released in response to public records requests made by Byard Duncan of Reveal (The Center for Investigative Reporting) for copies of consumer complaints regarding Vivid Seats, TicketNetwork, Ticket Network and StubHub, and concerning the secondary market for live event tickets as discussed in this article -- https://revealnews.org/article/how-is-this-legal/. These requests were made by Reveal between 01/01/2019 and the present. I believe two requests were made to the Attorney General's Office during this time period. I would like copies of all documents released in response to these requests.	5/19/2022	5/19/2022	No Records		
5/17/2022	Kacen	Bayless	Media	kbayless@kcstar.com					Other	expenses reports, receipts or financial documents filed or signed by Missouri Attorney General Eric Schmitt that pertain to his personal use of public funds. I am requesting records from Oct. 1, 2021 to May 17, 2022	5/20/2022	5/20/2022	No Records	N/A	
5/17/2022	Kacen	Bayless	Media	kbayless@kcstar.com					Other	Copies of all Sunshine Requests sent to the Office of the Attorney General regarding Eric Greitens' access to firearms from Oct. 1, 2016 to May 17, 2022.	5/20/2022	5/20/2022	Sent Records	3	
5/17/2022	Kacen	Bayless	Media	kbayless@kcstar.com					Other	Any and all records regarding or referencing Eric Greitens access to firearms, removal or limitation on Eric Greitens' access to firearms or assignment of firearms to Eric Greitens from Oct. 1, 2016 through June 15, 2018.	5/20/2022	5/20/2022	No Records	N/A	
5/17/2022	Jason	Trammell	General Public	1171hp@gmail.com					Case Files	Records related to Case No 06-5125-CV-SW-RED.	5/20/2022				
5/18/2022	Charles	Buchanan	General Public	mblair@bwoattorneys.com					Other	copies of public records that pertain to investigations regarding Justmish Enterprises LLC's failure to obtain workers' compensation insurance. Justmish Enterprises LLC is located at 11882 Key Lane, Carthage, Missouri, 64836. To date, Justmish Enterprises LLC has been investigated three times by the Fraud and Non-Compliance Section of the Missouri Workers Compensation Commission. We request copies of all three investigations undertaken by the Fraud and Non-Compliance Section of the Missouri Workers Compensation Commission against Justmish Enterprises LLC.	5/23/2022	5/23/2022	Not Custodian	N/A	

AMERICAN OVERSIGHT

5/19/2022	Christi	Coleman	Attorney's Office	Christi.Coleman@lewisbrisbois.com					Other	Policies, procedures, administrative guidance, internal memoranda or communications regarding the email retention policies and practices of the Missouri Attorney General's Office, from January 1, 2020, to the present.	5/24/2022	6/27/2022	Sent Records	64	
5/19/2022	Robert	Troise	General Public	lbm9020@yahoo.com					Consumer Complaints	Consumer complaints against Schuber Mitchell in Joplin MO.	5/24/2022	6/9/2022	Sent Records	2	
5/20/2022	Mehreen	Rasheed	Media	records@americanoversight.org					AGO Staff Emails	All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) between (a) any of the officials listed below, and (b) anyone communicating from an email address ending in @supremecourt.gov. Attorney General's Office Officials: i. Attorney General Eric Schmitt; ii. Solicitor General Dean John Sauer; iii. Anyone serving as Chief of Staff to the Attorney General; iv. Rhonda Meyer, Deputy Chief of Staff; v. Todd Scott, Senior Counsel; vi. Jay Atkins, General Counsel, or anyone acting as General Counsel; vii. Megan Werdehausen, Executive Secretary; and viii. Anyone acting as assistant or scheduler to the Attorney General. Please provide all responsive records from May 1, 2021 through May 20, 2022.	5/25/2022				
5/20/2022	Tessa	Weinberg	Media	tweinberg@missouriindependent.com					AGO Staff Emails	1. Any and all correspondence, electronic or otherwise, sent to or received by school districts, boards of education or school personnel related to the "Students First Initiative," including but not limited to inquiries related to curriculum, textbooks or teaching materials. 2. Any and all submissions received in response to the "Students First Initiative," including but not limited to responses sent through the attorney general's office's submission form. 3. Any and all correspondence, electronic or otherwise, sent to or received by school districts, boards of education or school personnel since May 1, 2022, related to face mask policies.	5/23/2022				
5/24/2022	Cade	Glasgow	Attorney's Office	Cade@pajcic.com					Consumer Complaints	A certified copy of the inspection report and any resulting citations for the attached reports regarding Crete Carrier Corporation.	5/27/2022	5/27/2022	No Records		
5/26/2022	Mehreen	Rasheed	Media	records@americanoversight.org					AGO Staff Emails	All email communications and text messages or electronic messages on messaging platforms (including emails, email attachments, complete email chains, calendar invitations, calendar invitation attachments, text messages, text message attachments, and messages on messaging platforms such as Slack, GChat or Google Hangouts, Lync, Skype, Twitter direct messages, Facebook messages, WhatsApp, Signal, Telegram, or Parler) between: (a) Any of the officials listed below, and (b) Graham Ledger (grahamledger@yahoo.com), or Christina Bobb (christina.bobb@protonmail.com, christina@cbgstrategies.com), or anyone communicating on behalf of One America News Network, including anyone communicating from therealstoryoan@gmail.com or an email address ending in @oann.com. Officials: i. Attorney General Eric Schmitt, or anyone communicating on his behalf, such as an assistant or scheduler ii. Communications Director Marianna Deal iii. Press Secretary Christopher Nuelle iv. Deputy Attorney General Jeremiah Morgan v. Anyone serving as Chief of Staff to Attorney General Schmitt or the Attorney General's Office vi. Deputy Chief of Staff Rhonda Meyer. For request Item 1, please provide all responsive records from June 1, 2021, through the date the search is conducted. All email communications and text messages or messages on messaging platforms (including emails, email attachments, complete email chains, calendar invitations, calendar invitation attachments, text messages, text message attachments, and messages on messaging platforms such as Slack, GChat or Google Hangouts, Lync, Skype, Twitter direct messages, Facebook messages, WhatsApp, Signal, Telegram, or Parler) sent by any of the Attorney General's Office officials listed in Item 1 above, containing any of the following key terms: Key Terms: a. "One America News" b. OAN c. OANN d. DirecTV e. AT&T f. Morrow g. "Bill Morrow" h. "Herring Networks". For request Item 2, please provide all responsive	5/31/2022				
5/27/2022	Amy	Davis	Attorney's Office	amysweenydavis@jobsandfreedom.org					Consumer Complaints	Consumer complaints against: 1. Car Credit, Inc.; 2. The Big Lot Car Credit; 3. The Big Lot; and 4. Prospect Funding LLC.	6/2/2022				
5/30/2022	O.H.	Skinner	Attorney's Office	o.h.skinner@allianceforconsumers.org					AGO Staff Emails	A copy of any emails from June 2, 2022, from Christ Toth, NAAG Executive Director, to Attorney General Schmitt and/or the office's Chief Deputy or First Assistant.	6/6/2022	6/6/2022	No Records		
6/1/2022	Sarah-Louis	Ball	Media	Sarah-louise@plumpictures.co.uk					Case Files	D7PU-CR00040-01	6/6/2022				
6/1/2022	David	McSwane	Media	David.McSwane@propublica.org					Consumer Complaints	Any and all complaints sent to the Missouri AG's office by consumers of health share ministry organizations, including but not limited to, Liberty Health Share, from Jan. 1, 2018 to June 1, 2022.	6/6/2022				

AMERICAN OVERSIGHT

6/1/2022	Dawn	Oliver-Dysart	General Public	Dawn@operation-liberation.org					Consumer Complaints	All documents related to the complaints lodged with this office relating to the Kansas City based LLC known as One Struggle KC, One Struggle or One Struggle KC, LLC, including but not limited to any investigative notes, interviews, correspondence or anything related to One Struggle KC's fundraising and/or consumer complaints related thereto, from March 2015 to present.	6/7/2022				
6/6/2022	Angelyn	Mikulec	Attorney's Office	amikulec@clarkhill.com					Consumer Complaints	Copies of any and all complaints filed with the Missouri Attorney General's Office after February 1, 2022 - present, pertaining to U.S. Gold Holdings, LLC, USG Intermediate, LLC and U.S. Money Reserve, Inc. and any of that entity's assumed names, including United States Rare Coin & Bullion Reserve; U.S. Rare Coin & Bullion Reserve; United States Money & Bullion Reserve; United States Money and Reserve; United States Gold & Silver Reserve; U.S. Money Reserve; United States Money Reserve; Legendary Precious Metals; and Legendary Precious Metals, presented by U.S. Money Reserve.	6/10/2022				
6/6/2022	Kyla	Miller	Attorney's Office	kjmiller@seyfarth.com					Other	Copies of public records that relate to Kristin O'Dell's Charge of Discrimination filed against Costco Wholesale Corporation.	6/10/2022	6/10/2022	No Records		
6/6/2022	Jim	Oldebeken	General Public	Jim.oldebeken@aol.com					SL Complaints	A report or log of complaints received about alleged violations of Missouri's Sunshine Law from January 2021 to present.	6/10/2022				
6/6/2022	Nathan	Rinne	General Public	Office@rinnetrimcraft.com					Other	Determination in investigation.	6/9/2022	6/9/2022	Sent Records	1	
6/6/2022	Kristi	Roth	Other	complaince@populusfinancial.com					Consumer Complaints	Consumer complaints in your information system(s) filed against Populus Financial Group, Inc. d/b/a ACE Cash Express, and ACE Credit Services LLC from February 11, 2022 to March 22, 2022.	6/9/2022	6/9/2022	No Records		
6/6/2022	Jack	Suntrup	Media	JSuntrup@post-dispatch.com					AGO Staff Emails	Any and all records (including emails, text messages, written communications, etc.) dated between May 1, 2021 and Aug. 1, 2021 that mention any of the following terms: "Alison Phillips," "Philips," "Nash," and/or "National Human Trafficking Hotline."; Any communications (including emails, text messages, etc.) to or from anyone in the attorney general's office that mention the term "Hope Initiative" between July 1, 2020 and June 3, 2022; Copies of any and all resignation letters, or any records of resignation, from members or former members of the Human Trafficking Task Force sent between June 1, 2021 and June 3, 2022; Any communications (including text messages, emails, written correspondence, etc.) between the any attorney general's office employee(s) and Columbia Police Department employee(s) that mention a "phone" or "missing phone" between May 1, 2021 and June 3, 2022; and Any communications (including text messages, emails, written correspondence, etc.) between the attorney general's office employee(s) and the Missouri State Highway Patrol employees that mention a "phone" or "missing phone" between May 1, 2021 and June 3, 2022.	6/9/2022				
6/7/2022	Bo	Oliver	General Public	Bozena.oliver@gmail.com					Consumer Complaints	Copy of any complaints against William Katlin or Katlin Demo of MO from May 1, 2020 to present.	6/10/2022				
6/7/2022	Kristi	Roth	Other	complaince@populusfinancial.com					Consumer Complaints	Consumer complaints in your information system(s) filed against Populus Financial Group, Inc. d/b/a ACE Cash Express, and ACE Credit Services LLC from January 11, 2022 to February 11, 2022.	6/9/2022	6/9/2022	No Records		
6/8/2022	Holly	Riggs	Attorney's Office	hriggs@stantonbarton.com					Consumer Complaints	Sunshine Request – Copies of all complaints filed by Richard Lejeune (Bolivar, Missouri) from 2017-2022 and any responses and correspondence relating to any complaint filed by Richard Lejeune from 2017-2022.	6/13/2022	6/13/2022	Sent Records	87	
6/8/2022	Kristi	Roth	Other	complaince@populusfinancial.com					Consumer Complaints	Consumer complaints in your information system(s) filed against Populus Financial Group, Inc. d/b/a ACE Cash Express, and ACE Credit Services LLC from March 22, 2022 to April 18, 2022.	6/9/2022	6/9/2022	No Records		
6/8/2022	Jeffrey	Tsoi	Attorney's Office	jeffrey@rightsbehindbars.org					Other	1) Any and all documents detailing settlement agreements paid to prisoners in the MODOC system in cases where the MODOC, a MODOC employee, and/or a major contractor with the MODOC was a party; 2) Any and all documents detailing jury awards paid to prisoners in the MODOC system in cases where the MODOC, a MODOC employee, and/or a major contractor with the MODOC was a party; and 3) Any nonprivileged document or communication regarding determinations as to the value of claims or procedures for evaluating the value of claims brought by prisoners in the MODOC system against the MODOC or one of its employees or contractors.	6/13/2022				

AMERICAN OVERSIGHT

6/9/2022	Janis	Bell	Attorney's Office	jb@belllawkc.com					Consumer Complaints	All consumer complaints about the following entity as far back as your records allow: Greensky, LLC; Greensky, Inc.; and Greensky Trade Credit, LLC.	6/14/2022	6/14/2022	Sent Records	2	
6/9/2022	Lenny	Boss	General Public	virgolen@yahoo.com					Other	Civil cases handled by AGO pertaining to 4th Amendment Violations	6/14/2022				
6/9/2022	Tessa	Weinberg	Media	tweinberg@missouriindependent.com					AGO Staff Emails	Any and all correspondence, electronic or otherwise, sent to, copied to or received by Southeastern Legal Foundation staff, including but not limited to emails sent from email addresses ending in "@southeasternlegal.org"; andAny and all correspondence, electronic or otherwise, sent to, copied to or received by Todd Young, Kimberly Hermann, Eric Dial, Braden Boucek, Cece O'Leary, Jeff Clayman, Denny Jones, Ronnie Chance, Joe Arnall, Kathy Barco-Jossim, Michael Riley, Emerson Russell, E. Gay Mayfield, Amy Starzynski, Josalyn Spivey or Edwin Meese.	6/14/2022	6/14/2022	Sent Records	95	
6/10/2022	Jessica	Brody	General Public	brodyje@wustl.edu					SL Complaints	Fort Zumwalt R-II response(s) to the MO Attorney Letter sent via email to FZ on 4/15/2022 regarding my (Jessica Brody) Sunshine Law Complaint. According to the email I received from Casey Lawrence, the response from Fort Zumwalt was due to be returned to the AG by 5/2/2022. I request that you make available to me, in electronic format, all records that relate to the complaint filed by Jessica Brody against Fort Zumwalt SD for violation of the Sunshine Law.	6/15/2022	6/15/2022	Sent Records	17	
6/10/2022	Kristi	Roth	Other	complaince@populusfinancial.com					Consumer Complaints	All consumer complaints in your information system(s) filed against Populus Financial Group, Inc. d/b/a ACE Cash Express, and ACE Credit Services LLC from 04/18/2022 to present.	6/13/2022	6/13/2022	No Records		
6/13/2022	James	Gohagan	General Public	James_Gohagan@camdenmo.org					Other	Any and all documents related to the Public Corruption complaint regarding James Gohagan.	6/16/2022	6/23/2022	Sent Records	2692	
6/14/2022	Eli	Hoff	Media	ehoff@mail.missouri.edu					Other	Draft versions of any declaration or opinion prepared by the Attorney General's office intended to make effective Missouri Revised Statutes Section 188.017, called the "Right to Life of the Unborn Child Act" created between May 1, 2022 and June 13, 2022.	6/17/2022	6/17/2022	Closed		
6/14/2022	Christine	Pink	Attorney's Office	Christine_Pink@fd.org					Other	Copy of Robert J. Ahsens personnel file.	6/14/2022	6/14/2022	Closed		
6/15/2022	Tyler	Kingkade	Media	Tyler.Kingkade@nbcuni.com					AGO Staff Emails	Emails sent by Chris Nuelle, Marianna Deal, Madeline Sieren, Josh Foster, Rhonda Meyer, Kiley Williams, James Atkins, Patrick Flesch that contain the non-case sensitive keywords "students first initiative" or "student surveys". Please limit the search to only those records dated March 1, 2022 or later	6/21/2022				
6/20/2022	Janis	Bell	Attorney's Office	jb@belllawkc.com					Consumer Complaints	All consumer complaints about the following entity as far back as your records allow: McCarthy Auto Group of Blue Springs, Inc. d/b/a McCarthy Hyundai.	6/23/2022	6/23/2022	Sent Records	4	
6/20/2022	Brett	Vovata	Attorney's Office	Bvotava@vnjlaw.com					Consumer Complaints	All investigation documents concerning Lutheran Senior Services at Breeze Park, 600 Breeze Park Dr., St. Charles, MO as of June 21, 2022; and All complaints concerning Lutheran Senior Services at Breeze Park, 600 Breeze Park Dr., St. Charles, MO as of June 21, 2022.	6/23/2022	6/23/2022	Closed		
6/23/2022	Amy	Davis	Attorney's Office	amysweenydavis@jobsandfreedom.org					Consumer Complaints	Consumer complaints records related to Stonegate Meadows Apartments.	6/28/2022	7/1/2022	Sent Records	25	
6/27/2022	Charles	Bradley	General Public	charles.h.bradley@gmail.com					Other	Copies of subpoenas sent to 7 schools	6/30/2022	7/20/2022	Sent Records	70	
6/28/2022	Jack	Gillum	Media	Jgillum1@bloomberg.net					AGO Staff Emails	Copies of all emails to or from employees in which the following internet domains are in the To, From, CC, BCC, Subject or Body fields of the email message: Acxiom.com; liveramp.com; verisk.com; Placeiq.com; Safegraph.com; Epsilon.com; Venntel.com; Babelstreet.com; Xmode.io; Outlogic.io; Anomalysix.com; and gravyanalytics.com. Emails include those sent or received from Jan. 1, 2021, to June 28, 2022 and attachments.	7/1/2022				
7/1/2022	Emma	Brown	Media	Emma.Brown@washpost.com					AGO Staff Emails	All emails sent to Attorney General Eric Schmitt or Deputy Attorney General Jeremiah Morgan or Solicitor General D. John Sauer or Deputy Solicitor General Jesus A. Osete from May 1, 2022 to the present, and that meet any of the following parameters: To or from any of the following individuals: David Johnson, Abigail Snyder, or Pete Bisbee OR that include, in the email header, the email body or in attachments, the terms "Obergefell" or "Dallas" or "Republican Attorneys General Association" or "RAGA" or "Rule of Law Defense Fund" or "RLDF" or "Center for Law and Policy" or "Rule of Law Endowment".	7/6/2022				
7/6/2022	Christina	Woodard	Media	CWoodard@krcl.com					Other	Case ID: KC21008694	7/11/2022	7/12/2022	No Records		
7/7/2022	Galen	Bacharier	Media	gbacharier@news-leader.com					AGO Staff Emails	All communications and documentation sent or received by members of Attorney General Eric Schmitt's office from June 24, 2022, to present regarding Missouri's abortion "trigger" law - also known as House Bill 126, HB 126, the Missouri Right to Life of the Unborn Child Act or RSMo § 188.017.	7/12/2022				
7/7/2022	Andrew	Boettcher	General Public	aboettcher@fischerhomes.com					Consumer Complaints	A list of all complaints regarding Fischer Homes.	6/10/2022	6/10/2022	Sent Records	1	
7/8/2022	Andrew	Boettcher	General Public	aboettcher@fischerhomes.com					Consumer Complaints	Copies of the following complaints: CC-2021-12-005599 (Joseph Prenger); CC-2022-05-002083 (Tammy Coryell); CC-2022-05-002713 (Melanie Kramer); and CC-2022-06-001880 (Stephen Jaromack)	6/13/2022	6/13/2022	Sent Records	30	
7/8/2022	Michele	Edstrom	Attorney's Office	medstrom@sandbergphoenix.com					Consumer Complaints	Copies of any/all documents containing information regarding NHC HealthCare Town & Country and Melody Hayes, including but not limited to any investigative materials relating to the December 22, 2019 incident.	7/13/2022				
7/12/2022	Robert	Buddin	General Public	robertrybovich@gmail.com					AGO Staff Emails	All AGO comms re Agape	7/15/2022				
7/12/2022	David	Watson	General Public	Watson0548@sbcglobal.net					Consumer Complaints	Investigation records regarding David Andrew Watson the prior owner of Watson's Old Time Donuts once located in House Springs Missouri.	7/15/2022	7/15/2022	No Records		
7/14/2022	Kasie	Elaine	General Public	kasieelaine67@gmail.com					Consumer Complaints	All complaints received against Renovate Rite America LLC.	7/15/20227				

AMERICAN OVERSIGHT

7/14/2022	Taylor	Legler	Attorney's Office	tlegler@batyotto.com					AGO Staff Emails	All documentation of communications, agreements or potential agreements with The City of Bates City or any City Official pertaining to or about the City of Bates City, Missouri Police Department or its Chief of Police created between December 31, 2019 and July 1, 2022.	7/19/2022				
7/25/2022	Hampton	Williams	Attorney's Office	hampton@sfalawfirm.com					Other	Please consider this my request for a copy of a document identifying the entities identified by the Missouri Attorney General's Office as regulated under Section 407.600 eq seq as: 1. An exchange program; 2. An exchange company; 3. An entity filing a notice pursuant to Section 407.610, RSMo.; and 4. Any entity filing a time-share plan under Section 407.625 RSMo from July 1, 2021 through July 1, 2022.	7/28/2022				
7/25/2022	Hampton	Williams	Attorney's Office	hampton@sfalawfirm.com					Consumer Complaints	All records or statements submitted in compliance with Section 407.610, RSMo., filed by the following entities for the timeshare properties located in Missouri, in any: a.Bayside Vacation Club, LLC b. Bayside Vacation Club Trust c. Stillwaters Vacation Resort Property Owners' Association; and All records or statements submitted in compliance with Section 407.625.5, RSMo., filed by the following entities for the timeshare properties located in Missouri, in any: a.Bayside Vacation Club, LLC b. Bayside Vacation Club Trust c. Stillwaters Vacation Resort Property Owners' Association	7/28/2022				
7/29/2022	Ter	Wereb	General Public	wer4freedom@mail.com					Consumer Complaints	registration records for Jordans Way LLC including contracts with charities and emails with Jordan's Way LLC or its representatives regarding registration	8/3/2022				
8/2/2022	Meredith	Sethel	Other	tigerlilliResources@proton.me					Consumer Complaints	Complaint related to Tigerlili Resources, Inc.	8/5/2022	8/5/2022	Sent Records	11	
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				1	AGO Staff Emails	Copies of all responsive documents to a November 13, 2018, request that asked for "All e-mails (including attachments) exchanged between any employee of the Office of the Attorney General and any employee of the White House from January 1, 2018 to November 13, 2018." We are asking for copies of all records that were provided in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				2	AGO Staff Calendars	Copies of all responsive documents to an October 4, 2018, request that asked for "Copies of the AG daily schedule for every day between 3/1/2018 to 10/4/2018." We are asking for copies of all records that were provided to Jack Suntrup, the St. Louis Post-Dispatch, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				3	Other	Copies of all responsive documents to an October 18, 2018, request that asked for "All records regarding the September 25, 2018, meeting with U.S. Attorney General Jeff Sessions and/or U.S. Department of Justice Antitrust staff; All records regarding the use, possible use, or declination of use of antitrust laws against information-technology companies, such as Facebook, Google, Twitter, Amazon, or Apple." We are asking for copies of all records that were provided to Kevin Schmidt, Cause of Action, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				4	AGO Staff Emails	Copies of all responsive documents to an October 1, 2018, request that asked for "AG September Emails." We are asking for copies of all records that were provided to Colin Smith, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				5	AGO Staff Calendars	Copies of all responsive documents to an October 1, 2018, request that asked for "AG/Rosell September Calendars and Sched Docs." We are asking for copies of all records that were provided to Colin Smith, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				6	AGO Staff Emails	Copies of all responsive documents to a September 4, 2018, request that asked for "Incoming and Outgoing emails for AG Hawley for August." We are asking for copies of all records that were provided to Colin Smith, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				7	AGO Staff Calendars	Copies of all responsive documents to a September 4, 2018, request that asked for "AG/Rosell August Calendars and Sched Docs." We are asking for copies of all records that were provided to Colin Smith, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				8	AGO Staff Emails	Copies of all responsive documents to an August 1, 2018, request that asked for "AG July Emails." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				9	Other	Copies of all responsive documents to an August 27, 2018, request that asked for "Any and all records requests submitted by the Attorney General's office requesting records and emails related to the Greitens administration, including but not limited to a May 11, 2018 request submitted by Michael Martinich-Sauter to the Governor's Office asking for emails and search terms; Any and all emails related to the response and processing of records requests submitted by the Attorney General's office requesting records and emails related to the Greitens administration; and Any and all records provided in response to records requests submitted by the Attorney General's office requesting records and emails related to the Greitens administration." We are asking for copies of all records that were provided to Tessa Weinberg or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				10	Other	Copies of all responsive documents to a July 23, 2018, request that asked for "records related to Texas v. US, Affordable Care Act, ACA, and Obamacare." We are asking for copies of all records that were provided to Tom Bastian or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				11	AGO Staff Calendars	Copies of all responsive documents to an August 1, 2018, request that asked for "AG and Rosell July Calendar and July Meeting Docs." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				12	AGO Staff Calendars	Copies of all responsive documents to a July 3, 2018, request that asked for "AG and ER Calendar for June and Scheduler Emails." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				13	AGO Staff Emails	Copies of all responsive documents to a July 3, 2018, request that asked for "AG June Emails." We are asking for copies of all records that were provided to Liam Stack, the New York Times, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				14	AGO Staff Emails	Copies of all responsive documents to a June 11, 2018, request that asked for "Correspondence between the AGO and Greitens admin between May 1, 2018 and June 1, 2018." We are asking for copies of all records that were provided to Jack Suntrup, the St. Louis Post-Dispatch, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				15	AGO Staff Calendars	Copies of all responsive documents to a July 2, 2018, request that asked for "AG Hawley outlook calendar for 2017." We are asking for copies of all records that were provided to Lindsay Wise, McClatch Hyde, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				16	Other	Copies of all responsive documents to a June 4, 2018, request that asked for "Records containing Conversion Therapy, Sexual Orientation Change Efforts (SOCE), Ex-Gay Therapy, Reparative Therapy, and/or Same-Sex Attraction (SSA) Therapy." We are asking for copies of all records that were provided to Liam Stack, the New York Times, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				17	AGO Staff Calendars	Copies of all responsive documents to a June 4, 2018, request that asked for "May Calendars." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				18	Case Files	Copies of all responsive documents to a May 22, 2018, request that asked for "Records related to Sansone v. Greitens/Confide/Sunshine Project Litigation." We are asking for copies of all records that were provided to Liam Stack, the New York Times, or any other requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				19	Other	Copies of all responsive documents to a May 29, 2018, request that asked for "Records related to Criminal Violations of Gov. Greitens." We are asking for copies of all records that were provided to Jack Suntrup, the St. Louis Post-Dispatch, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				20	Case Files	Copies of all responsive documents to a May 17, 2018, request that asked for "Records related to Sansone v. Greitens." We are asking for copies of all records that were provided to Rudi Keller, the Columbia Tribune, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				21	Other	Copies of all responsive documents to a May 18, 2018, request that asked for "Records related to Criminal Violations of Gov. Greitens." We are asking for copies of all records that were provided to Tony Messenger, the St. Louis Post-Dispatch, Bob Watson, the Jefferson City News Tribune, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				22	AGO Staff Calendars	Copies of all responsive documents to a May 1, 2018, request that asked for "AG & Rosell – April Calendars." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				23	AGO Staff Calendars	Copies of all responsive documents to a May 9, 2018, request that asked for "AG Hawley Calendar 1/9/17-5/9/17 and Koster Calendar 1/1/15-1/9/17." We are asking for copies of all records that were provided to Liam Stack, the New York Times, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				24	Other	Copies of all responsive documents to an April 30, 2018, request that asked for "Copy of invite from Federal Society." We are asking for copies of all records that were provided to MuckRock or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				25	AGO Staff Emails	Copies of all responsive documents to a May 1, 2018, request that asked for "AG April Emails." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				26	Other	Copies of all responsive documents to an April 30, 2018, request that asked for "Documents related to Greitens social media accounts." We are asking for copies of all records that were provided to the Kansas City Star or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				27	Other	Copies of all responsive documents to an April 30, 2018, request that asked for "Copy of invite from US Chamber of Institute for Legal Reform." We are asking for copies of all records that were provided to MuckRock or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				28	Other	Copies of all responsive documents to an April 25, 2018, request that asked for "Investigative Subpoena against Facebook." We are asking for copies of all records that were provided to Travis McDade or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				29	Other	Copies of all responsive documents to an April 23, 2018, request that asked for "Records related to AG's social media accounts." We are asking for copies of all records that were provided to the Kansas City Star or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				30	AGO Staff Emails	Copies of all responsive documents to an April 18, 2018, request that asked for "Email correspondence between the AG and @joshhawley.com and written correspondence between the AG and the Hawley for Senate Campaign." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				31	Other	Copies of all responsive documents to an April 19, 2018, request that asked for "Electronic records containing the following search terms: Alliance Defending Freedom, @adflegal.com, State policy Network, and @spn.org." We are asking for copies of all records that were provided to MuckRock or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				32	AGO Staff Calendars	Copies of all responsive documents to an April 18, 2018, request that asked for "AG's calendar from 12/4/17-12/10/17." We are asking for copies of all records that were provided to Jake Gillum, the Washington Post, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				33	AGO Staff Emails	Copies of all responsive documents to an April 4, 2018, request that asked for "AG Emails from 3/1/18-3/31/18." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				34	Data Breach	Copies of all responsive documents to a March 21, 2018, request that asked for "Records relating to leak investigations concerning members of the execution team." We are asking for copies of all records that were provided to Chris McDaniel, BuzzFeed News, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				35	AGO Staff Emails	Copies of all responsive documents to an April 4, 2018, request that asked for "Calendar for AG and ER 3/1/18-3/31/18 & Brad Johnson's emails." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				36	Other	Copies of all responsive documents to a March 12, 2018, request that asked for "Letter authorizing Bryan Cave firm to Represent GO in Sansone v. Greitens." We are asking for copies of all records that were provided to Jason Hancock, Lauren Trager, KMOV, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				37	Other	Copies of all responsive documents to a March 12, 2018, request that asked for "Records in Sansone v. Greitens." We are asking for copies of all records that were provided to Rudi Keller, the Columbia Tribune, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				38	SL Complaints	Copies of all responsive documents to a March 8, 2018, request that asked for "Complaints against Anthem and correspondence between AG's office and Anthem related to its policy." We are asking for copies of all records that were provided to Harvey Tettlebaum or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				39	AGO Staff Calendars	Copies of all responsive documents to a March 9, 2018, request that asked for "AG's calendar from 2/20/18-3/9/18." We are asking for copies of all records that were provided to MuckRock or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				40	AGO Staff Emails	Copies of all responsive documents to a March 1, 2018, request that asked for "AG's email correspondence from 2/6/18-2/28/18." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				41	AGO Staff Calendars	Copies of all responsive documents to a March 1, 2018, request that asked for "AG and Evan Rosell Calendar from 2/1/18-2/28/18 and Scheduling emails of Brad Johnson." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				42	Other	Copies of all responsive documents to a February 20, 2018, request that asked for "AG's Amicus Brief in Kolbe v. Hogan." We are asking for copies of all records that were provided to Justin Whitten or any other requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				43	AGO Staff Emails	Copies of all responsive documents to a February 27, 2018, request that asked for "emails that contain Republican Attorneys General Association, RAGA, Rule of Law Defense Fund, RLDF, @republicanags.com, @ruleoflawdefensefund.org, @rldf.org, Jason Heath, Amanda Gonzalez, Scott Will." We are asking for copies of all records that were provided to MuckRock or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				44	AGO Staff Calendars	Copies of all responsive documents to a February 6, 2018, request that asked for "Outlook Calendars of AG and Rosell from 1/1/18-1/31/18 and Scheduling emails between AG and Brad Johnson." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				45	Other	Copies of all responsive documents to a February 15, 2018, request that asked for "documents relating to Sansone v. Greitens." We are asking for copies of all records that were provided to Mark Pedroli, Rudy Keller, Pedroli Law, the Columbia Tribune or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				46	AGO Staff Emails	Copies of all responsive documents to a February 1, 2018, request that asked for "Copy of AG's emails from January 9th, 2017-February 1, 2018." We are asking for copies of all records that were provided to Jauren Trager, KMOV, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				47	Other	Copies of all responsive documents to a January 19, 2018, request that asked for "documents relating to Steve Stenger." We are asking for copies of all records that were provided to Arnie Dienhoff or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				48	AGO Staff Emails	Copies of all responsive documents to a January 17, 2018, request that asked for "AG's work email that he uses every day to conduct state business." We are asking for copies of all records that were provided to Arnie Dienhoff or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				49	Other	Copies of all responsive documents to a January 16, 2018, request that asked for "security breach between 7/1/17-12/31/17." We are asking for copies of all records that were provided to Lisa Nagi or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				50	AGO Staff Emails	Copies of all responsive documents to a January 9, 2018, request that asked for "AG's email correspondence from 7/2017 to 1/2018." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				51	AGO Staff Calendars	Copies of all responsive documents to a January 11, 2018, request asking for "Outlook calendars of AG from 9/22/17 – 11/15/17." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge, or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				52	AGO Staff Calendars	Copies of all responsive documents to a January 5, 2018, request asking for "Outlook calendars of AG, Brad Johnson and Evan Rosell." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge or any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				53	AGO Staff Emails	Copies of all responsive documents to a January 8, 2018, request that asked for "Emails exchanged between AGO and Rule of Law Defense Fund and the Republican Attorneys General Association." We are asking for copies of all records that were provided to Andrew Perez, MuckRock, or any other requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				54	AGO Staff Emails	Copies of all responsive documents to a November 16, 2017, request asking for "correspondence re Peter Thiel." We are asking for all records provided to Colin Lecher, the Verge and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				55	Other	Copies of all responsive documents to a December 26, 2017, request that asked for "text messages regarding state business on personal and state issued of AG Josh Hawley, Dean John Sauer, and Michael Martinich-Sauter." We are asking for copies of all records that were provided to Chelsea Rodrigues, the Democratic Senatorial Campaign Committee and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				56	AGO Staff Emails	Copies of all responsive documents to an October 31, 2017, request that asked for "AG correspondence and residence info." We are asking for copies of all records provided to Chelsea Rodriguez, the Democratic Senatorial Campaign Committee and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				57	AGO Staff Emails	Copies of all responsive documents to a November 2, 2017, request asking for "Outside counsel contracts and AG Email." We are asking for copies of all records provided to Kathleen Casey, American Bridge and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				58	Other	Copies of all responsive documents to an October 11, 2017, request that asked for "emails containing the following domains: @who.eop.gov; @ovp.eop.gov; @gop.com; @mogop.org; @missouri.gop; and/or @breitbart.com." We are asking for copies of all records that were provided to Spencer Scharff and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				59	Other	Copies of all responsive documents to an October 24, 2017, request that asked for "emails re Planned Parenthood and Claire McCaskill." We are asking for copies of all records provided to Quinn McCord and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				60	Other	Copies of all responsive documents to a July 31, 2017, request that asked for "copies of racial profiling reporting forms." We are asking for copies of all records that were provided to Michael Koontz and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				61	Other	Any and all Personal Financial Disclosure statements filed by Josh Hawley or Joshua Hawley. This request includes statements filed by Hawley both as a candidate for office and while serving as the Attorney General of Missouri.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				62	Other	Copies of all responsive documents to a July 18, 2017, request that asked for "copies of records related to Joshua 'Josh' David Hawley's tenure as Attorney General of Missouri from January 9, 2017, to Present." We are asking for copies of all records that were provided to Kathleen Casey, American Bridge and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				63	Other	Copies of all responsive documents to a July 31, 2017, request that asked for "employee roster including pay and position." We are asking for copies of all records that were provided to Summer Ballentine, the Associated Press and any other requester in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				64	Other	Copies of all responsive documents to a May 4, 2017, request that asked for a "copy of Planned Parenthood complaint." We are asking for copies of all records that were provided to the requester in response to this request.	8/5/2022				

AMERICAN OVERSIGHT

8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				65	Other	Copies of all responsive documents to a July 12, 2017, request that asked for "budget requests; open records requests; schedules, per diem; email log, advertisements, st vehicles; monthly billing statements; reimbursement requests; contracts; correspondence with lobbyists of TAMKO; correspondence to/from Humphreys; correspondence rel to public corruption unit." We are asking for copies of all records that were provided to the Missouri Democratic Party and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				66	Other	Copies of all responsive documents to a March 10, 2017, request that asked for "all records that relate to: David Schnare, Justin Schwab, Douglad Ericksen, Holly Greaves, George Sugimaya, David Kreutzer, Charles Munoz, Don Benton, Patrick Cais, Layne Bangerter, John Konkus, Ryan Jackson, Byron Brown and Samantha Dravis." We are asking for copies of all records provided to Jamie Corey and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				67	Other	Copies of all responsive documents to a March 10, 2017, request that asked for "all records that pertain to Energy and Environment Legal Institute, Free Market Environmental Law Clinic, Craig Richardson, Tom Tanton, Amy Oliver Cooke, Katy Grimes, Christopher Horner, Kevon Martis, Steve Milloy, Jenna Ashely Robinson, and George Taylor." We are asking for copies of all records that were provided to Jamie Corey and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				68	Other	Copies of all responsive documents to a March 10, 2017, request that asked for "all records that to Republican Attorneys General Association (RAGA) and the Rule of Law Defense Fund (RLDF)." We are asking for copies of all records that were provided to Jamie Corey and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				69	Other	Copies of all responsive documents to a March 10, 2017, request that asked for "all records that relate to: Scott Pruitt, Melissa Houston, Crystal Drwenski, Clayton Eubanks, Aaron Cooper, Ashley Omstead, Melissa Hale, Patrick Wyick and Mike Hunter." We are asking for copies of all records that were provided to Jamie Corey and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				70	Other	Copies of all responsive documents to a February 1, 2017, request that asked for "records re letter re nomination of Judge Neil Gorsuch." We are requesting copies of all records that were provided to Jamie Corey and any other requesters in response to this request.	8/5/2022				
8/2/2022	Nick	Bauer	Other	researchinfo@dnc.org				71	Other	Copies of all responsive documents to a January 26, 2017, request that asked for "emails re Websters Third New International Dictionary." We are asking for all records that were provided to Muckrock in response to this request.	8/5/2022				
8/2/2022	Michael	Weinhoffer	Attorney's Office	mweinhodder@thomaskeel.com					Case Files	A copy of any and all expert witness depositions of Susan Myers, Certified Nurse Midwife, including but not limited to the following cases: A Mother's Love, LLC, Petitioner v. Dep't of Health and Senior Services, Respondent, Mo. Admin. 12-1541 DH (Administrative Hearing Commission, 2013); Williston v. Mo. Dep't of Health and Senior Services, 461 S.W.3d 867 (Mo. Ct. App. 2015); and Williston v. Mo. State Board of Nursing, 610 S.W.3d 703 (Mo. Ct. App. 2020).	8/5/2022				
8/4/2022	Cori	Hulsey	General Public	cori.s@hotmail.com					Consumer Complaints	Complaint # CC-2022-07-003468	8/9/2022				
8/4/2022	Khadeeja	Safdar	Media	khadeeja.safdar@wsj.com					Consumer Complaints	consumer complaints against Cerebral Inc., a mental health company headquartered in San Francisco, from 01/01/2019 to 08/04/2022.	8/9/2022				
8/5/2022	Kelsey	McKelvey	General Public	kelsmckelvey7@gmail.com					Case Files	all of the records that relate or pertain to "RayVaun Christenson" as it pertain to the 2016 offense date for charges for Second-Degree Rape, charges which were filed on or around April of 2019. I believe the docket number in question is 1931-CR02200-01.	8/10/2022				

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8/8/2022	Kelly	Kowal	General Public	kellkowal@yahoo.com					Case Files	all records related to the death investigation of Laura Kowal (Galena, IL) on August 9, 2020 conducted by Missouri State Highway Patrol Troop B. I am seeking all records, autopsy photos, and 911 recordings from Gary Randolph (witness on scene). Report #200384751	8/11/2022				
8/9/2022	Aubree	Hardesty	General Public	ajhf5w@mail.missouri.edu					Other	copies of public records that display staffers names for your lower state-level house, the House of Representatives. I would like access to all current staffers for all members of your Michigan House of Representatives.	8/12/2022				
8/9/2022	Cathryn	Blakley	General Public	cgblakle@gmail.com					Other	1. The Attorney General's calendar for December 2020 2. All communications and invitations to the Attorney General or someone scheduling on their behalf to meet in Washington DC in December 2020 3. The Attorney General's travel arrangements and receipts for the December 2020 Washington DC travel 4. All communications to Mark Meadows or anyone on his staff regarding the 10Dec20 meeting with the AGs at the White House	8/12/2022				
8/12/2022	Jimmy	Cloutier	Media	jcloutier@crp.org					Other	Complete FOIA/public record request logs maintained by the Missouri Attorney General's Office between Jan. 1, 2021 and the date this request is processed (inclusive of those days).	8/17/2022				
8/16/2022	Janis	Bell	Attorney's Office	jbe@belllawkc.com					Consumer Complaints	Consumer complaints against Lakshmi Finance LLC dba Advance Financial	8/19/2022				
8/17/2022	Galen	Bacharier	Media	gbacharier@news-leader.com					Other	All calendars, appointment books, schedules, logs or other records, digital or handwritten, documenting meetings, appointments, trips, visits, or other daily activities of Attorney General Eric Schmitt from July 1, 2022 through Aug. 1, 2022.	8/22/2022				

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Message

From: Werdehausen, Megan [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WERDEM]
Sent: 8/24/2022 2:27:42 PM
To: 'JSuntrup@post-dispatch.com' [JSuntrup@post-dispatch.com]
Subject: Suntrup Sunshine Law Request
Attachments: 2022.8.24.ltr.Suntrup.pdf; Responsive Documents - Suntrup.pdf

Jack-

Please see attached.

Thank you,

Megan Werdehausen | Executive Secretary
Missouri Attorney General's Office
207 West High St
Jefferson City, MO 65101
(573) 751-8807
Megan.Werdehausen@ago.mo.gov

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IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; LEAGUE OF WOMEN VOTERS OF MISSOURI; D. RENE POWELL; and KIMBERLY MORGAN; Plaintiffs, v. STATE OF MISSOURI SERVE: Missouri Attorney General's Office Supreme Court Building 207 West High Street Jefferson City, Missouri 65102; JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State SERVE: Capitol Building, Room 208 Jefferson City, Missouri 65101; Defendants.	Case No. Division

PETITION FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, Missouri State Conference of the National Association for the Advancement of Colored People, League of Women Voters of Missouri, D. Rene Powell, and Kimberly Morgan, upon knowledge with respect to their own acts and on information and belief as to other matters, hereby allege for this petition for injunctive and declaratory relief:

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INTRODUCTION

1. The Missouri Constitution guarantees that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mo. Const. Art. I, § 25.

2. The Missouri Constitution also clearly defines voter qualifications: "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people . . . ." Mo. Const. Art. VIII, § 2.

3. The Missouri Constitution further provides that: "[A]ll constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design." Mo. Const. Art. I, § 2.

4. The right to vote and the right to equal protection under the laws "are the core of Missouri's constitution and, hence, receive state constitutional protections even more extensive than those provided by the federal constitution." *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. banc 2006).

5. In *Weinschenk*, 203 S.W.3d 201 and *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020), *reh'g denied* (Jan. 30, 2020), the Missouri Supreme Court confirmed the fundamental right to vote and struck down laws requiring that only limited forms of photographic identification ("photo ID") must be presented to vote. The Missouri Supreme Court has "made clear that

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requiring individuals to present photo identification to vote is unconstitutional." *Priorities*, 591 S.W.3d at 459.

6. Following the *Priorities* decision, Missouri voters maintained multiple options for voting in person at the polling place: (1) providing a form of photo ID, (2) providing an alternative secondary form of ID (e.g., a voter registration or notification card from the election authority, a Missouri student ID, or a copy of a current utility bill or bank statement), or (3) casting a provisional ballot. § 115.427, RSMo (2016).

7. House Bill 1878, effective August 28, 2022 (HB 1878), impinges upon the fundamental right to vote by restricting the identification options that registered voters may present to vote both in person at the polls and in-person absentee. HB 1878, § A (to be codified at § 115.427, RSMo and § 115.277, RSMo) (the "Voter ID Restrictions").[1]

8. The Voter ID Restrictions eliminate the second option of providing a form of secondary ID (e.g., a voter registration card, a student ID, or a copy of a utility bill or bank statement), and instead, require all registered voters in Missouri to either: (1) provide a non-expired acceptable Missouri or federal photo ID, or (2) cast a provisional ballot, which requires the voter to either return the same day with a non-expired acceptable photo ID or rely upon an arbitrary, standardless, and unreliable signature-matching process in order to count.

9. The Voter ID Restrictions will require those who lack one of the specified forms of photo ID, including individual Plaintiffs and members of organizational Plaintiffs, to expend time, resources, and effort navigating bureaucracies to acquire the requisite underlying documentation and an acceptable form of photo ID to vote.

[1] Section 115.277 provides that a person may cast an in-person absentee ballot if they meet certain requirements. Section 115.277 further provides that "[a] registered voter casting a ballot under the provisions of this subsection shall provide a form of personal photo identification that is consistent with subsection 1 of section 115.427."

AMERICAN OVERSIGHT

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10. These burdens in obtaining the now required photo ID to vote will be faced by voters who have already overcome the bureaucratic hurdles necessary to register to vote and who have been deemed eligible to vote by the State.

11. Civic organizations that represent populations who disproportionately lack one of the acceptable forms of a non-expired photo ID to vote and face significant barriers to obtaining one (e.g., racial minorities, people living in poverty, rural Missourians, students, senior citizens, Missourians with disabilities, Missourians returning from incarceration, unhoused Missourians), including the Missouri State Conference of the National Association for the Advancement of Colored People ("Missouri NAACP") and the League of Women Voters of Missouri ("LWVMO"), will now be required to expend and divert resources to ameliorate confusion among voters related to what identification will be needed to vote and to assist voters with understanding how to obtain acceptable forms of identification as well as documentation needed to acquire a non-expired acceptable photo ID.

12. The Voter ID Restrictions substantially and severely burden the fundamental right to vote by restricting the ability to cast a regular ballot to only those who possess certain limited, narrow forms of photo ID, by imposing unnecessary obstacles to voting for the population of Missourians who lack an acceptable form of photo ID, and by requiring civic organizations to expend and divert resources educating their members and the public about the new Voter ID Restrictions.

13. Because the Voter ID Restrictions impose a severe, substantial, and heavy burden on fundamental right to vote protected by the Missouri Constitution, they are subject to strict scrutiny. These onerous restrictions cannot satisfy any level of judicial scrutiny, however, as they are neither necessary nor narrowly tailored to advance any compelling state interest.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

14. The Voter ID Restrictions are unconstitutional both facially and as applied to all Missourians who lack the limited photo ID required by this law to cast a regular ballot, including Plaintiffs' members and Plaintiffs D. Rene Powell and Kimberly Morgan.

15. Plaintiffs request that this Court declare the Voter ID Restrictions unconstitutional and enjoin their application in all future elections.

JURISDICTION AND VENUE

16. This Court maintains original subject-matter jurisdiction over this action under §§ 526.030 and 527.010 of the Missouri Revised Statutes and Missouri Rule of Civil Procedure 87.01.

17. Venue is proper in this Court because Secretary of State John R. Ashcroft maintains an office in Cole County, Missouri.

PARTIES

A. Plaintiffs

18. The Missouri NAACP is a statewide membership organization.

19. In Missouri, the Missouri NAACP is the chief unit of the National Association for the Advancement of Colored People ("NAACP"), whose mission is: (i) to ensure the political, education, and economic equality of rights of all persons; (ii) to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; (iii) to remove all barriers of racial discrimination through democratic processes; (iv) to seek the enactment of federal, state, and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; (v) to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof; and (vii) to take any other lawful action utilizing the tools available to a 501(c)(4) organization in furtherance of these objectives.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

20. The Missouri NAACP has thousands of members across the state, divided into more than twenty local units.

21. The mission of the Missouri NAACP, which aligns with the NAACP, is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. Its objectives include seeking enactment and enforcement of laws securing civil rights as well as educating people as to their rights.

22. The issues upon which the Missouri NAACP and the NAACP are largely focused, include: Race & Justice (fighting racial injustice by building Black political, social, and economic power), Education Innovation (a world-class education for all students), Environmental & Climate Justice (an environmental, social and economic revolution), Inclusive Economy (mobility and a thriving Black economy), Health & Well-being (an inclusive culture of health and equitable social health systems), Next Generation Leadership (support for young leaders and change agents), Advocacy & Litigation (fair and just representation for all by standing up for the rights of Black Americans in the courts and in Congress).

23. A key objective for the Missouri NAACP and NAACP is to make sure that Black voters and other underserved communities are engaged and encouraged to vote in every election.

24. Voting is a foundational value of the Missouri NAACP. The organization believes that enabling all Missourians to exercise their fundamental right to vote is vital to ensuring equal citizenship and achieving the organization's substantive policy goals.

25. The Missouri NAACP is an active member of the Missouri Voter Protection Coalition, which works to secure the rights of all voters in Missouri.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

26. The Missouri NAACP conducts substantial voter engagement and education work in furtherance of its mission, including outreach and activities that communicate and advance its views about the importance of voter registration and access to absentee voting.

27. The population that the Missouri NAACP strives to support and encourage to vote (marginalized and underserved populations) stand to be disproportionately impacted by the implementation of HB 1878 and, specifically, the Voter ID Restrictions.

28. The Missouri NAACP provides voting-related outreach to, and advocacy on behalf of, its members and community, including outreach and advocacy related to voting requirements under Missouri law.

29. In order to fulfill its mission and increase voter turnout among its members and the communities it serves, the Missouri NAACP is expending and diverting resources educating the public on the Voter ID Restrictions and assisting those who need support obtaining an acceptable form of identification or the underlying documents necessary to obtain that form of identification.

30. The LWVMO is a statewide membership organization.

31. The LWVMO is a state chapter of the League of Women Voters ("LWV").

32. Rooted in the suffrage movement that secured the right to vote for women, the LWVMO has worked to foster civic engagement and enhance access to the vote since the organization was founded in 1920.

33. The LWVMO works to ensure every citizen has the information and resources necessary to register and exercise their right to vote.

34. The LWV and the LWVMO seek to expand voter access and fight voter suppression.

35. For almost 100 years, the LWVMO has been dedicated to ensuring a free, fair, and accessible electoral system for all eligible citizens.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

36. The LWVMO's goal is to safeguard the rights of all qualified voters—specifically those from traditionally underrepresented or underserved communities, including first-time voters, youth (both college and non-college), people with disabilities, new citizens, minorities, seniors, those with low income, and women—populations who stand to be disproportionately impacted by the Voter ID Restrictions.

37. The LWVMO is an active member of the Missouri Voter Protection Coalition, which works to secure the rights of voters in Missouri.

38. As a membership organization, the LWVMO is the state chapter and has nine local league chapters throughout the state.

39. The LWVMO's more than 1,300 members reside throughout Missouri.

40. LWV members who reside in Missouri are members of the LWVMO as well as their local league chapter.

41. The LWVMO provides voting-related outreach to and advocacy on behalf of its members and community members, including outreach and advocacy related to voting requirements under Missouri law, including the Voter ID Restrictions.

42. The LWVMO has members and works with communities that include individuals who do not have a photo ID that satisfies the Voter ID Restrictions.

43. In order to fulfill its mission and increase voter turnout among its members and the communities it serves, the LWVMO is expending and diverting resources educating the public on the Voter ID Restrictions and assisting those who need support obtaining an acceptable form of identification or the underlying documents necessary to obtain that form of identification.

44. D. Rene Powell is a resident of Columbia, Boone County, Missouri.

45. Ms. Powell is an eligible Missouri voter and is registered to vote in Missouri.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

46. Ms. Powell fifty-two years old and is disabled due to epilepsy and mobility issues. Ms. Powell lives alone. Because of her disability, she is unable to drive and must rely upon public transportation, transportation services like Uber and Lyft, or the assistance of friends to get around.

47. Ms. Powell does not have a Missouri driver's license.

48. Ms. Powell does not have a passport.

49. Ms. Powell has never served in the Missouri National Guard or United States Armed Forces.

50. Ms. Powell has a Missouri state non-driver's ID that expired on December 29, 2021.

51. Ms. Powell also has alternative forms of non-photo ID that she could use to vote under current law (e.g., a voter registration card and current utility bills).

52. The only reason that Ms. Powell would need to get her expired photo ID renewed would be to vote.

53. Ms. Powell has voted regularly in all local, state, and national elections for the past 20 years.

54. Ms. Powell voted in the August 2022 Primary Election and plans to vote in the November 2022 General Election.

55. Upon information and belief, the Voter ID Restrictions will prevent Ms. Powell from relying upon her expired state-issued photo ID or alternative forms of identification to cast a regular ballot in elections after the November 2022 General Election.

56. To obtain a new form of ID that complies with HB 1878 and to cast a regular ballot in future elections, Ms. Powell will need to engage in significant time, effort, and planning, including arranging transportation, complying with bureaucratic requirements, and making physical efforts to visit and wait at the appropriate agencies.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

57. Ms. Powell is a current member of the LWVMO and a board member of the LWV of Columbia-Boone County league chapter.

58. Kimberly Morgan is a resident of Fenton, Jefferson County, Missouri.

59. Ms. Morgan is an eligible Missouri voter and is registered to vote in Missouri.

60. Ms. Morgan is thirty-five years old and stays at home raising her three young children.

61. Ms. Morgan does not drive.

62. Ms. Morgan's husband works fulltime.

63. Because of an error in 2003, Ms. Morgan's birth certificate incorrectly spells her first name as "Kimberley."

64. Ms. Morgan's current state issued non-driver's photo ID also spells her first name incorrectly as "Kimberley" as she had used her birth certificate to obtain her first state issued ID.

65. It was not until after Ms. Morgan had received her first state issued ID that she noticed the spelling error.

66. Ms. Morgan is married but did not change her name.

67. Ms. Morgan's marriage license also includes the incorrect spelling of her first name.

68. Ms. Morgan's social security card has the correct spelling of her name.

69. Ms. Morgan does not have a passport.

70. Ms. Morgan has never served in the Missouri National Guard or the United States Armed Forces.

71. Upon information and belief, the correct spelling of her first name was reflected on her original birth certificate, as it also appears on her social security card that was issued shortly after her birth, but despite her attempts, Ms. Morgan has been unable to locate the original birth

AMERICAN OVERSIGHT

certificate and the only copy the department of vital records provided to her upon request includes the incorrect spelling of her first name.

72. Ms. Morgan was born in the City of St. Louis.

73. Ms. Morgan is registered to vote using her legal first name spelled correctly as "Kimberly."

74. Ms. Morgan votes with her voter registration card.

75. Ms. Morgan has made attempts to correct the name spelling on her documents through administrative and bureaucratic means but has been unable to do so.

76. Ms. Morgan has voted regularly in local, state, and national elections for several years.

77. Ms. Morgan voted in the August 2022 Primary Election and wants to vote in the November 2022 General Election.

78. Upon information and belief, the Voter ID Restrictions will prevent Ms. Morgan from using her voter registration card and she cannot use her state-issued ID with the name misspelling or any other alternative forms of identification to vote with a regular ballot in future elections.

79. In order to obtain the necessary underlying documents for a photo ID acceptable for casting a regular ballot after August 28, 2022, Ms. Morgan will have to engage in significant time, effort, and planning, including determining as an initial matter whether she can obtain a corrected birth certificate, before identifying and complying with bureaucratic requirements to obtain a photo ID with the correct spelling of her name so that she can exercise her fundamental right to vote.

B. Defendants

80. Defendant State of Missouri is the entity responsible for enforcement of Missouri's voting statutes, including the Voter ID Restrictions found in HB 1878, to be codified as § 115.427. It also provides state-issued IDs and certain underlying documents for voters who lack them.

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

81. Defendant John R. Ashcroft is the Missouri Secretary of State, the state's chief elections official, and responsible for implementation of laws related to voting, including HB 1878, to be codified as § 115.427, across the State. He is sued in his official capacity.

GENERAL FACTUAL ALLEGATIONS

Missouri s Constitutional Provisions and Established Legal Prohibition upon ID Laws

82. Missouri's "constitutional provisions establish with unmistakable clarity that the right to vote is fundamental to Missouri citizens." *Weinschenk*, 203 S.W.3d at 211; accord *Priorities*, 591 S.W.3d at 452; see also Mo. Const. Art. I, § 25; Mo. Const. Art. I, § 2; Mo. Const. Art. I, § 10; Mo. Const. Art. VIII, § 2.

83. The Missouri Constitution enumerates an exclusive list of qualifications that a person must have in order to have the right to vote in Missouri elections, guaranteeing that right to: "All citizens of the United States ... over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, if ... they are registered within the time prescribed by law." Mo. Const. Art. VIII, § 2. This exclusive list of qualifications establishes that individuals who are: (1) citizens of the United States; (2) over the age of eighteen; (3) residents of Missouri; (4) residents of the political subdivision in which they offer to vote; and (5) registered within the time prescribed by the law, "are entitled to vote at all elections by the people." *Id.*

84. The Missouri Constitution also provides the exclusive list of disqualifications to vote in Missouri: (1) a person who has a court-appointed guardian of his or her estate by reason of mental incapacity; and (2) a person who is involuntarily confined in a mental institution pursuant to a court adjudication. Mo. Const. Art. VIII, § 2.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

85. Mo. Const. Art. VIII, § 2 grants the Missouri General Assembly the authority to make only one determination on qualifications to vote: the General Assembly may, if it chooses to do so, exclude by law from voting "persons convicted of a felony, or crime connected with the exercise of the right of suffrage." *Id.*

86. In *Weinschenk*, 203 S.W.3d 201, the Missouri Supreme Court invalidated strict voter identification provisions implemented by S.B. 1014, 93rd Gen. Assemb., 2d Reg. Sess. (2006), which required Missouri voters to present certain limited forms of government-issued photo ID, specifically a document issued by a state or federal government that contains the person's name as listed in the voter registration records, the person's photograph, and an expiration date showing that the ID is not expired. § 115.427.1 (2005) (the court noted that "[i]n practical effect, the only documents that most Missourians would have that could meet these requirements are a Missouri driver's or non-driver's license or a United States passport").

87. The *Weinschenk* court held that the ID requirements under SB 1014 violated fundamental voting rights and equal protection under the Missouri Constitution. *Id.* at 204.

88. The *Weinschenk* court emphasized the "practical costs" that would be incurred by Missouri voters seeking an acceptable form of photo ID, who would have to navigate complicated bureaucracies simply to exercise their constitutional right to vote, and the time it would take for a voter to receive the required documents—burdens that the individuals most likely to lack the required documentation were least likely to be able to surmount. *Id.* at 208–09, 214–15.

89. The *Weinschenk* court also found that the State's asserted interest in preventing voter fraud could not justify this burden for purposes of the strict scrutiny analysis because the photo ID requirement "could only prevent a particular type of voter fraud [(voter impersonation)] that the record d[id] not show [wa]s occurring in Missouri." *Id.* at 218.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

90. Ten years after *Weinschenk*, Missouri legislators again attempted to implement strict photo identification requirements for voting by amending § 115.427, in H.B. 1631, 98th Gen. Assemb., 2d Reg. Sess. (2016).

91. HB 1631 maintained photo ID requirements, but also included an alternative option: otherwise-qualified voters who lacked one of the prescribed forms of ID could vote with a secondary form of ID, including: (1) any ID issued by the state of Missouri or the federal government, a state or federal agency, or a local election authority, (2) ID issued by a university, college, vocational, or technical school within the state of Missouri, or (3) a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing the voter's name and current address. However, a voter using a secondary form of ID was required to sign an affidavit confirming their identity and averring that they "do not possess personal identification approved for voting, are eligible to receive a Missouri nondriver's license free of charge, and are required to present a form of personal identification to vote." § 115.427 (2016).

92. In *Priorities*, the Missouri Supreme Court struck down the affidavit requirement of HB 1631's photo ID scheme. The court held that the affidavit language was unconstitutional because it was "misleading and contradictory." 591 S.W.3d at 455. While the court invalidated the affidavit requirement, it maintained alternative secondary ID options, determining that voters could present any of the enumerated secondary forms of ID instead of limiting the statute to strict photo ID requirements (e.g., a voter registration card, a student ID, or a copy of a utility bill or bank statement). *Id.* at 458–59.

93. In preserving alternative secondary ID requirements, the *Priorities* court reaffirmed the fundamental voting rights established by *Weinschenk*.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

94. The *Priorities* court found that removing the option to vote with a secondary ID, which would leave only the narrower photo ID provision and the provisional ballot signature-matching alternative (which is what HB 1878 also does with the mostly recently enacted Voter ID Restrictions), posed the same problems as the scheme invalidated in *Weinschenk* and "could not have been adopted by this Court." *Id.* at 459.

95. The *Priorities* court noted substantial evidence that the inadequacy of signature-matching necessary to count a provisional ballot cast by a voter without a photo ID—lack of training or uniform standards, age, and illness—"could result in an over-rejection of legitimate signatures[,]" *id*. at 458, n.15, leaving voters who wanted to be certain their ballots were counted with the same, singular option they had under the statute challenged in *Weinschenk*: obtain a photo ID. *Id*. at 458.

96. The *Priorities* court reaffirmed that obtaining proper ID requires "appropriate documentation, time, and the ability to navigate bureaucracies." *Id*. at 359. These hurdles "require substantial planning in advance of an election to preserve the right to vote," burdening even those voters who successfully overcome them and disenfranchising those who cannot. *Id*. (quoting *Weinschenk*, 203 S.W.3d at 215).

97. The HB 1631 version of the statute also allowed an eligible voter to obtain one non-driver's license and a copy of each the requisite underlying documents at no cost. *Id*.

98. The *Priorities* court rejected the dissent's attempt to distinguish the two laws because HB 1631, unlike its predecessor, required the state to provide one non-driver's license without cost as well as free underlying documentation necessary to get a Missouri ID, such as a certified birth certificate. *Id*. at n.16. As there was record evidence of a plaintiff wrongly having to pay for a non-driver's license, and as only the first license was free, HB 1631 still unconstitutionally attached

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

direct financial cost to the fundamental right to vote (e.g., if someone possessed a non-expired ID but lost or could not locate it or had an expired ID on file with the state). *Id*. Moreover, the Court concluded that the severe practical burdens that accompany obtaining an ID were just as important to SB 1014's unconstitutionality as its financial burden was. *Id*. Because of these burdens, and because "[i]n *Weinschenk* [the] Court made clear that requiring individuals to present photo identification to vote is unconstitutional," the Court determined that HB 1631 could not have survived without the secondary ID alternative. *Id*. at 458-59.[2]

99. In effect, the Voter ID Restrictions imposed by HB 1878 implement a scheme that Missouri Supreme Court refused to accept in *Weinschenk* and *Priorities*: requiring a photo ID for in-person voting; eliminating all previously permissible secondary forms of ID; and offering as the only alternative casting a provisional ballot, which will only be counted if the voter returns to their polling place the same day with a photo ID or can have their signature accepted via the arbitrary signature-matching process. *Id.*

The Voter ID Restrictions

100. On May 12, 2022, the Missouri General Assembly truly agreed to and passed House Bill 1878, 101st Gen. Assemb., 2d Reg. Sess. (2022).

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[2] Specifically, the *Priorities* court wrote:

> "In effect, the dissenting opinion's proposal to sever option two in its entirety would result in individuals having to present government-issued photo identification to ensure their votes are counted. In Weinschenk, this Court made clear that requiring individuals to present photo identification to vote is unconstitutional. 203 S.W.3d at 219. Weinschenk emphasized that some individuals, due to their personal circumstances, experience hurdles when attempting to obtain photo identification, id. at 215, a concern that remains relevant in the instant case. Obtaining photo identification requires appropriate documentation, time, and the ability to navigate bureaucracies. *Id.* "Those things that require substantial planning in advance of an election to preserve the right to vote can tend to 'eliminate from the franchise a substantial number of voters who did not plan so far ahead.'" *Id.* (quoting *Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965)). For these reasons, the dissenting opinion's first proposed remedy poses constitutional concerns and could not have been adopted by this Court."

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

101. Governor Michael Parson signed HB 1878 into law on June 29, 2022.

102. The provisions of HB 1878 will go into effect on August 28, 2022.

103. HB 1878 introduces sweeping restrictions on voting rights, including new limitations upon voter identification, voter registration efforts, and absentee voting.

104. Plaintiffs challenge the provisions of HB 1878 that effectively require a specific form of photo ID for all in-person voting at the polling place on election day under amended § 115.427 and for in-person absentee voting under amended § 115.277 (the "Voter ID Restrictions").

105. HB 1878 repeals and amends certain voting identification provisions of § 115.427. The newly effective provisions of 115.427.1 will establish the following photo ID requirements:

> Persons seeking to vote in a public election shall establish their identity and eligibility to vote at the polling place or, if voting absentee in person under section 115.277, at the office of the election authority or other authorized location designated by the election authority by presenting a form of personal photo identification to election officials. No form of personal photo identification other than the forms listed in this section shall be accepted to establish a voter's qualifications to vote. Forms of personal photo identification that satisfy the requirements of this section are any one of the following:
>
> (1) Nonexpired Missouri driver's license;
> (2) Nonexpired or nonexpiring Missouri nondriver's license;
> (3) A document that satisfies all of the following requirements:
>
> (a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record;
> (b) The document shows a photograph of the individual;
> (c) The document includes an expiration date, and the document is not expired, or, if expired, the document expired after the date of the most recent general election; and
> (d) The document was issued by the United States or the state of Missouri; or
>
> (4) Any identification containing a photograph of the individual which is issued by the Missouri National Guard, the United States Armed Forces, including the Space Force, or the United States Department of Veteran Affairs to a member or

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

> former member of the Missouri National Guard or the United States Armed Forces, including the Space Force, and that is not expired or does not have an expiration date.

106. HB 1878 establishes a new requirement that persons voting absentee in person under § 115.277, at the office of the election authority or other authorized location designated by the election authority, must also show an acceptable form of personal photo ID.[3]

107. HB 1878 also repeals the previously available alternative secondary ID options under § 115.427 (2016) that were preserved by the *Priorities* court, which allowed a voter to cast a regular, non-provisional ballot if they signed an affidavit and could present certain specified secondary forms of ID (e.g., a voter registration card, a Missouri student ID, or a copy of a utility bill or bank statement).

108. Sections 115.427.2–4 and 115.427.3, as amended, provide the provisional ballot process for a voter who does not present the required photo ID at the polling place. To be counted, the affidavit on the provisional ballot envelope must be complete, must be signed by the voter, must be signed by a poll worker from each political party. *Id.*

109. A provisional ballot cast under this section shall not be counted unless the voter returns during polling hours with a valid and acceptable form of personal photo ID, or "[t]he election authority verifies the identity of the individual by comparing that individual's signature to the signature on file with the election authority and determines that the individual was eligible to cast a ballot at the polling place where the ballot was cast." § 115.427.2–.4.

110. A voter who casts a provisional ballot must incur the additional burden of retrieving their acceptable form of photo ID, assuming they have one, and making another trip to the polling

[3] Section 115.277 provides that a person may cast an in-person absentee ballot if they meet certain requirements. Section 115.277 further provides that "[a] registered voter casting a ballot under the provisions of this subsection shall provide a form of personal photo identification that is consistent with subsection 1 of section 115.427."

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

place before the polls close on election day or subject their fundamental right to vote to the vagaries of an entirely subjective, standardless, unreliable, and arbitrary signature-matching process and ensure the affidavit on the provisional ballot envelope is complete and signed by multiple individuals.

111. HB 1878 requires all in-person voters to provide an acceptable form of photo ID to cast a regular, non-provisional ballot.

112. The Voter ID Restrictions do not provide any exceptions for voters who face barriers to obtaining a current Missouri or federal photo ID for various reasons, such as voters who are disabled, ill, elderly, hold religious objections, lack the underlying documentation necessary to get a state ID, or lack transportation or ability to get to a motor vehicle office.

113. By imposing a substantial and severe burden on the fundamental right to vote under the Missouri Constitution, the Voter ID Restrictions suffer from the same infirmities that the Missouri Supreme Court addressed in *Weinschenk* and *Priorities* and are therefore unconstitutional.

114. HB 1878 also amends current § 115.417.5 to eliminate existing requirements that the Secretary of State provide "advance notice" of personal identification requirements, including "at a minimum, the use of advertisements and public service announcements in print, broadcast television, radio, and cable television media, as well as the posting of information on the opening pages of the official state internet websites of the secretary of state and governor."

115. Amended § 115.417.5 merely requires that "[t]he secretary of state shall provide notice of the personal photo identification requirements described in subsection 1 of this section on the official state internet website of the secretary of state."

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

116. HB 1878 repeals current § 115.417.3, removing language providing for appropriation of implementation costs from the general revenue of state funds.

117. As a result of the elimination of State outreach and funding requirements under HB 1878, the Missouri NAACP and the LWVMO have been and will continue to shift their resources to provide education and assistance to their members and the public regarding the Voter ID Restrictions.

118. The Voter ID Restrictions will cause confusion to voters leading up to and during the upcoming November 2022 Missouri statewide General Election and future elections, particularly as they are being enacted mid-way through the 2022 election cycle.

119. The Voter ID Restrictions will result in disenfranchisement of eligible voters during the upcoming November 2022 Missouri statewide General Election and future elections.

120. The November 2022 Missouri statewide General Election ballot will include elections for the offices of U.S. Senator, U.S. Representative, State Senator, State Representative, State Auditor, Justices of the Missouri Supreme Court, and intermediate appellate court judges, along with local office and ballot measures.

The Voter ID Restrictions Impose a Severe and Substantial Burden Upon the Fundamental Right to Vote

121. An individual seeking to obtain personal photo ID in order to vote will need to obtain underlying documentation, which may include: (a) a birth certificate; (b) a marriage license or certificate; (c) a divorce decree; (d) a certificate of decree of adoption; (e) a court order changing the person's name; (f) a social security card reflecting an updated name; and/or (g) naturalization papers or other documents from the United States Department of State proving citizenship.

122. Obtaining underlying documentation needed to apply for personal photo ID acceptable for voting may require the voter to identify, determine the requirements of,

AMERICAN OVERSIGHT

communicate with, and visit various federal, state, and local agencies, such as the local health or vital records departments, the Missouri Department of Health and Senior Services, the Recorder of Deeds for the applicable county, the Circuit Court for the applicable county, the Social Security Administration, and the United States Department of State.

123. The Voter ID Restrictions do not provide any exception or alternative for eligible voters who are unable to obtain the underlying documentation or undertake the process to get an ID at a Missouri motor vehicle office to cast a regular, non-provisional ballot in person.

124. Although amended § 115.427.6 provides generally that an individual may obtain one free copy of a nondriver's license and of certain specific underlying documents for voting purposes and "may request the secretary of state to facilitate the acquisition of such documents," the statute does not provide specific guidance on how an individual may make or the Secretary of State may fulfill such a request nor would this cover someone who possesses such identification but lost or misplaced it or cannot locate it because it has been destroyed (e.g., in a fire or flood).

125. Amended § 115.427.6 does not provide for a free copy of a driver's license for voting purposes.

126. Hundreds of thousands of Missouri voters are likely to be impacted by the Voter ID Restrictions.

127. A February 2017 No-Match Analysis conducted at the request of Secretary of State Ashcroft comparing the voter rolls against those with state IDs on file with the Missouri Department of Revenue found: 137,723 registered voters in Missouri did not have a Department of Revenue ID (*i.e.*, a driver's license, non-driver's license, or instruction permit); 140,073 registered voters had an expired Department of Revenue ID (*i.e.*, a driver's or non-driver's license); and 2,040 registered voters had forfeited their driver's licenses.

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

128. The Voter ID Restrictions will likely increase the number of provisional ballots cast and lead to voter confusion. *See* L.R. No. 4557S.05T, Comm. on Leg. Research, Oversight Division, Fiscal Note (HB 1878), at 14 (June 3, 2002) ("Requiring photo ID for voters would likely increase the amount of provisional votes cast which would need to be processed by election board staff within the certification period…This provisions also eliminates the duty of the SOS to inform the public of the new ID requirement; lack of information would likely lead to confusion on the part of the voter; and lead to casting of more provisional ballots.").

129. The Secretary of State previously noted that provisional ballots are not an acceptable substitute for voters lacking appropriate ID because they are so rarely counted. For example, "[i]n the 2012 Presidential Election, fewer than 3 in 10 provisional ballots were counted." Office of the Missouri Secretary of State, *House Bill 1073 Impact Report: The Effect on Missouri Voters*, at 4 (Feb. 2014), https://www.sos.mo.gov/CMSImages/NewsReleases/2014ImpactReport.pdf.

130. A study of votes in recent elections "shows that strict photo identification laws have a differentially negative impact on the turnout of Hispanics, Blacks, and mixed-race Americans in primaries and general elections. Voter ID laws skew democracy in favor of whites and those on the political right." Zoltan Hajnal, et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. OF POLITICS 2 (2017).

131. The Voter ID Restrictions will require Plaintiff Ms. Powell to expend substantial time, effort, and planning to obtain a new photo ID in compliance with the Voter ID Restrictions, including arranging transportation, determining and complying with bureaucratic requirements, and making physical efforts to visit and wait at the appropriate agencies. If she does not engage in efforts to navigate bureaucracies and undertake the processes of acquiring the proper

AMERICAN OVERSIGHT

documentation and applying for a photo ID, Ms. Powell will be prevented from exercising her fundamental right to vote.

132. The Voter ID Restrictions will require Plaintiff Ms. Morgan to expend substantial time, effort, and planning in order to obtain underlying documentation and a photo ID that reflects her correct legal name and complies with the new law. If she does not engage in efforts to navigate bureaucracies and undertake the same time-consuming and confusing processes of acquiring the proper underlying documentation and applying for a photo ID, Ms. Morgan will be prevented from exercising her fundamental right to vote.

133. Upon information and belief, members of the Missouri NAACP and the LWVMO do not have acceptable photo ID that complies with the Voter ID Restrictions and will be prohibited from voting in future elections.

134. Upon information and belief, members of the Missouri NAACP and the LWVMO face uncertainty and confusion about the scope and requirements of the Voter ID Restrictions and will be dissuaded from exercising their right to vote.

135. Plaintiffs the Missouri NAACP and the LWVMO and other civic organizations are diverting resources, and will continue to do so, to educate and assist their members and eligible voters throughout Missouri to address confusion, uncertainty, and compliance with the Voter ID Restrictions.

136. The Missouri NAACP will be preparing public service announcements to air on local radio stations to educate their members and others in the community about the Voter ID Restrictions.

137. The Missouri NAACP is involved in the creation of ID assistance clinics that will help those who need acceptable forms of ID for voting obtain them.

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AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

138. The Missouri NAACP will develop educational materials to distribute to members and the public related to the Voter ID Restrictions. These materials would typically focus on increasing voter turnout and educating members on substantive issues in upcoming elections, but resources will now have to be shifted from those efforts to inform the public about the Voter ID Restrictions.

139. The LWVMO is preparing to participate in education, outreach, and other trainings to inform its members and the community about the Voter ID Restrictions.

140. The first page of the LWVMO's current website has a prominent message about HB 1878 and the Voter ID Restrictions.

141. The LWVMO plans to create additional paid media communications to notify members and other voters about the Voter ID Restrictions.

142. The LWVMO will train interested members on the availability of resources to help registered voters who lack the necessary underlying documents to obtain an acceptable photo ID for voting.

The Voter ID Restrictions Cannot Satisfy Any Level of Scrutiny

143. The Voter ID Restrictions impose severe and substantial burdens on the fundamental right to vote which are not justified by a sufficient state interest.

144. No change in any purported state interest has occurred since the Missouri Supreme Court held in *Weinschenk* that "the Photo–ID Requirement could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri, yet it would place a heavy burden on the free exercise of the franchise for many citizens of this State." *Weinschenk*, 203 S.W.3d at 218 (finding that photo ID requirement was not narrowly tailored to accomplish purpose

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

of preventing voter impersonation fraud); *see also Priorities*, 591 S.W.3d at 455 (finding affidavit requirement scheme did "not pass muster under any level of scrutiny").

145. While legislative proponents have cited the prevention of voter fraud as the purported justification for the Voter ID Restrictions, there has been no evidence of voter impersonation fraud at the polls in the past twenty years since Missouri introduced its first voter ID law in 2002.

146. To the contrary, Secretary of State Ashcroft repeatedly confirmed that the most recent General Election in 2020 was "secure[]"[4] and "successful"[5] despite the many challenges to voting presented by the COVID-19 pandemic. Two rare cases of alleged voter fraud in Missouri in the 2020 election involved allegedly double voting rather than voter impersonation fraud, the only irregularity potentially addressed by the Voter ID Restrictions, and "Secretary Ashcroft is confident these isolated issues are not indicative of problems with Missouri elections."[6]

147. The Voter ID Restrictions are not narrowly tailored to combating voter impersonation fraud, which is virtually non-existent in Missouri.

148. Additionally, HB 1878 eliminates the requirement under the pre-amended version of § 115.427.8, RSMo (2016), that voters sign a precinct register. This existing signature requirement already provided a safeguard for confirming a voter's identity and qualification to vote. *Priorities*, 591 S.W.3d at 457 (finding that precinct register requirement made affidavit for voters presenting alternate forms of non-photo ID futile).

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[4] Jason Hancock, *Jay Ashcroft Touts Integrity of Missouri's 2020 Election, but Supports an Audit*, Mo. Indep. (Nov. 22, 2021), https://missouriindependent.com/2021/11/22/jay-ashcroft-touts-integrity-of-missouris-2020-election-but-supports-an-audit.

[5] Press Release, John R. Ashcroft, Mo. Sec'y of State, Ashcroft Applauds Missourians for Smooth Election, High Turnout (Nov. 4, 2020), https://www.sos.mo.gov/default.aspx?PageId=9966.

[6] Press Release, John R. Ashcroft, Mo. Sec'y of State, *Ashcroft Uncovers Voter Fraud and Demands Prosecution* (Aug. 26, 2021), https://www.sos.mo.gov/Ashcroft-Uncovers-Voter-Fraud-Demands-Prosecution.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

COUNT I

The Voter ID Restrictions Violate Fundamental Right to Vote under the Missouri Constitution

149. Plaintiffs reallege and incorporate by reference the allegations of the preceding paragraphs.

150. The Missouri Constitution expressly guarantees that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mo. Const. Art. I, § 25.

151. The Missouri Constitution provides an exclusive list of qualifications necessary to vote in Missouri. Mo. Const. Art. VIII, § 2 ("All citizens of the United States ... over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, if ... they are registered within the time prescribed by law").

152. The Voter ID Restrictions burden fundamental voting rights in violation of Article I, § 25 of the Missouri Constitution by eliminating the option to provide certain alternative non-photographic forms of ID to vote, and requiring qualified Missouri voters, including Plaintiffs Ms. Powell and Ms. Morgan and members of the Missouri NAACP and the LWVMO, to either: (i) present a limited form of photo ID, which requires significant time, effort, and advance planning to obtain; or (ii) cast a provisional ballot, which will be subject to an arbitrary review process and the risk of rejection. *Weinschenk*, 203 S.W.3d 201; *Priorities*, 591 S.W.3d 448.

153. There is no compelling state interest that justifies the burdens upon the fundamental right to vote imposed by the Voter ID Restrictions.

154. The Voter ID Restrictions constitute an unconstitutional scheme that cannot withstand judicial scrutiny, as confirmed in *Weinschenk*, 203 S.W.3d 201 and *Priorities*, 591 S.W.3d 448.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

155. Plaintiffs expressly state that they are not asserting or attempting to assert any claim under the United States Constitution or any federal statute.

156. Plaintiffs face irreparable injury to their—and, for Plaintiffs the Missouri NAACP and the LWVMO, their members'—fundamental right to vote absent an injunction of the Voter ID Restrictions.

COUNT II

The Voter ID Restrictions Unduly Burden the Fundamental Right to Vote in Violation of the Equal Protection Clause of the Missouri Constitution

157. Plaintiffs reallege and incorporate by reference the allegations of the preceding paragraphs.

158. Article I, Section 2 of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law."

159. The Voter ID Restrictions impose severe and substantial burdens on the fundamental right to vote of a significant number of eligible voters that are neither justified by, nor necessary to promote any substantial or compelling state interest that is not already being adequately protected by existing election laws and procedures, or which could not have been advanced using other, less restrictive and less burdensome alternatives.

160. Defendants have not advanced any substantial or compelling state interest that justifies the severe burdens imposed by the Voter ID Restrictions upon Missouri voters, including Plaintiffs Ms. Powell and Ms. Morgan and members of Plaintiffs the Missouri NAACP and the LWVMO, who do not possess an acceptable form of photo ID.

161. The Voter ID Restrictions are not strictly necessary nor narrowly tailored to any State interest.

AMERICAN OVERSIGHT

Electronically Filed - Cole Circuit - August 23, 2022 - 04:17 PM

162. The Voter ID Restrictions will disproportionately impact protected classes of people, particularly voters who are people of color and voters with disabilities.

163. The Voter ID Restrictions have deprived and will continue to deprive Missouri voters of fundamental rights secured to them by the Missouri Constitution. Plaintiffs expressly state that they are not asserting or attempting to assert any claim under the United States Constitution or any federal statute.

164. The Missouri NAACP and the LWVMO are membership organizations and protecting voting rights and increasing voter participation is germane to their purpose.

165. The Missouri NAACP and the LWVMO have already and will continue to divert resources to educate and assist their members and eligible voters throughout Missouri to address confusion, uncertainty, and compliance with the Voter ID Restrictions.

WHEREFORE, Plaintiffs pray this Court:

A. Enter a declaratory judgment that the Voter ID Restrictions imposed by HB 1878, to be codified at § 115.427, RSMo and § 115.277, RSMo, violate the Missouri Constitution both facially and as applied and may not be enforced;

B. Issue a permanent injunction prohibiting Defendants and anyone acting in concert with them from enforcing the Voter ID Restrictions imposed by HB 1878, to be codified at § 115.427, RSMo and § 115.277, RSMo; and

C. Allow such other and further relief as is proper under the circumstances.

Respectfully submitted,

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Message

From: Eighth Circuit U.S. Court of Appeals Clerks Office [via_no_reply@ca8.uscourts.gov]
Sent: 8/25/2022 10:00:19 AM
To: Sauer, John [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f134eb2c5f6846bdb89d9c697c5ff5c5-Sauer, John]
Subject: Opinion Descriptions for 08/25/2022

Opinions Descriptions For: 08/25/2022

DISCLAIMER: The following unofficial case summaries are prepared by the clerk's office as a courtesy to the reader. They are not part of the opinion of the court.

http://media.ca8.uscourts.gov/opndir/22/08/193006P.pdf 08/25/2022 Ray Dansby v. Dexter Payne
U.S. Court of Appeals Case No: 19-3006
and No: 19-3105
U.S. District Court for the Western District of Arkansas - El Dorado
[PUBLISHED] [Colloton, Author, with Grasz and Kobes, Circuit Judges]
Prisoner case - Habeas - Death Penalty. For the court's prior opinion vacating dismissal of two of Dansby's claims and remanding the matter for further consideration, see Dansby v. Hobbs, 766 F.3d 809 (8th Cir. 2014). On remand, the district court denied relief with respect to Dansby's murder convictions, but granted relief from the death sentence and ordered the state to stipulate to a sentence of life imprisonment. Both sides appeal. The Arkansas Supreme Court's decision concerning the scope of cross-examination of a government witness did not contravene or unreasonably apply Supreme Court precedent by concluding that the balance struck by the trial court was permissible under the Sixth Amendment, and Dansby's Confrontation Clause claim did not merit relief; with respect to Dansby's Brady claim, the claim is procedurally defaulted, and Dansby showed neither cause nor prejudice to overcome the default; the grant of relief with respect to the sentence of death is reversed, and the case is remanded with directions to dismiss Dansby's second amended petition for a writ of habeas corpus.

http://media.ca8.uscourts.gov/opndir/22/08/202061P.pdf 08/25/2022 Mark Fochtman v. Hendren Plastics, Inc.
U.S. Court of Appeals Case No: 20-2061
and No: 20-2068
U.S. District Court for the Western District of Arkansas - Fayetteville
[PUBLISHED] [Colloton, Author, with Loken and Benton, Circuit Judges]
Civil case - Arkansas Minimum Wage Act. In this class action, participants in a drug and alcohol recovery program alleged the program assigned them to work for defendant Hendren, a private company which paid the program for their services; plaintiffs alleged the defendants failed to pay them the required minimum wage; the district court concluded the plaintiffs were employees and granted them relief. Held: the state drug court judgments assigning the plaintiffs to the program did not present a Rooker-Feldman issue, and the district court had jurisdiction over the suit under the Class Action Fairness Act; the plaintiffs in the suit were the primary benefits of the unusual work and payment arrangements between the program and Hendren in that it allowed them to avoid adjudication in the criminal justice system, and the fact that the work they performed as participants in a court-ordered recovery program also benefited Hendren did not make the program participants employees of either the program or Hendren; as the plaintiffs were not employees, the district court judgment is reversed.

http://media.ca8.uscourts.gov/opndir/22/08/212161U.pdf 08/25/2022 United States v. Jordan Ness
U.S. Court of Appeals Case No: 21-2161
U.S. District Court for the Northern District of Iowa - Eastern
[UNPUBLISHED] [Per Curiam - Before Loken, Kelly, and Kobes, Circuit Judges]
Criminal case - Sentencing. No error in determining defendant's base offense level pursuant to Guidelines Sec. 2K2.1(a)(4)(b) based on his possession of a semi-automatic firearms capable of accepting a high-capacity magazine; the guideline does not require that the defendant know about the characteristics of either the firearm or the magazine for the section to apply; defendant waived his objection that the government breached the plea agreement by abandoning the objection when offered the express opportunity to present it squarely to the district court.

http://media.ca8.uscourts.gov/opndir/22/08/212875P.pdf 08/25/2022 Dylan Brandt v. Leslie Rutledge
U.S. Court of Appeals Case No: 21-2875
U.S. District Court for the Eastern District of Arkansas - Central

AMERICAN OVERSIGHT

[PUBLISHED] [Kelly, Author, with Loken, Circuit Judge, and Menendez, District Judge]
Civil case - Civil rights. Plaintiffs, a transgender youth, their parents, and two healthcare professionals, sought to enjoin Arkansas Act 626, which prohibits healthcare professionals from providing gender transition procedures to any individual under the age of 18 or from referring any such individual to any healthcare professional for gender transition procedures; the district court enjoined the Act, and the State appeals. Held: plaintiffs had standing to bring the suit; because a minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law, Act 626 discriminates on the basis of sex and, as such, the statute must be supported by an exceedingly persuasive justification; the record at this stage of the proceedings provides substantial evidence to support the district court's factual findings that the Act prohibits medical treatment that conforms with the recognized standard of care for adolescent gender dysphoria, that such treatment is supported by medical evidence that has been subjected to rigorous study, and that the purpose of the Act is not to ban a treatment but to ban an outcome the State deems undesirable; as a result, the district court did not err in concluding the Act is not substantially related to the State's interest in protecting children from experimental treatment and regulating medical ethics, and plaintiffs have demonstrated a likelihood of success on their equal protection claim; the balance of the equities also favored plaintiffs; the district court did not abuse its discretion in granting a facial injunction.

http://media.ca8.uscourts.gov/opndir/22/08/213707U.pdf 08/25/2022 Timothy Carroll v. Norfolk Regional Center
U.S. Court of Appeals Case No: 21-3707
U.S. District Court for the District of Nebraska - Omaha
[UNPUBLISHED] [Per Curiam - Before Colloton, Gruender, and Benton, Circuit Judges]
Civil case - Civil rights. Order granting defendant's motion for summary judgment affirmed without comment.

http://media.ca8.uscourts.gov/opndir/22/08/221343U.pdf 08/25/2022 Timothy Carroll v. Chris Luebe
U.S. Court of Appeals Case No: 22-1343
U.S. District Court for the District of Nebraska - Omaha
[UNPUBLISHED] [Per Curiam - Before Colloton, Gruender, and Benton, Circuit Judges]
Civil case - Civil rights. Dismissal affirmed without comment.

----------VIA TRANSMISSION----------

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AMERICAN OVERSIGHT

Missouri Newspapers

1. The science behind vaccines in Missouri schools hasn't changed. But the GOP has

Kansas City Star (MO) August 17, 2021 Word Count: 385

...himself has already said is safe and effective?) Attorney General **Eric Schmitt**, who is running for Roy Blunt's Senate seat next year...

...Tony Messenger Tony Messenger Tony Messenger 0.8 Eric Schmitt **Eric Schmitt Eric Schmitt** 0.8 Roy Blunt Roy Blunt Roy Blunt 0.8...

Though Gov. Mike Parson and other Republicans in our state government in Jefferson City are now fierce and freedom-loving opponents of vaccine...

2. Messenger: Missouri AG Schmitt flip-flops on vaccine mandates at worst possible time

St. Louis Post-Dispatch (MO) August 16, 2021 Word Count: 922

...verify accuracy, please compare to our digital microfilm at www.stltoday.newspapers.com **Eric Schmitt** was for vaccine mandates before he was against them. Lately...

...4 G:9 M:1TH M:1TG tony messenger;commentary; **eric schmitt**;local-coronavirus;covid-19;vaccine mandate;mask mandate;st. louis...

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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

[Docket No. ATF 2021R–05; AG Order No. 5051–2021]

RIN 1140–AA54

Definition of "Frame or Receiver" and Identification of Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Department of Justice ("Department") proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") regulations to provide new regulatory definitions of "firearm frame or receiver" and "frame or receiver" because the current regulations fail to capture the full meaning of those terms. The Department also proposes amending ATF's definitions of "firearm" and "gunsmith" to clarify the meaning of those terms, and to provide definitions of terms such as "complete weapon," "complete muffler or silencer device," "privately made firearm," and "readily" for purposes of clarity given advancements in firearms technology. Further, the Department proposes amendments to ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before August 19, 2021. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number ATF 2021R–05, by any of the following methods—

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; *ATTN: ATF 2021R–05.*
- *Fax:* (202) 648–9741.

Instructions: All submissions received must include the agency name and docket number (ATF 2021R–05) for this notice of proposed rulemaking ("NPRM" or "proposed rule"). All properly completed comments received will be posted without change to the Federal eRulemaking portal, *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the Gun Control Act of 1968 ("GCA"), as amended, and the National Firearms Act of 1934 ("NFA"), as amended.[1] This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing the GCA and NFA. *See* 27 CFR parts 478, 479.

Prior to passage of the GCA, the Federal Firearms Act of 1938 ("FFA") regulated all firearm parts. The FFA and implementing regulations defined the term "firearm" to mean "any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such weapon.*" Public Law 75–785, 52 Stat. 1250 (1938); 26 CFR 177.10 (repealed) (emphasis added). The Omnibus Crime Control and Safe Streets Act of 1968 repealed the FFA, replacing it with the GCA. Public Law 90–351, section 907, 82 Stat. 197 (1968). During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that "[t]he present definition of this term includes 'any part or parts' of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.'" *See* 111 Cong. Rec. 5527 (March 22, 1965).[2]

A "firearm" is defined by 18 U.S.C. 921(a)(3) to include not only a weapon that will, is designed to, or may readily be converted to expel a projectile, but also the "frame or receiver" of any such weapon. Because "frames" or "receivers" are included in the definition of "firearm," any person who engages in the business of manufacturing, importing, or dealing in frames or receivers must obtain a license from ATF. 18 U.S.C. 922(a)(1)(A); *id.* at 923(a). Each licensed manufacturer or importer must "identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer."[3] 18 U.S.C. 923(i); *see* 27 CFR 478.92, 479.102. Licensed manufacturers and importers must also maintain permanent records of production or importation, as well as their receipt, sale, or other disposition of firearms, including frames or receivers. 18 U.S.C. 923(g)(1)(A); 27 CFR 478.122, 478.123.

A "frame or receiver" is the primary structural component of a firearm to which fire control components are attached.[4] While the GCA does not

[1] NFA provisions still refer to the "Secretary of the Treasury." 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002), transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this notice of proposed rulemaking refers to the Attorney General throughout.

[2] *See also* H.R. Rep. 90–1577, at 4416 (June 21, 1968) ("Under former definitions of 'firearm,' any part or parts of such a weapon were included. It was found impractical to have controls over each small part of a firearm. Thus, this definition includes only the major parts of the firearm, that is, the frame or receiver."); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same).

[3] Additionally, a firearm frame or receiver that is not a component part of a complete weapon at the time it is sold, shipped, or disposed of must be identified in the manner prescribed with a serial number and all of the other required markings. 27 CFR 478.92(a)(2); *id.* at 479.102(e); ATF Ruling 2012–1.

[4] *See* Webster's Third New International Dictionary, pp. 902, 1894 (1971) (a "frame" is "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm"; "receiver" means "the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached"); *Olson's Encyclopedia of Small Arms,* p.72 (1985) (the term

AMERICAN OVERSIGHT

define the term ''frame or receiver,'' to implement the statute, the terms ''firearm frame or receiver'' and ''frame or receiver'' were defined in regulations several decades ago as that part of a firearm that provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel. 27 CFR 478.11 (implementing GCA, Title I); 27 CFR 479.11 [5] (implementing GCA, Title II). The intent in promulgating these definitions was to provide guidance as to which portion of a firearm was the frame or receiver for purposes of licensing, serialization, and recordkeeping, thereby ensuring that a necessary component of the weapon could be traced if later involved in a crime.

At the time these definitions were published around 50 years ago, single-framed firearms such as revolvers and break-open shotguns were far more prevalent for civilian use than split/multi-piece receiver weapons, such as semiautomatic rifles and pistols with detachable magazines. Single-framed firearms incorporate the hammer, bolt or breechblock, and firing mechanism within the same housing. Years after these definitions were published, split/multi-piece receiver firearms, such as the AR–15 semiautomatic rifle (upper receiver and lower receiver), Glock semiautomatic pistols (upper slide assembly and lower grip module), and Sig Sauer P320 (M17/18 as adopted by the U.S. military) (upper slide assembly, chassis, and lower grip module), became popular.[6] Additionally, more firearm manufacturers began incorporating a striker-fired mechanism rather than a ''hammer'' in the firing design. With the rise in popularity of striker-fired Glock semiautomatic pistols in the mid-1980s, other manufacturers began incorporating a striker-fired mechanism, rather than a hammer, in semiautomatic handguns.[7]

A. ATF's Application of the Definitions To Split Frames or Receivers

Although ATF's regulatory definitions of ''frame or receiver'' do not expressly capture these types of firearms (*i.e.,* split/multi-piece receivers) that now constitute the majority of firearms in the United States,[8] ATF's position has long been that the weapon ''should be examined with a view toward determining if [either] the upper or lower half of the receiver more nearly fits the legal definition of 'receiver,' '' and more specifically, for machineguns, whether the upper or lower portion has the ability to accept machinegun parts.[9] [10]

Since it began issuing firearm classifications under the GCA and NFA in private letter rulings and for criminal investigations, ATF has considered a variety of factors when examining firearms, including: (a) Which component the manufacturer intended to be the frame or receiver; (b) which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms; (c) how the component fits within the overall design of the firearm when assembled; (d) the design and function of the fire control components to be housed, such as the hammer, bolt or breechblock, and firing mechanism; (e) whether the component could permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed, in accordance with regulations; (f) whether classifying the particular component is consistent with the legislative intent of the GCA and implementing regulations; and (g) whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

Even though neither the upper nor the lower portion of a split/multi-piece receiver firearm alone falls within the precise wording of the regulatory definition, ATF has for many years interpreted the regulatory definition using these factors as a guide in determining which portion of a weapon model is a firearm frame or receiver. Indeed, the current definitions were never intended to be, or understood to be, exhaustive; at the time the current definitions were adopted there were numerous models of firearms that did not contain a part that fully met the regulatory definition of ''frame or receiver,'' such as the Colt 1911, FN–FAL, and the AR–15/M–16, all of which were originally manufactured almost exclusively for military use, and ATF has long applied these factors in determining which component of those weapons qualifies as the frame or receiver.[11]

Existing law recognizes that the definition of ''frame or receiver'' need not be limited to a strict application of the regulation. The prefatory paragraph to the definitional section of 27 CFR 478.11 (Meaning of Terms) states: ''[w]hen used in this part and in forms

''frame'' means ''the basic structure and principal component of a firearm''); *Steindler's New Firearms Dictionary* p. 209 (1985) (''receiver'' means ''that part of a rifle or shotgun (excepting hinged frame guns) that houses the bolt, firing pin, mainspring, trigger group, and magazine or ammunition feed system. The barrel is threaded into the somewhat enlarged forward part of the receiver, called the receiver ring. At the rear of the receiver, the butt or stock is fastened. In semiautomatic pistols, the frame or housing is sometimes referred to as the receiver.'').

[5] The definition of ''frame or receiver'' in § 479.11 differs slightly from the definition in § 478.11 in that it omits an Oxford comma between ''bolt or breechblock'' and ''firing mechanism.''

[6] *See Once Banned, Now Loved and Loathed: How the AR–15 Became 'America's Rifle'*, New York Times (Mar. 3, 2018), *https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html* (Once the patent expired in 1977, ''it opened the way for dozens of weapons manufacturers to produce their own models, using the same technology. The term AR–15 has become a catchall that includes a variety of weapons that look and operate similarly''); Paul M. Barrett, *Glock: The Rise of America's Gun* 21–23 (2013) (''Today the Glock is on the hip of more American police officers than any other handgun.''); *A Star Is Born—U.S. Army Chooses Sig Sauer P320 For Its New Service Pistol, Forbes.com* (Jan. 20, 2017) *https://www.forbes.com/sites/frankmininter/2017/01/20/a-star-is-born-u-s-army-chooses-sig-sauer-p320-for-its-new-service-pistol/*. While millions of AR–15s/M–16s existed at the time ATF promulgated the definitions, they were manufactured almost exclusively for military use. *See* Internal Colt Memorandum from B. Northrop, Feb. 2, 1973, p.2 (noting that there were 2,752,812 military versus 25,774 civilian (''Sporters'') serialization of AR–15/M–16 rifles then manufactured).

[7] *A Matter of Purpose: Striker Fire vs. Hammer Fire*, Small Arms Defense Journal (June 8, 2018), *http://www.sadefensejournal.com/wp/a-matter-of-purpose-striker-fire-vs-hammer-fire/* (''Even though Glock wasn't the first to use striker fire on pistols, Glock can be credited for making the striker fire popular in the 1980s when they started using striker fire in their entire line of pistols. As Glock became popular, other manufacturers started using striker fire as well, proliferating it across the firearms manufacturing community on a grand scale.'').

[8] *United States* v. *Rowold*, 429 F. Supp. 3d 469 (N.D. Ohio 2019), Testimony of ATF Firearms Enforcement Officer Daniel Hoffman at Doc. No. 60, Hrg. Tr., Page ID 557 (approximately 10% of currently manufactured firearms in the United States include the three components in the frame or receiver definition); and Defense Expert Daniel O'Kelly at Doc. No. 60, Hrg. Tr. Page ID 482 (''90 some percent of [semiautomatic pistols] do not have a part which has more than one of these four elements in it and, therefore, don't qualify, according to the definition in the CFR.'').

[9] ATF Internal Revenue Service Memoranda #21208 (Mar. 1, 1971) (lower portion of the M–16 is the frame or receiver because it comes closest to meeting the definition of frame or receiver in 26 CFR 178.11 (now 27 CFR 478.11), and is the receiver of a machinegun as defined in the NFA); ATF Memorandum #22334 (Jan. 24, 1977) (upper half of the FN FAL rifle is the frame or receiver because it was designed to accept the components that allow fully automatic fire). The ability to accept machinegun parts is considered because both the GCA and the NFA regulate machinegun receivers as ''machineguns.'' *See* 18 U.S.C. 921(a)(23); 26 U.S.C. 5845(b) (''The term ['machinegun''] shall also include the frame or receiver of any such weapon [which shoots is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger].'').

[10] Regulations implementing the relevant statutes spell the term ''machine gun'' rather than ''machinegun.'' *E.g.,* 27 CFR 478.11, 479.11. For convenience, this notice of proposed rulemaking uses ''machinegun'' except when quoting a source to the contrary.

[11] *See* footnote 9 *supra.*

AMERICAN OVERSIGHT

prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section." [12] The intent of Congress, as indicated by the plain language and the statutory scheme of the GCA, is to regulate—as a firearm—the frame or receiver of a firearm. *See* 111 Cong. Rec. 5527 (March 22, 1965). As stated above, Congress replaced the term "part or parts" in the FFA definition of "firearm" with "frame or receiver," the major parts of a weapon regulated under the GCA. This includes marking these parts with serial numbers for tracing purposes, recording these parts as "firearms" in required records, and running a National Instant Criminal Background Check System ("NICS") background check when individuals purchase or acquire them.

In the past few years, however, some courts have treated the regulatory definition as exhaustive when applied to the lower portion of the AR–15-type rifle, which is the semiautomatic version of the M–16-type machinegun originally designed for the U.S. military. While ATF for decades has classified the lower receiver of the AR–15 rifle as a "frame or receiver," courts recently have read the regulatory definition to mean that the lower portion of the AR–15 is not a "frame or receiver" because it only provides housing for the hammer and firing mechanism, but not the bolt or breechblock. *See United States* v. *Rowold,* 429 F. Supp. 3d 469, 475–77 (N.D. Ohio 2019) ("The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism."); *United States* v. *Jimenez,* 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) ("[A] receiver must have the housing for three elements: hammer, bolt or breechblock, and firing mechanism."); *United States* v. *Joseph Roh,* SACR 14–167–JV, Minute Order p. 6 (C.D. Cal. July 27, 2020) (granting defendant's post-trial motion for acquittal for manufacturing AR–15 lower receivers without a license because "[n]o reasonable person would understand that a part constitutes a receiver where it lacks the components specified in regulation").

These courts' interpretation of ATF's regulations, if broadly followed, could mean that as many as 90 percent of all firearms now in the United States would not have any frame or receiver subject to regulation.[13] Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320 [14] pistols, that do not utilize a hammer—a named component—in the firing sequence. Such a narrow interpretation of what constitutes a frame or receiver would allow persons to avoid: (a) Obtaining a license to engage in the business of manufacturing or importing upper or lower frames or receivers; (b) identifying upper or lower frames or receivers with a serial number and other traceable markings; (c) maintaining records of upper or lower frames or receivers produced or imported through which they can be traced; and (d) running NICS checks on potential transferees to determine if they are legally prohibited from receiving or possessing firearms when they acquire upper or lower frames or receivers. In turn, this would allow prohibited persons to acquire upper and lower receivers that can quickly be assembled into semiautomatic weapons more easily and without a background check.[15] If no portion of split/multi-piece frames or receivers were subject to any existing regulations, such as marking, recordkeeping, or background checks, law enforcement's ability to trace semiautomatic firearms later used in crime would be severely impeded. This result would thereby undermine the intent of Congress in requiring the frame or receiver of every firearm to be identified, *see* 18 U.S.C. 923(i), and regulated as a firearm, *see* 18 U.S.C. 921(a)(3)(B).[16]

B. Privately Made Firearms or "Ghost Guns"

Technological advances have also made it easier for unlicensed persons to make firearms at home from standalone parts or weapon parts kits, or by using 3D printers or personally owned or leased equipment, without any records or a background check. Commonly referred to as "ghost guns," these privately made firearms ("PMFs"), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver, making it difficult for law enforcement to determine where, by whom, or when they were manufactured, and to whom they were sold or otherwise disposed.

In recent years, the number of PMFs recovered from crime scenes throughout the country has increased.[17] From January 1, 2016, through December 31, 2020, there were approximately 23,906 suspected PMFs reported to ATF as having been recovered by law enforcement from potential crime scenes, including 325 homicides or attempted homicides, and that were attempted to be traced by ATF, broken down by year as follows: [18]

[12] ATF's predecessor agency, the Alcohol, Tobacco and Firearms Division within the Internal Revenue Service, derived this limitation on the application of definitions from the Internal Revenue Code ("IRC"), 26 U.S.C. 7701(a). Courts interpreting definitions in the IRC have not strictly applied those definitions where they would be manifestly incompatible with the intent of the applicable statute. *See, e.g., Pierre* v. *Commissioner,* 133 T.C. 24, 35 (2009) (even though a Limited Liability Company was not among any of the named entities defined in section 7701, it would be manifestly incompatible with the Federal estate and gift tax statutes to exclude them); *Bunnel* v. *Commissioner,* 50 T.C. 837, 841 (1968) (literal application of the definition of "taxpayer" in section 7701(a)(14) was avoided where it was manifestly incompatible with the intent of other sections of the IRC); *Davis* v. *Commissioner,* 30 T.C. 462, 466–67 (1958) (strict geographical application of the term "United States" in 26 U.S.C. 3797(a)(9) (now 7701(a)(9)) to the territory of American Samoa, rather than in a political sense, would be manifestly incompatible with the intent and purpose of the income tax exemption for persons earning income outside the United States).

[13] *See* footnote 8, *supra.*

[14] The United States military services have adopted variants of the Sig Sauer P320 as their official side arm, and are in the process of purchasing up to 500,000 of these striker-fired pistols. *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol, Military.com* (Jan. 19, 2017), *https://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html; Every U.S. military branch is about to get its hands on the Army's new sidearm of choice, Taskandpurpose.com* (Nov. 18, 2020), *https://taskandpurpose.com/military-tech/modular-handgun-system-fielding/* (Sig Sauer delivered its 200,000th P320 variant pistol to the military despite the obstacles posed by the novel coronavirus).

[15] *See Design of AR–15 could derail charges tied to popular* rifle, *APnews.com* (Jan. 13, 2020), *https://apnews.com/article/396bbedbf4963a28bda99e7793ee6366.*

[16] *See* footnote 2, *supra.*

[17] *See Baltimore police report a 400% increase in untraceable 'ghost guns',* The Baltimore Sun (Feb. 18, 2021), *http://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-ghost-gun-ban-20210218-ae2dortu6ngn5llmfmq6yxtx6m-story.html; Syracuse joins lawsuit against feds amid rise in ghost guns,* WRVO Syracuse (Aug. 27, 2020), *https://www.wrvo.org/post/syracuse-joins-lawsuit-against-feds-amid-rise-ghost-guns#stream/0; Ghost Guns: The build-it-yourself firearms that skirt most federal gun laws and are virtually untraceable,* CBS News (May 10, 2020), *https://www.cbsnews.com/news/ghost-guns-untraceable-weapons-criminal-cases-60-minutes-2020-05-10/; Untraceable ghost guns proliferate as Philadelphia grapples with violence,* The Morning Call (Mar. 18, 2020), *https://www.mcall.com/news/pennsylvania/mc-nws-pa-philadelphia-ghost-guns-20200318-jzyt4thyvvgntproexbleyleay-story.html; Ghost Guns Are Everywhere in California,* The Trace (May 17, 2019), *https://www.thetrace.org/2019/05/ghost-gun-california-crime/; The Rise of Untraceable Ghost Guns,* Wall Street Journal (Jan. 4, 2018), *https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800; How D.C. Is Addressing An Ongoing Spike In Gun Violence,* NPR Washington (Mar. 2, 2020), *https://www.npr.org/local/305/2020/03/02/811194978/how-d-c-is-addressing-an-ongoing-spike-in-gun-violence; Untraceable 'Ghost Guns' sold across Central Florida,* WKMG–TV Orlando (Nov. 15, 2016), *https://www.clickorlando.com/getting-results/2016/11/15/untraceable-ghost-guns-sold-across-central-florida/.*

[18] Source: ATF Office of Strategic Intelligence and Information. These numbers (as of March 4, 2021)

AMERICAN OVERSIGHT

2016: 1,750
2017: 2,507
2018: 3,776
2019: 7,161
2020: 8,712

It is, therefore, not unexpected that numerous Federal criminal cases have been brought by the Department to counter illegal trafficking in unserialized home-completed and assembled weapons, and possession of such weapons by prohibited persons.[19]

The problem of untraceable firearms being acquired and used by violent criminals and terrorists is international in scope. On May 28, 2019, citing intelligence reports by the Department of Homeland Security ("DHS"), the Federal Bureau of Investigation ("FBI"), and the National Counterterrorism Center ("NCTC"), the House Committee on Homeland Security issued a report concluding that "[g]host guns not only pose a challenge on the front end, enabling prohibited buyers to purchase deadly weapons with just a few clicks online, but also on the back end, hamstringing law enforcement's ability to investigate crimes committed with untraceable weapons" and that the "wide availability of ghost guns and the emergence of functional 3D-printed guns are a homeland security threat. Terrorists and other bad actors may seek to exploit the availability of these weapons for dangerous ends." H.R. Rep. No. 116–88, at 2 (May 28, 2019).[20] Criminal investigations and studies highlight this concern.[21]

The GCA "insists that the dealer keep certain records, to enable federal authorities both to enforce the law's verification measures and to trace firearms used in crimes." *Abramski* v. *United States,* 573 U.S. 169, 173 (2014) (citing H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)). "That information helps to fight serious crime." *Id.* at 182; *see also* Identification Markings Placed on Firearms, 66 FR 40597 (Aug. 3, 2001) ("Firearms tracing is an integral part of

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are likely far lower than the actual number of PMFs recovered from crime scenes because some law enforcement departments incorrectly trace some PMFs as commercially manufactured firearms, or may not see a need to use their resources to attempt to trace firearms with no serial number or other identifiable markings. The term "suspected PMF" is used because of the difficulty of getting law enforcement officials to uniformly enter PMF trace information into ATF's electronic tracing system ("eTrace"), resulting in reporting inconsistencies of PMFs involved in crime. For example, often PMFs resemble commercially manufactured firearms, or incorporate parts from commercially manufactured firearms bearing that manufacturer's name, so some firearms suspected of being PMFs were entered into eTrace using a commercial manufacturer's name rather than as one privately made by an individual. The term "potential crime scenes" is used because ATF does not know if the firearm being traced by the law enforcement agency was found at a crime scene as opposed to one recovered by them that was stolen or otherwise not from at the scene of a crime. This is because the recovery location or correlated crime is not always communicated by the agency to ATF in the tracing process.

[19] *See, e.g., Kissimmee Man Sentenced To Five Years In Prison For Manufacturing Over 200 "Ghost Guns" Without A License,* D.O.J Office of Public Affairs (June 12, 2018), *https://www.justice.gov/usao-mdfl/pr/kissimmee-man-sentenced-five-years-prison-manufacturing-over-200-ghost-guns-without; Grass Valley Man Sentenced to 5 Years in Prison for Unlawfully Manufacturing Ghost Guns and Selling Them on Dark Web,* DOJ Office of Public Affairs (Sept. 21, 2018), *https://www.justice.gov/usao-edca/pr/grass-valley-man-sentenced-5-years-prison-unlawfully-manufacturing-ghost-guns-and; Rhode Island Man Charged with Building, Selling "Ghost" Machine Gun,* DOJ Office of Public Affairs (Dec. 12, 2018), *https://www.justice.gov/usao-ri/pr/rhode-island-man-charged-building-selling-ghost-machine-gun; Conroe Man Ordered to Prison for Making "Ghost Guns",* DOJ Office of Public Affairs (Feb. 21, 2019) *https://www.justice.gov/usao-sdtx/pr/conroe-man-ordered-prison-making-ghost-guns; Seven Felons Indicted, Dozens of Firearms Seized as Part of Investigation Targeting Criminal Gun Sales in Orange County,* DOJ Office of Public Affairs (Oct. 10, 2019), *https://www.justice.gov/usao-cdca/pr/seven-felons-indicted-dozens-firearms-seized-part-investigation-targeting-criminal-gun; Man Sentenced to 15 Years for Trafficking "Ghost Guns" and Drugs,* DOJ Office of Public Affairs (Feb. 14, 2020), *https://www.justice.gov/usao-edva/pr/man-sentenced-15-years-trafficking-ghost-guns-and-drugs; Tampa Man Sentenced To Over Five Years For Manufacturing Counterfeit Credit Cards, Fake IDs, And Illegal Firearms,* DOJ Office of Public Affairs (June 26, 2020), *https://www.justice.gov/usao-mdfl/pr/tampa-man-sentenced-over-five-years-manufacturing-counterfeit-credit-cards-fake-ids-and; Alleged Dealer of Ghost Guns and Machinegun Conversion Devices Arraigned,* DOJ Office of Public Affairs (July 15, 2020), *https://www.justice.gov/usao-edva/pr/alleged-dealer-ghost-guns-and-machinegun-conversion-devices-arraigned; Connecticut Man Charged with Firearm Trafficking,* DOJ Office of Public Affairs (Aug. 12, 2020), *https://www.justice.gov/usao-ma/pr/connecticut-man-charged-firearm-trafficking; Operation 'Black Phoenix' Leads to Federal Charges Against 25 Who Allegedly Engaged in Illegal Narcotics and Firearms Sales,* DOJ Office of Public Affairs (Sept. 15, 2020), *https://www.justice.gov/usao-cdca/pr/operation-black-phoenix-leads-federal-charges-against-25-who-allegedly-engaged-illegal; D.C. Felon Pleads Guilty in Federal Court in Maryland to Illegal Possession of a "Ghost Gun" Firearm and Ammunition,* DOJ Office of Public Affairs (Sept. 22, 2020), *https://www.justice.gov/usao-md/pr/dc-felon-pleads-gui&lty-federal-court-maryland-illegal-possession-ghost-gun-firearm-and; Ghost Gun and Machine Gun Conversion Device Dealer Pleads Guilty,* DOJ Office of Public Affairs (Sept. 29, 2020), *https://www.justice.gov/usao-edva/pr/ghost-gun-and-machine-gun-conversion-device-dealer-pleads-guilty; Felon sentenced to more than five years in prison for arsenal of 'ghost guns' and smuggled silencers,* DOJ Office of Public Affairs (Oct. 9, 2020), *https://www.justice.gov/usao-wdwa/pr/felon-sentenced-more-five-years-prison-arsenal-ghost-guns-and-smuggled-silencers; Montgomery County Man Admits to Unlawfully Selling "Ghost Guns",* DOJ Office of Public Affairs (Nov. 5, 2020), *https://www.justice.gov/usao-ndny/pr/montgomery-county-man-admits-unlawfully-selling-ghost-guns; Drug Dealer Who Sold "Ghost Guns," Silencers, and a Machinegun Sentenced to Thirty Years in Federal Prison,* DOJ Office of Public Affairs (Nov. 6, 2020), *https://www.justice.gov/usao-ndia/pr/drug-dealer-who-sold-ghost-guns-silencers-and-machinegun-sentenced-thirty-years-federal; Baltimore Man Sentenced to 21 Years in Federal Prison for Five Bank Robberies, Five Armed Robberies of Liquor Stores, and Related Firearms Charges,* DOJ Office of Public Affairs (Nov. 12, 2020), *https://www.justice.gov/usao-md/pr/baltimore-man-sentenced-21-years-federal-prison-five-bank-robberies-five-armed-robberies; Philadelphia Man Sentenced to 12½ Years for Trafficking Methamphetamine and Weapons, Including 'Ghost Guns,' Near Schools,* DOJ Office of Public Affairs (Dec. 30, 2020), *https://www.justice.gov/usao-edpa/pr/philadelphia-man-sentenced-12-12-years-trafficking-methamphetamine-and-weapons; Vineland Boys Gang Member Pleads Guilty to Racketeering Offenses, Including Attempted Murder and Narcotics Trafficking,* DOJ Office of Public Affairs (Jan. 22, 2021), *https://www.justice.gov/usao-cdca/pr/vineland-boys-gang-member-pleads-guilty-racketeering-offenses-including-attempted; Burbank Man Arrested on Federal Complaint Alleging He Sold 'Ghost Guns' Out of His Hookah Lounge,* DOJ Office of Public Affairs (Jan. 29, 2021), *https://www.justice.gov/usao-cdca/pr/burbank-man-arrested-federal-complaint-alleging-he-sold-ghost-guns-out-his-hookah; Saratoga County Man Admits to Unlawfully Selling "Ghost Guns" and Methamphetamine Distribution,* DOJ Office of Public Affairs (Feb. 3, 2021), *https://www.justice.gov/usao-ndny/pr/saratoga-county-man-admits-unlawfully-selling-ghost-guns-and-methamphetamine; Orange County Man Sentenced to 10 Years in Federal Prison for Brokering Illegal Sales of 'Ghost Guns,' Other Firearms,* DOJ Office of Public Affairs (Feb. 8, 2021), *https://www.justice.gov/usao-cdca/pr/orange-county-man-sentenced-10-years-federal-prison-brokering-illegal-sales-ghost-guns.*

[20] Specifically, the House Report cited a January 11, 2019, Joint Intelligence Bulletin issued by DHS, FBI, and NCTC concluding that "these rapidly evolving technologies pose an ongoing, metastasizing challenge to law enforcement in understanding, tracking, and tracing ghost guns," and an April 19, 2019, DHS intelligence assessment that "repeated the warning that ghost guns pose an urgent and evolving threat to the homeland, particularly in the hands of ideologically motivated lone wolf actors." H.R. Rep. No. 116–88, at 2.

[21] *CBP: 3–D-printed full-auto rifle seized at Lukeville crossing, tucsonsentinel.com* (Feb. 8, 2016), *http://www.tucsonsentinel.com/local/report/020816_3d_printed_gun/cbp-3-d-printed-full-auto-rifle-seized-lukeville-crossing/; Firearms using 3D-printed components seized in Sweden,* Armament Research Services (May 19, 2017), *https://armamentresearch.com/3d-printed-firearms-seized-in-sweden/; The TSA Has Found 3D-Printed Guns at Airport Checkpoints 4 Times Since 2016,* Time (Aug. 2, 2018), *https://time.com/5356179/3d-printed-guns-tsa/; Indiana Residents Indicted on Terrorism and Firearms Charges,* DOJ Office of Public Affairs (July 11, 2019), *https://www.justice.gov/opa/pr/indiana-residents-indicted-terrorism-and-firearms-charges; Use of 3D printed guns in German synagogue shooting must act as warning to security services, experts say, independent.co.uk* (Oct. 11, 2019), *https://www.independent.co.uk/news/world/europe/3d-gun-print-germany-synagogue-shooting-stephan-balliet-neo-nazi-a9152746.html; TSA Confiscated 3D-Printed Guns at Raleigh-Durham International Airport, nextgov.com* (Mar. 4, 2020), *https://www.nextgov.com/emerging-tech/2020/03/tsa-confiscated-3d-printed-guns-raleigh-durham-international-airport/163533/; Man Sentenced for Attempting to Board International Flight with a Loaded Firearm,* DOJ Office of Public Affairs (Mar. 12, 2021), *https://www.justice.gov/usao-sdca/pr/man-sentenced-attempting-board-international-flight-loaded-firearm; Glock ghost guns up for grabs on the dark web,* Australian National University (Mar. 23, 2021), *https://www.anu.edu.au/news/all-news/glock-ghost-guns-up-for-grabs-on-the-dark-web; Spain dismantles workshop making 3D-printed weapons,* BBC, (Apr. 19, 2021), *https://www.bbc.com/news/world-europe-56798743.*

AMERICAN OVERSIGHT

any investigation involving the criminal use of firearms.''); *Blaustein & Reich, Inc.* v. *Buckles,* 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (ATF has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).[22] An accurate firearm description is necessary to trace a firearm and is required to be recorded by a person licensed to engage in the business of manufacturing, importing, or dealing in firearms, or by a licensed collector of curio or relic firearms, regardless of whether it is a business or personal firearm.[23]

ATF traces firearms found by law enforcement at a crime scene by first contacting the licensed manufacturer or importer marked on the frame or receiver who maintains permanent records of their manufacture or importation and disposition. Using the information obtained from those required records, ATF then contacts each licensed dealer or other licensee who recorded their receipt and disposition to locate the first unlicensed purchaser to help find the perpetrator or otherwise solve the crime.[24] However, because PMFs do not bear a serial number or other markings of a licensed manufacturer or importer, ATF has found it extremely difficult to complete such traces on behalf of law enforcement to individual unlicensed purchasers. From January 1, 2016, through March 4, 2021, ATF could only complete traces of suspected PMFs recovered by law enforcement to an individual purchaser in approximately 151 out of 23,946 attempts, generally by tracing a serial number engraved on a handgun slide, barrel, or other firearm part not currently defined as a frame or receiver, but recorded by licensees in the absence of other markings.[25]

With the proliferation of PMFs, ATF has also received numerous requests from licensees seeking clarity on how they may be accepted and recorded so that they can track their inventories, process warranty claims, reconcile any missing inventory, respond to trace requests, and report lost or stolen PMFs to police and insurance companies. Federal law and regulations require licensees, before conducting business, to inventory the firearms possessed for such business and record it in a Firearms Acquisition and Disposition Record (''A&D Record'').[26] After commencing business, licensees must record all firearms received and disposed of by the business in the A&D Record to include the following information separated into columns: Manufacturer and/or importer, model, serial no., type, and caliber or gauge.[27] When a firearm is disposed to an unlicensed person, licensees are required to complete a Firearms Transaction Record, ATF Form 4473 (''Form 4473'').[28] Like the A&D Record, this form requires licensees to record the manufacturer and importer, model (if designated), serial number, type, and caliber or gauge of the firearm. Licensees are also required by law to report the theft or loss of firearms on a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, which includes a description of the manufacturer, importer, model, serial number, type, and caliber/gauge of each firearm stolen or lost.[29] And when licensees sell or otherwise dispose of multiple pistols or revolvers within five consecutive business days to the same person, they must report to ATF the type, serial number, manufacturer, model, importer, and caliber on a Report of Multiple Sale or Other Disposition of Pistols and Revolvers, ATF Form 3310.4.[30]

However, because PMFs do not have markings identifying the name of a licensed manufacturer or importer, model, serial number, or caliber/gauge, licensees might only record a ''type'' of firearm (*e.g.,* pistol, revolver, rifle, or shotgun) in their A&D Records and on ATF Forms 4473. Over time, as more PMFs are accepted into inventory, it will become increasingly difficult, if not impossible, for licensees and ATF (during inspections) to distinguish between those PMFs physically in the firearms inventory and those recorded in required A&D Records, as well as determine which PMFs recorded as disposed on ATF Form 4473, were those recorded as disposed in the A&D Record.[31] Likewise, it will be difficult for licensees and ATF to accurately determine which PMFs were stolen or lost from inventory, and for police to locate stolen PMFs in the business inventories of pawnbrokers,[32] or to return any recovered stolen or lost PMFs to their rightful owners.

Not only does the inability to distinguish between unmarked firearms

[22] *See also* ATF Ruling 2009–5, p.2 (''The unique marks of identification of firearms serve several purposes. First, the marks are used by Federal firearms licensees to effectively track their firearms inventories and maintain all required records. Second, the marks enable law enforcement officers to trace specific firearms used in crimes from the manufacturer or importer to individual purchasers, and to identify particular firearms that have been lost or stolen. Further, marks help prove in certain criminal prosecutions that firearms used in a crime have travelled in interstate or foreign commerce.'').

[23] *See* 18 U.S.C. 923(g)(1)(D); 27 CFR 478.125(f) (disposition records of a Federal firearms licensee's personal collection firearms must contain a complete description of the firearm); House Consideration and Passage of S.2414, 99th Cong., 2d Sess., 132 Cong. Rec. 15229 (June 24, 1986) (Statement of Rep. Hughes) (''In order for the law enforcement Firearm Tracing Program to operate, some minimal level of recordkeeping is required [for sales from dealers' personal collections]. Otherwise, we will not have tracing capability. This provision simply requires that a bound volume be maintained by the dealer of the sales of firearms which would include a complete description of the firearm, including its manufacturer, model number, and its serial number and the verified name, address, and date of birth of the purchaser. There is only a minimal inconvenience for the dealer, yet obtaining and recording this information is critical to avoid serious damage to the Firearm Tracing Program.'').

[24] Licensees must respond to ATF trace requests within 24 hours. 18 U.S.C. 923(g)(7); *see also J&G Sales Ltd.* v. *Truscott,* 473 F.3d 1043, 1045–46 (9th Cir. 2007) (describing the tracing process).

[25] Source: ATF Office of Strategic Intelligence and Information. These figures were extracted on May 5, 2021, and include traces for both U.S. and international law enforcement agencies.

[26] 27 CFR 478.125(e).

[27] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.125(e), (f).

[28] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.124.

[29] 18 U.S.C. 923(g)(6); 27 CFR 478.39a(b).

[30] 18 U.S.C. 923(g)(3)(A); 27 CFR 478.126a. Pursuant to 18 U.S.C. 923(g)(5)(A), licensed dealers along the Southwest border are also required by demand letter to report to ATF multiple sales of certain rifles during five consecutive business days to the same person on ATF Form 3310.12, including the rifle's serial number, manufacturer, importer, model, and caliber. Also under that statute, licensed dealers with 15 or more trace requests with a ''time-to-crime'' of three years or less must report to ATF the acquisition date, model, caliber or gauge, and the serial number of a secondhand firearm transferred by the dealer.

[31] In *United States* v. *Biswell,* 406 U.S. 311, 315–16 (1972), the Supreme Court explained that ''close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.'' (citation omitted).

[32] Most states require pawnbrokers to record or report any serial number and other identifying markings on pawned merchandise so that police can determine their origin. *See* Ala. Code section 5–19A–3(1); Alaska Stat. section 08.76.180(a)(4); Ariz. Rev. Stat. section 44–1625(C)(5); Colo. Rev. Stat. section 29–11.9–103(1); Conn. Gen. Stat. section 21–41(c); Del. Code tit. 24, section 2302(a)(1)(b); DC Code section 47–2884.11(d); Fla. Stat. section 538.04(1)(b)(3),(9); Ga. Code section 44–12–132(4); Haw. Rev. Stat. section 445–134.11(c)(10); 205 Ill. Comp. Stat. section 510/5(a); Ind. Code section 28–7–5–19(a)(4); Ky. Rev. Stat. Ann. section 226.040(1)(d)(7); La. Stat. Ann. section 37:1782(16)(a); Mass. Gen. Laws ch. 140 section 79; Mich. Comp. Laws section 446.205(5)(1),(4); Minn. Stat. section 325J.04(Sub.1)(1); Miss. Code Ann. section 75–67–305(1)(a)(iii),(ix); Mo. Rev. Stat. section 367.040(6)(b); Neb. Rev. Stat. section 69–204(3); N.M. Stat. section 56–12–9(A)(3); N.C. Gen. Stat. section 66–391(b)(1); Ohio Rev. Code section 4727.07; Okla. Stat. tit. 59 section 1509(D)(h); S.C. Code Ann. section 40–39–80(B)(1)(l)(iii),(ix); Tenn. Code Ann. section 45–6–209(b)(1)(C),(H); Tex. Fin. Code section 371.157(4); Utah Code section 13–32a–104(1)(h)(i)(A); Va. Code Ann. section 54.1–4009(A)(1); Wash. Rev. Code section 19.60.020(1)(e); W. Va. Code section 47–26–2(b)(1); Wis. Stat. section 134.71(8)(c)(2).

AMERICAN OVERSIGHT

make it extremely difficult for law enforcement to trace PMFs involved in crime, it also makes it more difficult for Federal, State, and local law enforcement to identify and prosecute illegal firearms traffickers who are often tied to violent criminals and armed narcotics traffickers.[33] The ATF Form 4473 is the primary evidence used to prosecute straw purchasers who buy firearms from a Federal firearms licensee on behalf of prohibited persons, such as felons, and other persons who could use them to commit a violent crime. The form is typically the key evidence that the straw purchaser who bought the firearm (and who can pass a background check) made a false statement to the Federal firearms licensee concerning the identity of the actual purchaser when acquiring that firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(1)(A), or State law.[34] But as unmarked and difficult-to-trace PMFs proliferate throughout the marketplace, it is likely to become increasingly difficult to prove that firearms acquired under false pretenses on a Form 4473 were the ones found in the hands of the true purchaser—and thus more difficult to prosecute straw purchasers for making false statements.[35] This assumes, of course, that the PMF involved in the crime could even be traced to the Federal firearms licensee, or that the correct Form 4473 could be located. Likewise, the absence of identifying firearm information on multiple sales forms and theft/loss reports makes it more difficult for ATF to identify firearms traffickers and thieves.[36]

Although clarifying the definition of ''frame or receiver'' in this rule would help the firearms industry and the public understand which part of a complete weapon is the regulated ''frame or receiver,'' and more commercially manufactured frames or receivers are likely to be marked by licensed manufacturers as a result, PMFs are increasingly being made or 3D printed at home without any identifying marks, recordkeeping, or background checks. In turn, these firearms are progressively finding their way to licensees who may wish to acquire them so they can advertise and market them broadly, or who may repair, customize, or accept them as security in pawn for a loan. Rulemaking is therefore necessary to ensure that PMFs are not unlawfully manufactured for sale to licensees who may wish to acquire them for resale, or accept them as security in pawn for a loan, as this would undermine the important public safety goals of the GCA to reduce violent crime, which includes assisting State and local law enforcement in their efforts to control the traffic of firearms within their borders.[37] Indeed, several States and municipalities have banned or severely restricted unserialized or 3D printed firearms.[38]

II. Proposed Rule

Due to judicial developments as well as continued technological advancements in firearms manufacturing, maintaining the current definitions negatively affects both public safety and the regulated firearms industry. For these reasons, the Department proposes amending ATF's regulations to clarify the definition of ''firearm'' and to provide a more comprehensive definition of ''frame or receiver'' so that those definitions more accurately reflect firearm configurations not explicitly captured under the existing definitions in 27 CFR 478.11 and 479.11. Further, this NPRM proposes new terms and definitions to take into account technological developments and modern terminology in the firearms industry, as well as amendments to the marking and recordkeeping requirements that would be necessary to implement these definitions. However, nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law. Also, while licensed manufacturers who sell or distribute firearms to law enforcement agencies would be subject to this rule, law enforcement agencies (not engaged in the business of manufacturing firearms for sale or distribution) would be excluded from this rule, including associated amendments to the marking and recordkeeping requirements necessary to implement its definitions.

[33] *See United States* v. *Marzzarella*, 614 F.3d 85, 100 (3rd Cir. 2010) (''The direct tracing of the chain of custody of firearms involved in crimes is one useful means by which serial numbers assist law enforcement. But serial number tracing also provides agencies with vital criminology statistics—including a detailed picture of the geographical source areas for firearms trafficking and ''time-to-crime'' statistics which measure the time between a firearm's initial retail sale and its recovery in a crime—as well as allowing for the identification of individual dealers involved in the trafficking of firearms and the matching of ballistics data with recovered firearms.''); *Following the Gun, Enforcing Federal Laws Against Firearms Traffickers*, ATF Publication, pp.1, 26 (June 2000) (serial number obliteration is a clear indicator of firearms trafficking to, among other criminals, armed narcotics traffickers).

[34] *See, e.g., Abramski* v. *United States*, 573 U.S. 169 (2014); *Marshall* v. *Commonwealth*, 822 S.E.2d 389 (Va. App. 2019); *Commonwealth* v. *Baxter*, 956 A.2d 465 (Pa. Super 2008).

[35] *See, e.g., United States* v. *Powell*, 467 F. Supp. 3d 360, 368, 374 (E.D. Va. 2020) (indictment charging false statements on ATF Form 4473 in connection with the purchase of specific handguns listed by date of purchase, make, caliber, model, serial number, and name of FFL); *United States* v. *McCurdy*, 634 F. Supp. 2d 118 (D. Me 2009) (denial of a motion for a new trial discussing whether the firearm sold as documented on the ATF Form 4473 and the firearm introduced at trial were the same).

[36] The lack of firearm description information in theft/loss reports makes it difficult for ATF to match recovered firearms with those reported as lost or stolen, thereby hindering ATF's efforts to enforce the numerous provisions of the GCA that prohibit thefts. *See* 18 U.S.C. 922(i) (transporting or shipping stolen firearms in interstate or foreign commerce); *id.* at 922(j) (receiving, possessing, concealing, storing, bartering, selling, disposing, or pledging or accepting as security for a loan any stolen firearm which has moved in interstate or foreign commerce); *id.* at 922(u) (stealing a firearm that has been shipped or transported in interstate or foreign commerce from the person or premises of an FFL); *id.* at 924(l) (stealing a firearm which is moving in or has moved in interstate commerce); and *id.* at 924(m) (stealing a firearm from a licensee).

[37] *See* Public Law 90–351, sec. 901(a), 82 Stat. 212, 225–26 (1968); 18 U.S.C. 922(b)(2) (prohibiting licensees from selling or delivering any firearm to any person in a State where the purchase or possession by such person of such firearm would be in violation of any State law or published ordinance applicable at the place of sale, delivery, or other disposition); *id.* at 922(t)(2),(4) (NICS background check denied if receipt of firearm by transferee would violate State law); *id.* at 923(d)(1)(F) (requiring license applicants to certify compliance with the requirements of State and local law applicable to the conduct of business).

[38] *See* Cal. Pen. Code. section 29180 (prohibiting ownership of firearms that do not bear a serial number or other mark of identification provided by the State); Conn. Gen. Stat. section 29–36a(a) (prohibiting manufacture of firearms without permanently affixing serial numbers issued by the State); DC Code section 7–2504.08(a) (prohibiting licensees from selling firearms without serial numbers); Haw. Rev. Stat. section 134–10.2 (prohibiting unlicensed persons from producing 3D printed or parts kit firearms without a serial number); Mass. Gen. Laws 269 section 11E (prohibiting manufacture or delivery of unserialized firearms to licensed dealer); N.J. Stat. Ann. section 2C:39–3(n) (prohibiting possession of firearms manufactured or assembled without serial number); N.Y. Penal Law sections 265.50, 265.55 (prohibiting manufacture/possession of undetectable firearms); R.I. Gen. Laws section 11–47–8(e) (prohibiting possession of ''a ghost gun or an undetectable firearm or any firearm produced by a 3D printing process''); Va. Code. Ann. section 18.2–308.5 (prohibiting possession of undetectable firearms); Wash. Rev. Code section 9.41.190 (prohibiting the manufacture with intent to sell of undetectable and untraceable firearms); *see also Philadelphia Becomes First City To Ban 3D-Printed Gun Manufacturing, Reason.com* (Nov. 22, 2013), *https://reason.com/2013/11/22/philadelphia-becomes-first-city-to-ban-3/; County Council Unanimously Approves Ghost Gun Bill, Mocoshow.com (April 6, 2021), https://mocoshow.com/blog/county-council-unanimously-approves-ghost-gun-bill/?fbclid=IwAR1KCyFal3AId31WKCTLanR-uEUj_-dW_T32lND5gfKmle_-nvIbZyT052.*

AMERICAN OVERSIGHT

A. Definition of "Firearm"

Under the GCA and implementing regulations, the term "firearm" includes:

"(A) any weapon (including a starter gun) which *will or is designed to* or *may readily be converted* to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3); 27 CFR 478.11 (emphasis added). Although weapon parts kits in their unassembled, incomplete, and/or unfinished state or configuration generally will not expel a projectile by the action of an explosive at the time of sale or distribution, weapon parts kits that are "designed to" [39] or "may readily be converted" [40] to expel a projectile by the action of an explosive are "firearms" under the GCA.[41]

In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called "80% receivers," [42] either directly from manufacturers of the kits or retailers, without background checks or recordkeeping. Some of these parts kits contain most or all of the components (finished or unfinished) necessary to complete a functional weapon within a short period of time. Some of them include jigs, templates, instructions, drill bits, and tools that allow the purchaser to complete the weapon to a functional state with minimal effort, expertise, or equipment. Weapon parts kits such as these are "firearms" under the GCA because they are *designed to* or *may readily be converted* to expel a projectile by the action of an explosive.[43] Manufacturers of such parts kits must be licensed, abide by the marking and recordkeeping requirements, and pay Federal Firearms Excise Tax on their sales price.[44] Any Federal firearms licensee that sells such kits to unlicensed individuals would need to complete ATF Forms 4473, conduct NICS background checks, and abide by the recordkeeping requirements applicable to fully completed and assembled firearms.[45] Therefore, to reflect existing case law, this proposed rule would add a sentence at the end of the definition of "firearm" in 27 CFR 478.11 providing that "[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive."

Nonetheless, this amendment is not intended to affect the classification of a weapon, including a weapon parts kit, in which each frame or receiver (as defined in this proposed rule) of such weapon is properly destroyed in accordance with ATF standards. Because such weapons have been completely destroyed or permanently redesigned not to expel a projectile by the action of an explosive, and cannot readily be converted to do so, ATF would not consider them as either "designed to" or "readily assembled, completed, converted, or restored to expel a projectile by the action of an explosive." To make this clear, this proposed rule would add another sentence to the end of the definition of "firearm" in 27 CFR 478.11 to provide that "[t]he term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed." (see Section II.B.5 of the preamble)

B. Definition of "Frame or Receiver"

The proposed new regulatory definition of "frame or receiver" would be a multi-part definition added to 27

[39] *See* H.R. Rep. 90–1577, at 4416 (June 21, 1968) ("This provision makes it clear that so-called unserviceable firearms come within the definition."); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same). Numerous courts have held that weapons *designed to* expel a projectile by the action of an explosive are "firearms" under 18 U.S.C. 921(a)(3)(A) even if they cannot expel a projectile in their present form or configuration. *See, e.g., United States* v. *Hardin,* 889 F.3d 945, 946 (8th Cir. 2017) (pistol with broken trigger and numerous missing internal parts was a weapon designed to expel a projectile by the action of an explosive); *United States* v. *Dotson,* 712 F.3d 369 (7th Cir. 2013) (damaged pistol with corroded, missing and broken components); *United States* v. *Rivera,* 415 F.3d 284, 285–87 (2nd Cir. 2005) (pistol with a broken firing pin and flattened firing-pin channel); *United States.* v. *Brown,* 117 F.3d 353 (7th Cir. 1997) (no firing pin); *United States* v. *Reed,* 114 F.3d 1053 (10th Cir. 1997) (shotgun with broken breech bolt); *United States* v. *Hunter,* 101 F.3d 82 (9th Cir. 1996) (pistol with broken firing pin); *United States* v. *Yannott,* 42 F.3d 999, 1005 (6th Cir. 1994) (shotgun with broken firing pin); *United States* v. *Ruiz,* 986 F.2d 905, 910 (5th Cir. 1993) (revolver with hammer filed down); *United States.* v. *York,* 830 F.2d 885, 891 (8th Cir. 1987) (revolver with no firing pin and cylinder did not line up with barrel). *But see United States* v. *Wada,* 323 F. Supp. 2d 1079 (D. Or. 2004) (firearms redesigned as ornaments that "would take a great deal of time, expertise, equipment, and materials to attempt to reactivate" were no longer designed to expel a projectile by the action of an explosive and could not readily be converted to do so).

[40] *See, e.g., United States* v. *Wick,* 697 F. App'x 507, 508 (9th Cir. 2017) (complete UZI parts kits "could 'readily be converted to expel a projectile by the action of an explosive,' meeting the statute's definition of firearm under section 921(a)(3)(A)" because the "kits contained all of the necessary components to assemble a fully functioning firearm with relative ease"); *United States* v. *Stewart,* 451 F.3d 1071, 1073 n.2 (9th Cir. 2006) (upholding district court's finding that .50 caliber rifle kits with incomplete receivers were "firearms" under 921(a)(3)(A) because they could easily be converted to expel a projectile); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within short period of time could readily be converted to expel a projectile).

[41] The plain language of the definition of "firearm" in 18 U.S.C. 921(a)(3)(A) states that a weapon need not function so long as it is designed to, or may readily be converted to, expel a projectile. Even though they generally cannot function to expel a projectile when sold, weapon parts kits are still "weapons"—real combat instruments, such as pistols, revolvers, rifles, or shotguns—in an unassembled, unfinished, and/or incomplete state or configuration. There is no minimum utility or lethality requirement in the GCA or NFA for an item to be considered a "weapon." *Cf. United States* v. *Thompson/Center Arms,* 504 U.S. 505, 513, n.6 (1992) (a rifle was "made" under the NFA when a pistol was packaged together with a disassembled rifle parts kit); *United States* v. *Hunter,* 843 F. Supp. 235, 256 (E.D. Mich. 1994) ("If Defendants believe that machinegun conversion kits are not in and of themselves 'weapons' under § 921(a)(3), they forget that that section clearly envisions machineguns as weapons."); *United States* v. *Drasen,* 845 F.2d 731, 736–37 (7th Cir. 1988) (rejecting argument that a collection of rifle parts cannot be a "weapon").

[42] The term "80% receiver" is a term used by some industry members, the public, and the media to describe a frame or receiver that has not yet reached a stage in manufacture to be classified as a "frame or receiver" under Federal law. However, that term is neither found in Federal law nor accepted by ATF.

[43] *See* footnotes 39 and 40, *supra.*

[44] The Internal Revenue Code of 1954, 26 U.S.C. 4181, imposes on the manufacturer, producer, or importer an excise tax of 10% (pistols and revolver) or 11% (other firearms) on the sales price of firearms manufactured, produced, or imported, including complete, but unfinished, weapon parts kits. *See* Rev. Rul. 62–169 (IRS RRU), 1962–2 C.B. 245 (kits which contain all of the necessary component parts for the assembly of shotguns are complete firearms in knockdown condition even though, in assembling the shotguns the purchaser must 'final-shape,' sand, and finish the fore-arm and the stock); *cf.* Rev. Rul. 61–189 (IRS RRU), 1961–2 C.B. 185 (kits containing unassembled components and tools to complete artificial flies for fisherman were sporting goods subject to excise tax); *Hine* v. *United States,* 113 F. Supp. 340, 343 (Ct. Cl. 1953) ("True enough, [these fishing rod kits] might be called 'blanks' by those engaged in the trade, but what could they be called or to what practical use could they be put other than 'fishing rods?' Plaintiff says that it would be extremely difficult if not impossible to case with a 'blank' rod and this is true, but we can conceive of no other practical use for them except as fishing rods. . . . Having reached the stage of manufacture or development where they became recognizable as one of the sporting goods described in Section 3406(a)(1) the rods upon being sold were subject to tax even though there remained one or more finishing operations to be performed.") (citations omitted).

[45] Additionally, persons who engage in the business of selling or distributing such weapon parts kits cannot avoid licensing, marking, recordkeeping, or excise taxation by selling or shipping the parts in more than one box or shipment to the same person, or by conspiring with another person to do so. *See, e.g., United States* v. *Evans,* 928 F.2d 858 (9th Cir. 1991) (conspiracy to cause and aid and abet the possession of unregistered machineguns where one defendant sold parts kits containing all component parts of Sten machineguns except receiver tubes, and the other sold customers blank receiver tubes along with detailed instructions on how to complete them); Internal Revenue Service Technical Advice Memorandum 8709002, 1986 WL 372494, at 4 (Nov. 13, 1986) (for purposes of imposing Firearms Excise Tax it is irrelevant whether the components of a revolver in an unassembled knockdown condition are sold separately to the same purchaser in various related transactions, rather than sold as a complete kit in a single transaction).

AMERICAN OVERSIGHT

CFR 478.11 and 479.11 (referencing section 478.11). First, there would be a general definition of ''frame or receiver'' with non-exclusive examples that illustrate the definition. This would be followed by supplements that further explain the meaning of the term ''frame or receiver'' for certain firearm designs and configurations, as follows: (a) Firearm muffler or silencer frame or receiver; (b) split or modular frame or receiver, also followed by examples of the frames or receivers for common firearm designs that are distinguishable because of differences in firing cycle, method of operation, or physical design characteristics; (c) partially complete, disassembled, or inoperable frame or receiver; and (d) destroyed frame or receiver. Although the new definition would more broadly define the term ''frame or receiver'' than the current definition, it is not intended to alter any prior determinations by ATF of what it considers the frame or receiver of a particular split/modular weapon. ATF would also continue to consider the same factors when classifying firearms (see Section I.A of the preamble).

1. General Definition of ''Frame or Receiver''

ATF proposes to replace the respective regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' in 27 CFR 478.11 and 479.11 because they too narrowly limit the definition of receiver with respect to most current firearms and have led to erroneous district court decisions. Indeed, most firearms currently in circulation in the United States do not have a specific part that expressly falls within the current ''frame or receiver'' regulatory definitions. Most concerning is that the interpretation of these definitions by some courts, relying on the current regulations, would make it easier to obtain the majority of existing firearms, including some of the most advanced semiautomatic weapons, without complying with the requirements of the GCA, and make it far more difficult to trace those firearms after a crime. Should the current definition remain in place and courts continue to interpret it such that no part or parts of most firearms are defined as the frame or receiver, these unserialized parts, easily purchased and assembled to create functioning firearms, would be untraceable, thereby putting the public at risk. While a ''frame or receiver'' is clearly within the statutory definition of what constitutes a ''firearm'' under the GCA, 18 U.S.C. 921(a)(3)(B), clarifying that this term includes how most modern-day firearms operate would help ensure that the regulatory definition of ''frame or receiver'' will not be misinterpreted by the courts, the firearms industry, or the public at large to mean that most firearms in circulation have no part identifiable as a frame or receiver.

As a threshold matter, the new definition makes clear that a ''frame or receiver'' must be visible to the exterior when the complete weapon is assembled so that licensees can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see the identifying markings for tracing purposes. Nonetheless, as explained in Section II.B.3 of the preamble, an internal frame or chassis at least partially exposed to the exterior to allow identification may be determined by ATF to be the frame or receiver of a split or modular frame or receiver.

Next, the new definition more broadly describes a ''frame or receiver'' as one that provides housing or a structure designed to hold or integrate any fire control component. Unlike the prior definitions of ''frame or receiver'' that were rigidly tied to three specific fire control components (*i.e.,* those necessary for the firearm to initiate or complete the firing sequence), the new regulatory definition is intended to be general enough to encompass changes in technology and parts terminology. With respect to the fire control components housed by the frame or receiver, the definition would include, at a minimum, any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. However, the definition is not limited to those particular fire control components.[46] There may be future changes in firearms technology or terminology resulting in housings or holding structures for new or different components that initiate, complete, or continue the firing sequence of weapons that expel a projectile by the action of an explosive. For further clarity, the definition would then give four nonexclusive examples with illustrations of common single-framed firearms: (1) Hinged or single frame revolver (structure to hold the trigger, hammer, and cylinder); (2) bolt-action rifle (structure to hold the bolt and firing pin, and attach the trigger mechanism); (3) break action, lever action, or pump action rifle or shotgun (housing for the bolt and firing pin, or a structure designed to integrate the breechblock); and (4) semiautomatic firearm or machinegun with a single receiver housing all fire control components (housing for the hammer, bolt, trigger mechanism, and firing pin, *e.g.,* AK-type firearms).

Finally, the definition would make clear to persons who may acquire or possess a part now defined as a ''frame or receiver'' that is identified with a serial number that they must presume, absent an official determination by ATF or other reliable evidence to the contrary, that the part is a firearm ''frame or receiver'' without further guidance.

2. Firearm Muffler or Silencer Frame or Receiver

Under the GCA, licensed manufacturers and importers must identify the frame or receiver of each firearm, including a firearm muffler or silencer, with a serial number in accordance with regulations. 18 U.S.C. 921(a)(3)(C), 923(i). The NFA requires firearm manufacturers, importers, and makers to identify each firearm, including a firearm muffler or silencer, with a serial number and such other identification as may be prescribed by regulations. 26 U.S.C. 5842(a); *id.* at 5845(a)(7). Because under the NFA each individual part of a firearm muffler or silencer is a ''firearm'' [47] that must be registered in the National Firearms Registration and Transfer Record (''NFRTR''), the regulations currently assume that every part defined as a silencer must be marked in order to be registered, and expressly require that they be marked whenever sold, shipped, or otherwise disposed even though they may be installed by a qualified licensee within a complete muffler or silencer device.[48]

However, this result has caused confusion and concern among many silencer manufacturers because some silencer parts defined as ''silencers,'' such as baffles, are difficult to mark, and make little sense to mark for tracing purposes when the outer tube or

[46] The prefatory paragraph to the definitional sections in the GCA and NFA regulations explain that ''[t]he terms 'includes' and 'including' do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.'' 27 CFR 478.11, 479.11.

[47] A firearm ''muffler or silencer'' is defined to include ''any combination of parts'' designed and intended for the use in assembling or fabricating a firearm silencer or muffler and ''any part intended only for use in such assembly or fabrication.'' 18 U.S.C. 921(a)(24); 26 U.S.C. 5845(a)(7); 27 CFR 478.11; *id.* at 479.11. This rule defines the term ''complete muffler or silencer device'' not to say that individual silencer parts are not considered a firearm ''muffler or silencer'' subject to the requirements of the NFA, but to advise industry members when those individual silencer parts must be marked and registered in the NFRTR when they are used in assembling or fabricating a muffler or silencer device.

[48] *See* 27 CFR 479.101(b); 478.92(a)(4)(iii); 479.102(f)(1).

AMERICAN OVERSIGHT

housing of the complete device is marked and registered. Not only is it difficult for manufacturers to apply identifying markings, there is also the administrative difficulty in timely filing and processing numerous ATF Forms 2, Notice of Firearms Manufactured or Imported upon manufacture of each part, and ATF Forms 3, Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer upon sale or other disposition of each part to another qualified licensee.

For these reasons, ATF is proposing a number of amendments to clarify how and when firearm muffler or silencer parts must be marked and registered in the NFRTR. Among other changes (see Section II.H.9 of the preamble, below), this rule defines the term ''frame or receiver'' as it applies to a ''firearm muffler or silencer frame or receiver'' and adds the term ''complete muffler or silencer device'' (see Section II.D of the preamble). Under the NPRM, the term ''frame or receiver'' means, ''in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: baffles, baffling material, or expansion chamber.'' These new definitions would clarify for manufacturers and makers of complete muffler or silencer devices that they need only mark each part (or specific part(s) previously determined by the Director) of the device defined as a ''frame or receiver'' under this rule. However, individual muffler or silencer parts must be marked if they are disposed of separately from a complete device unless transferred by qualified manufacturers to other qualified licensees for the manufacture or repair of complete devices (see Section II.H.9 of the preamble).[49]

ATF anticipates that, under this supplemental definition, the outer tube of a complete muffler or silencer device would be considered the frame or receiver with respect to most commercial silencer designs currently on the market. This is because the outer tube would be the only housing for essential internal components (*e.g.,* baffles or baffling material) of the complete device. Marking the outer tube, as distinguished from a smaller non-housing component like an end cap that can be damaged upon expulsion of projectiles, best preserves the ability of law enforcement to trace the silencer device if used in crime, and is consistent with recommendations ATF has received from the firearms industry.[50]

Nonetheless, like the definition of ''frame or receiver'' for projectile weapons, this sub-definition would be flexible enough to encompass changes in technology and parts terminology. This is because any housing or structure designed to hold or integrate an essential internal component of the muffler or silencer device would meet the definition. While the proposed definition gives examples of internal components that manufacturers must consider as essential, *e.g.,* baffles, baffling material, or expansion chamber, it is not limited to those particular components.[51]

3. Split or Modular Frame or Receiver

This second supplement explains that ATF may determine ''in the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential components'' whether one or more specific part(s) of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. It then sets forth the factors ATF considers in making this determination: ''(a) Which component the manufacturer intended to be the frame or receiver; (b) which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms; (c) how the component fits within the overall design of the firearm when assembled; (d) the design and function of the fire control components to be housed or integrated; (e) whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed; (f) whether classifying the particular component is consistent with the legislative intent of the Act and this part; and (g) whether classifying the component as the frame or receiver is consistent with the Director's prior classifications.'' No single factor is controlling. It would further make clear that ''[f]rames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.''

This supplement to the general definition addresses one of the core problems of the current definition of ''firearm frame or receiver;'' namely, that a majority of firearms now use a split or modular design in which more than one part houses a different fire control component and/or incorporates a striker instead of a hammer. It would make clear that even though a firearm, including a silencer, may have more than one part that falls within the definition of ''frame or receiver,'' ATF may classify a specific part or parts to be the ''frame or receiver'' of a particular weapon. For this reason, manufacturers may wish to submit samples to ATF for classification of one or more particular components as the frame or receiver so that they need only mark a specific part or parts of a weapon, rather than all qualifying parts (see Section II.H.10 of the preamble) or obtain a marking variance (see Section II.H.6 of the preamble). However, this supplemental definition would also make clear that ATF would not classify an internal frame or chassis as a ''frame or receiver'' unless it is at least partially exposed to the exterior to allow identification so that licensees accepting them into inventory can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see the identifying markings for tracing purposes.[52]

One important goal of this rule is to ensure that it does not affect existing ATF classifications of firearms that specify a single component as the frame or receiver. Application of the rule, as proposed, would not alter these prior

[49] This rule is consistent with ATF enforcement policy. *See* footnote 72 *infra.*

[50] In 2016, ATF issued an Advance Notice of Proposed Rulemaking in response to a petition for rulemaking from a firearms industry trade association recommending that regulations be amended to require that a silencer be marked on the outer tube (as opposed to other locations), unless a variance is granted by the Director on a case-by-case basis for good cause. *See* 81 FR 26764 (May 4, 2016).

[51] *See* footnote 46, *supra.*

[52] Markings must also be clearly visible from the exterior because they may be needed to prove that a criminal defendant had knowledge that the serial number was obliterated or altered. *See, e.g., Lewis* v. *United States,* No. 3:12–0522, 2012 WL 5198090, at *4 (M.D. Tenn. Oct. 19, 2012) (serial number obliterated on the ''visible exterior'' of a revolver); *State* v. *Shirley,* No. 107449, 2019 WL 2156402 (Ct. App. Ohio May 16, 2019) (same); *cf. United States* v. *Sands,* 948 F.3d 709, 719 (6th Cir. 2020) (serial number is not altered or obliterated so long as it is ''visible to the naked eye''); *United States* v. *St. Hilaire,* 960 F.3d 61, 66 (2d Cir. 2020) (''This 'naked eye test' best comports with the ordinary meaning of 'altered'; it is readily applied in the field and in the courtroom; it facilitates identification of a particular weapon; it makes more efficient the larger project of removing stolen guns from circulation; it operates against mutilation that impedes identification as well as mutilation that frustrates it; and it discourages the use of untraceable weapons without penalizing accidental damage or half-hearted efforts.'').

AMERICAN OVERSIGHT

ATF classifications. To provide more clarity, this supplement to the definition would include a nonexclusive list of common weapons with a split/multi-piece frame or receiver configuration for which ATF has previously determined a specific part to be the frame or receiver. If a manufacturer produces or an importer imports a firearm falling within one of these designs as they exist as of the date of publication of a final rule, it can refer to this list to know which part is the frame or receiver. The manufacturer or importer can then mark without needing to ask ATF for a classification. The nonexclusive list identifies the frame or receiver for the following firearms: (i) Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols; (ii) Glock-type striker fired semiautomatic pistols; (iii) Sig Sauer P320-type semiautomatic pistols; (iv) certain locking block rail system semiautomatic pistols; (v) AR–15-type and Beretta AR–70-type firearms; (vi) Steyr AUG-type firearms; (vii) Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP 38, MP 40, and SIG 550 type firearms, and HK-type machineguns and semiautomatic variants; (viii) Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof; and (ix) Sten, Sterling, and Kel-tec Sub-2000-type firearms. However, if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of ''frame or receiver'' would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF, as described above.

4. Partially Complete, Disassembled, or Inoperable Frame or Receiver

This third supplement would define ''frame or receiver'' to include ''in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state.'' To determine this status, ''the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials.'' For clarification, ''partially complete'' for purposes of this definition ''means a forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.''

This supplement addresses another core challenge of the existing, definition of firearm ''frame or receiver;'' namely, that it does not address the question when an object becomes a frame or receiver. While the GCA and implementing regulations define a ''firearm'' to include the ''frame or receiver,'' neither delineates when a frame or receiver is created. The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law. ATF has long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture. This is the point at which a substantial step has been taken, or a critical line crossed, so that the item in question may be so classified under the law. This ''critical stage of manufacture'' is when the article becomes sufficiently complete to function as a frame or receiver, or may readily be completed, assembled, converted, or restored to accept the parts it is intended to house or hold.[53]

Clarifying this issue is needed to deter the increased sale or distribution of unlicensed and unregulated partially complete or unassembled frames or receivers often sold within parts kits that can readily be completed or assembled to a functional state.[54] Many kits that include unfinished frame or receivers have been sold by nonlicensees who were not required to run a background check or maintain transaction records. Accordingly, prohibited persons have easily obtained them.[55] Moreover, without any markings, they are nearly impossible to trace. Although this addition is intended to capture when an item becomes a frame or receiver that is regulated irrespective of the type of technology used to complete the assembly, frame or receiver molds that can accept metal or polymer, unformed blocks of metal, and other articles only in a primordial state would not—without more—be considered a ''partially complete'' frame or receiver. However, when a frame or receiver is broken or has been disassembled into pieces that can readily be made into a frame or receiver, or is a partially complete frame or receiver forging, casting, or additive printing[56] that has reached a stage in manufacture where it can readily be made into a functional frame or receiver, that article would be a ''frame or receiver'' under the GCA.

5. Destroyed Frame or Receiver

This fourth supplement would exclude from the definition of ''frame or receiver'' any frame or receiver that is destroyed. The supplement describes what it means to be a ''destroyed'' frame or receiver: One permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and that may not readily be assembled, completed, converted, or restored to a functional state. This new definition then would set forth nonexclusive acceptable methods of destruction, which have been provided by ATF in past guidance.[57]

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[53] ATF Letter to Private Counsel #907010 (Mar. 20, 2015).

[54] The Polymer 80 assembly, for example, may be completed in under thirty minutes. *See, e.g., Silverback Reviews, Polymer 80 Lower Completion/Parts Kit Install,* YouTube (Aug. 19, 2019), *https://www.youtube.com/watch?v=ThzFOIYZgIg* (21-minute video of completion of a Polymer 80 lower parts kit with no slide). Indeed, the internet is replete with people with no experience completing these firearms. *See* HandleBandle, *DIY: How to Build a Gun at Home (That Shoots) Part 1,* YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=nO-8Pns9aq4;* HandleBandle, *Polymer 80 with No Experience Tips (Build Part 2),* YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=a0JM5v45vsg;*HandleBandle, Legally Building a Gun in My Living Room (5D Tactical Glock Kit), YouTube (Oct. 18, 2018), *https://www.youtube.com/watch?v=5SaNLrhnnuA.*

[55] *See Bridgeport Felon Sentenced to More Than 5 Years in Federal Prison for Possessing Firearms,* Justice.gov (Jan. 7, 2021), *https://www.justice.gov/usao-ct/pr/bridgeport-felon-sentenced-more-5-years-federal-prison-possessing-firearms; Winthrop man had homemade 'ghost' guns and 3,000 rounds of ammunition, prosecutors say, Boston.com* (Aug. 5, 2020), *https://www.boston.com/news/crime/2020/08/05/winthrop-man-had-homemade-ghost-guns-prosecutors-say; 'Ghost Gun' used in shooting that killed two outside Snyder County restaurant,* Penn Live (Jul. 14, 2020), *https://www.pennlive.com/crime/2020/07/ghost-gun-used-in-shooting-that-killed-two-outside-snyder-county-restaurant.html; The gunman in the Saugus High School shooting used a 'ghost gun,'* sheriff says, CNN (Nov. 21, 2019), *https://www.cnn.com/2019/11/21/us/saugus-shooting-ghost-gun/index.html; How the felon killed at Walmart got his handgun, DA says, LehighValleyLive.com* (March 28, 2018), *https://www.lehighvalleylive.com/news/2018/05/how_the_felon_killed_at_walmar.html; 'Ghost guns': Loophole allows felons to legally buy gun parts* online, *KIRO7.com, https://www.kiro7.com/news/local/ghost-guns-federal-loophole-allows-felons-to-legally-buy-gun-parts-online-build-assault-weapons/703695149/.*

[56] ATF does not believe the production of 3D printed frames or receivers is substantial at this time when compared with commercially produced firearms. For the most part, individuals currently make PMFs from parts kits produced commercially, not by using 3D printers. However, the cost, capabilities, and availability of 3D printers are quickly improving.

[57] *See How to Properly Destroy Firearms, ATF.gov, https://www.atf.gov/firearms/how-properly-destroy-firearms;* ATF Rul. 2003–1 (destruction of Browning M1919 type receivers); ATF Rul.2003–2 (FN FAL type receivers); ATF Rul. 2003–3 (H&K G3 type receivers); ATF Rul. 2003–4 (Sten type receivers).

AMERICAN OVERSIGHT

C. Definition of "Readily"

To provide guidance on how the term "readily" is used to classify firearms, including frame or receiver parts kits or weapon parts kits sold with incomplete or unassembled frames or receivers, the NPRM adds this term to 27 CFR 478.11 and 479.11 and defined as "a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process." It would further list factors relevant in making this determining to include: (a) Time, *i.e.,* how long it takes to finish the process; (b) ease, *i.e.,* how difficult it is to do so; (c) expertise, *i.e.,* what knowledge and skills are required; (d) equipment, *i.e.,* what tools are required; (e) availability, *i.e.,* whether additional parts are required, and how easily they can be obtained; (f) expense, *i.e.,* how much it costs; (g) scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and (h) feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction. This definition and factors considered in determining whether a weapon, including a weapon parts kit, or unfinished or damaged frame or receiver may readily be assembled, completed, converted, or restored to function are based on case law interpreting the terms "may readily be converted to expel a projectile" in 18 U.S.C. 921(a)(3)(A) and "can be readily restored to shoot" in 26 U.S.C. 5845(b).[58] Thus, defining the term "readily" is necessary to provide further clarity in determining when incomplete weapons or configurations of parts become a "firearm" regulated under the GCA and NFA.

D. Definitions of "Complete Weapon" and "Complete Muffler or Silencer Device"

This proposed rule would add definitions for "complete weapon" and "complete muffler or silencer device" to 27 CFR 478.11 and 479.11. A "complete weapon" would be defined as "a firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable." Likewise, a "complete muffler or silencer device" would be defined as "a firearm muffler or firearm silencer that contains all of the component parts necessary to function as designed whether or not assembled or operable." These definitions are needed to explain when a frame or receiver of a firearm, including a firearm muffler or silencer, as the case may be, must be marked.

E. Definition of "Privately Made Firearm"

The NPRM proposes adding a definition of "privately made firearm" to 27 CFR 478.11 to mean "[a] firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings placed by a licensed manufacturer at the time the firearm was produced." The term would not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). This proposed definition explains that PMFs are those firearms that were made by nonlicensees without the markings required by this part, and excludes those already marked and registered in the NFRTR, and any firearm made before enactment of the GCA which, unlike the repealed law it replaced, required all firearms to be marked under federal law.[59] The term "made" is incorporated within the term "privately made firearm" rather than "manufacture" to distinguish between firearms manufactured (or "made") by private individuals without a license and those manufactured by persons licensed to engage in the business of manufacturing firearms.[60]

F. Definition of "Importer's or Manufacturer's Serial Number"

The proposed rule would define the term "importer's or manufacturer's serial number" in 27 CFR 478.11 as: "[t]he identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number." Because "privately made firearms" are manufactured by someone other than a licensed manufacturer, the serial number that incorporates the abbreviated Federal firearms license ("FFL") number placed by a licensee on a PMF under this rule is the "importer's or manufacturer's serial number." This definition would help ensure that the serial numbers and other markings necessary to ensure tracing, including those placed by a licensee on a "privately made firearm" or marked with an ATF-issued serial number,[61] to include imported firearms, are considered the "importer's or manufacturer's serial number" protected by 18 U.S.C. 922(k), which prohibits their removal, obliteration, or alteration.[62]

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[58] *See United States* v. *Dodson,* 519 F. App'x 344, 352–53 (6th Cir. 2013) (gun that was restored with 90 minutes of work, using widely available parts and equipment and common welding techniques, fit comfortably within the readily restorable standard); *United States* v. *TRW Rifle 7.62x51mm Caliber,* 447 F.3d 686, 692 (9th Cir. 2006) (a two-hour restoration process using ordinary tools, including a stick weld, is within the ordinary meaning of "readily restored"); *United States* v. *Mullins,* 446 F.3d 750, 756 (8th Cir. 2006) (a starter gun that can be modified in less than one hour by a person without any specialized knowledge to fire may be considered "readily convertible" under the GCA); *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 422–24 (6th Cir. 2006) ("[T]he Defendant weapon here had all of the necessary parts for restoration and would take no more than six hours to restore."); *United States* v. *Woods,* 560 F.2d 660, 664 (5th Cir. 1977) (holding that a weapon was a shotgun within the meaning of 26 U.S.C. 5845(d) and stating "[t]he fact that the weapon was in two pieces when found is immaterial considering that only a minimum of effort was required to make it operable."); *United States* v. *Smith,* 477 F.2d 399, 400–01 (8th Cir. 1973) (machinegun that would take around an eight-hour working day in a properly equipped machine shop was readily restored to shoot); *United States* v. *16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns,* 443 F.2d 463 (2d Cir. 1971) (starter guns converted in no more than 12 minutes to fire live ammunition were readily convertible under the GCA); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within a short period of time could readily be converted to expel a projectile); *United States* v. *Catanzaro,* 368 F. Supp. 450, 453 (D. Conn. 1973) (a sawed-off shotgun was "readily restorable to fire" where it could be reassembled in one hour and the necessary missing parts could be obtained at a Smith & Wesson plant); *compare with United States* v. *Seven Miscellaneous Firearms,* 503 F. Supp. 565, 574–75 (D.D.C. 1980) (weapons could not be "readily restored to fire" when restoration required master gunsmith in a gun shop and $65,000 worth of equipment and tools).

[59] The Federal Firearms Act of 1938 (repealed), the predecessor to the GCA, made it unlawful for a person to receive a firearm that had the manufacturer's serial number removed, obliterated or altered. 15 U.S.C. 902(i). Regulations promulgated to implement this law required each firearm manufactured after July 1, 1958, to be identified with the name of the manufacturer or importer, a serial number, caliber, and model. However, there was an exception from the serial number and model requirements for any shotgun or .22 caliber rifle unless that firearm was also subject to the NFA. 26 CFR 177.50 (rescinded).

[60] Both the GCA and NFA define the term "manufacturer" as any person "engaged in the business of manufacturing firearms," and the GCA further defines the term "licensed manufacturer" as "any such person licensed under the provisions of this chapter." 18 U.S.C. 921(a)(10); 26 U.S.C. 5845(m). The NFA further defines the term "make," and the various derivatives of that word, to include "manufacturing (other than by one qualified to engage in the business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. 5845(i).

[61] ATF occasionally issues serial numbers for placement on firearms in which the serial numbers were not originally placed, *see* 26 U.S.C. 5842(b), or were accidentally removed, damaged, or worn due to routine use or other innocent reason.

[62] In addition to Federal law, 18 U.S.C. 922(k) and 26 U.S.C. 5861(g), (h), (i), almost every state prohibits the removal, alteration, or obliteration of a firearm's serial number or possession of a firearm with a serial number that has been removed,

AMERICAN OVERSIGHT

G. Definition of "Gunsmith" [63]

To provide greater access to professional marking, this proposed rule would clarify that the meaning of the term "gunsmith" includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services. Specifically, this proposed rule would amend the definition of "engaged in the business" as it applies to a "gunsmith" in 27 CFR 478.11 to clarify the meaning of that term as someone "who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms."

This amendment would make clear that businesses that routinely repair or customize existing firearms, make or fit special barrels, stocks, or trigger mechanisms, or mark firearms as a service performed on firearms not for sale or distribution by a licensee, may be licensed as dealer-gunsmiths rather than as manufacturers.[64] Under this rule, PMFs would first need to be recorded by the dealer-gunsmith as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight), and once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. This would ensure that the PMF, if ever found by police at a crime scene, can be traced. However, no ATF Form 4473 or NICS background check would be required upon return of the marked firearm to the person from whom it was received, pursuant to 27 CFR 478.124(a).

H. Marking Requirements for Firearms

1. Information Required To Be Marked on the Frame(s) or Receiver(s)

To properly implement the new definitions, this proposed rule would amend 27 CFR 478.92(a) and 479.102 to explain how and when markings must be applied on each part defined as a frame or receiver, particularly since there could be more than one part of a complete weapon, or complete muffler or silencer device, that is the frame or receiver (*i.e.,* when ATF has not identified specific part(s) as the frame or receiver). After publication of a final rule, each frame or receiver of a new firearm design or configuration manufactured or imported after the date of publication of the final rule would need to be marked with a serial number, and *either:* (a) The manufacturer's or importer's name (or recognized abbreviation), and city and State (or recognized abbreviation) where the manufacturer or importer maintains their place of business, or in the case of a maker of an NFA firearm, where the firearm was made; or (b) the manufacturer's or importer's name (or recognized abbreviation), and the serial number beginning with the licensee's abbreviated FFL number as a prefix, which is the first three and last five digits followed by a hyphen, and then followed by a number (which may incorporate letters and a hyphen) as a suffix, *e.g.,* "12345678–[number]." The serial number (with or without the FFL prefix) identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm.

The additional information required to be marked on each frame or receiver (*i.e.,* name, city and state, or name and abbreviated serial number) would only apply to new designs or configurations of firearms manufactured or imported after publication of the rule. Licensed manufacturers and importers may continue to identify the additional information on firearms (other than PMFs) of the same design and configuration as they existed before [effective date of the rule] under the prior content rules, and any rules necessary to ensure such identification will remain effective for that purpose. This provision is intended to reduce production costs incurred by licensees.

Requiring Federal firearms licensees to mark in this manner on each part defined as a frame or receiver would make it possible for ATF to trace the firearm if the manufacturer's or importer's name, city, or state is marked on the slide or barrel, and the original components are later separated. At the same time, it would give an option for manufacturers and importers to avoid marking their city and state as currently required at §§ 478.92(a)(1)(ii)(D), (E) and 479.102(a)(1)(iv) and (v), or obtain a marking variance from this requirement, by allowing them to mark their abbreviated license number as a prefix to the serial number as an alternative because this information can be obtained by looking up the licensee's information. Except for silencer parts transferred by manufacturers to other qualified manufacturers and dealers for completion or repair of devices (see Section II.H.9 of the preamble), there would be no change to the existing requirement that each part defined as a machinegun or silencer that is disposed of separately and not part of a complete weapon or device be marked with all required information because individual machinegun conversion and silencer parts are "firearms" under the NFA that must be registered in the NFRTR. 26 U.S.C. 5841(a)(1); *id.* at 5845(a), (b). However, for frames or receivers, and individual machinegun conversion or silencer parts defined as "firearms" that are disposed of separately, the model designation and caliber or gauge may be omitted if it is unknown at the time the part is identified.

altered, or obliterated. *See* Ala. Code section 13A–11–64; Alaska Stat. section 11.61.200; Ariz. Rev. Stat. section 13–3102; Ark. Code section 5–73–107; Cal. Penal Code section 23900; Colo. Rev. Stat. section 18–12–103; Conn. Gen. Stat. section 29–36; Del. Code tit. 11 section 1459; Fla. Stat. Ann. section 790.27; Ga. Code. Ann. section 16–9–70; Haw. Rev. Stat. section 134–10; Idaho Code Ann. section 18–2410; 720 Ill. Comp. Stat. section 5/24–5; Ind. Code section 35–47–2–18; Kan. Stat. Ann. section 21–6306; Ky. Rev. Stat. section 527.050; La. Stat. Ann. section 40:1788; Me. Stat. tit. 17–A section 705(E); Md. Code Pub. Safety section 5–142; Mass. Gen. Laws 269 section 11C; Mich. Comp. Laws section 750.230; Minnesota Stat. section 609.667; Mo. Rev. Stat. section 571.050; Mont. Code Ann. section 45–6–326; Neb. Rev. Stat. sections 28–1207, 28–1208; Nev. Rev. Stat. section 202.277; N.H. Rev. Stat. Ann. section 637:7–a; N.J. Stat. Ann. section 2C:39–3(d); N.Y. Penal Law section 265.02(3); N.C. Gen. Stat. section 14–160.2; N.D. Cent. Code section 62.1–03–05; Ohio Rev. Code section 2923.201; Okla. Stat. tit. 21 section 1550(B); Or. Rev. Stat. section 166.450; 18 Pa. Cons. Stat. sections 6110.2, 6117; R.I. Gen. Laws section 11–47–24; S.C. Code. Ann. section 16–23–30(C) (handguns); S.D. Codified Laws 22–14–5; Tenn. Code Ann. section 39–14–134; Tex. Penal Code section 31.11; Utah Code section 76–10–521 (handguns); Va. Code Ann. section 18.2–311.1; Wash. Rev. Code section 9.41.140; W. Va. Code section 18.2–311.1; Wis. Stat. section 943.37(3).

[63] The term "gunsmith" is not used in the GCA; however, the Firearm Owners' Protection Act, Public Law 99–308, amended the GCA to define "engaged in the business" as applied to dealers to clarify when gunsmiths must have a license. *See* 18 U.S.C. 921(a)(11)(B); *id.* at (a)(21)(D); 132 Cong. Rec. 9603–04 (May 6, 1986) (statement of Sen. McClure).

[64] By clarifying the definition of gunsmith to mean a service routinely performed on existing firearms that are not for sale or distribution by a licensee, this rule would supersede ATF Ruling 2010–10, which allows gunsmiths under specified conditions to engage in certain manufacturing activities for licensed manufacturers. This would eliminate a significant source of confusion among regulated industry members and the public as to who needs a license to manufacture firearms. *See Broughman* v. *Carver,* 624 F.3d 670 (4th Cir. 2010) (distinguishing dealer-gunsmiths from manufacturers).

AMERICAN OVERSIGHT

2. Size and Depth of Markings

This proposed rule would not change the existing requirements for size and depth of markings in 27 CFR 478.92(a)(1) and 479.102(a), but for sake of clarity, consolidates them into a standalone paragraph along with the existing method of measuring the size and depth of markings set forth in 27 CFR 478.92(a)(5) and 479.102(b).

3. Period of Time To Identify Firearms

Neither the GCA nor the NFA explain at what point in the manufacturing process the required markings must be placed. In this regard, the proposed rule would make a distinction between the manufacture or making of a complete weapon or complete muffler or silencer device, and each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed. Complete weapons or complete muffler or silencer devices, as defined in this rule, would be allowed to be marked up to seven days from completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except for silencer parts produced by qualified manufacturers for transfer to other licensees to complete or repair silencer devices (see Section II.H.9 of the preamble), parts defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that are not component parts of a complete weapon or device when disposed of would be allowed to be marked up to seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. Adding this language would codify ATF Ruling 2012–1, and this ruling would become obsolete upon publication of the rule. As explained in that ruling, whether the end product is to become a complete weapon or device, or a frame or receiver to be disposed of separately, firearms that are actively awaiting materials, parts, or equipment repair to be completed are still considered to be actively in the manufacturing process.

4. Marking of Privately Made Firearms

Because privately made firearms do not have the identifying markings required of commercially manufactured firearms, this rule proposes to amend 27 CFR 478.92 to require FFLs to mark, or supervise the marking of, the same serial number on each frame or receiver (as defined in this rule) of a weapon that begins with the FFL's abbreviated license number (first three and last five digits) as a prefix followed by a hyphen on any "privately made firearm" (as defined) that the licensee acquired (*e.g.*, "12345678–[number]"). Unless previously identified by another licensee, PMFs acquired by licensees on or after the effective date of the rule would need to be marked in this manner within seven days of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner.[65] For PMFs acquired by licensees before the effective date of the rule, licensees would be required to mark or cause them to be marked by another licensee either within 60 days from that date, or before the date of final disposition (including to a personal collection), whichever is sooner. With respect to polymer firearms, including those that are produced using additive manufacturing (also known as "3D printing"), the method of marking would typically require the licensee to embed (or use pre-existing) metal serial number plates within the plastic to ensure they cannot be worn away during normal use.[66] Incorporation of this metal plate along with other metal components would also help ensure that the polymer firearm does not violate the Undetectable Firearms Act, 18 U.S.C. 922(p), which prohibits the manufacture and possession of firearms that are not as detectable as the "Security Exemplar" that contains 3.7 ounces of material type 17–4 PH stainless steel.[67]

PMFs currently in inventory that a licensee chooses not to mark may also be destroyed or voluntarily turned in to law enforcement within the 60-day period. Also, this proposed rule would not require Federal firearms licensees to accept any PMFs, or to mark them themselves. Licensees would be able to refuse to accept PMFs, or arrange for private individuals to have them marked by another licensee before accepting them, provided they are properly marked in accordance with this proposed rule. To provide greater access to professional marking, as stated previously, this rule would clarify that the meaning of the term "gunsmith" includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services.

Consistent with the language and purpose of the GCA, this proposed provision is necessary to allow ATF to trace all firearms acquired and disposed of by licensees, prevent illicit firearms trafficking, and provide guidance to FFLs and the public with respect to PMF transactions with the licensed community. This provision is crucial in light of advances in technology that allow unlicensed persons easily to produce firearms at home from parts ordered online, or by using 3D printers or personally owned or leased equipment. Such privately made firearms have and will continue to make their way to the primary market in firearms throughout the licensed community.[68] At the same time, consistent with the intent of the GCA,[69] nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law.[70] Persons should consult the laws and officials in their own States and localities to determine the lawfulness of PMFs.

[65] Under this rule, licensed collectors would only need to mark PMFs they receive or otherwise acquire that are defined as "curios or relics." *See* 27 CFR 478.11 (definitions of "firearm" and "curios or relics").

[66] When the size and depth of markings regulations were first promulgated, ATF recognized that "all markings can be removed by someone who wishes to make a deliberate effort to remove the markings. Realistically, we need to be concerned about markings that could be worn away during normal use or markings that could survive normal refinishing processes, *e.g.*, blueing, plating, etc. . . . As such, ATF has required manufacturers and importers who use polymer plastic frames to mark serial numbers in a steel plate embedded within the plastic." 66 FR 40599 (Aug. 3, 2001).

[67] Handguns that are 3D printed are also subject to the registration and taxation requirements of the NFA if they have a smooth bore and are capable of being concealed on the person, thereby falling within the definition of "any other weapon." *See* 26 U.S.C. 5845(e).

[68] Under Federal law, for example, certain firearm transactions must be conducted through Federal firearms licensees. *See* 18 U.S.C. 922(a)(5) (prohibiting any person other than a licensee, subject to certain limited exceptions, from selling or delivering a firearm to an unlicensed out of state resident).

[69] *See* Public Law 90–351, sec. 901(b), 82 Stat. 227.

[70] This rule is also consistent with the Second Amendment. As the Supreme Court stated in *District of Columbia* v. *Heller*, 554 U.S. 570, 626–27 & n.26 (2008), "presumptively lawful regulatory measures" include those "imposing conditions and qualifications on the commercial sale of arms." *See also United States* v. *Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010) (concluding that even if strict scrutiny were to apply, 18 U.S.C. 922(k) (prohibiting possession of firearms with obliterated serial numbers) would be upheld under the Second Amendment because "serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms. Because it assists law enforcement in this manner, we find its preservation is not only a substantial but a compelling interest.").

AMERICAN OVERSIGHT

5. Meaning of Marking Terms

An additional amendment to 27 CFR 478.92 and 478.102 would clarify the meaning of the terms ''legible'' and ''legibly'' to ensure that ''the identification markings use exclusively Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen,'' and that the terms ''conspicuous'' and ''conspicuously'' are understood to mean that ''the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.'' This would codify the meaning of those terms as explained in ATF Ruling 2002–6 (''legible''), and ATF's final rule at 66 FR 40599 (Aug. 3, 2001) (referencing U.S. Customs Service regulations on the definition of ''conspicuous'').

6. Alternate Means or Period of Identification

This proposed rule would not alter the Director's ability to authorize other means of identification, or a ''marking variance,'' for any part defined as a firearm (including a machinegun or silencer) upon receipt of a letter application or an Application for Alternate Means of Identification of Firearms (Marking Variance), ATF Form 3311.4, showing that such other identification is reasonable and does not hinder the effective administration of the regulations. The amendment would also allow ATF to grant a variance from the period in which to mark firearms.

7. Destructive Device Period of Identification

Similar to other firearms, because the proposed rule would now specify the seven-day grace period in which to mark all completed firearms, including destructive devices, this rule would also allow ATF to grant a variance from this period. The marking requirements for destructive devices are otherwise unchanged.

8. Adoption of Identifying Markings

This rule proposes to authorize licensed manufacturers and importers to adopt an existing serial number, caliber/gauge, model, or other markings already identified on a firearm provided they legibly and conspicuously place, or cause to be placed, on each part (or part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, which is the first three and last five digits followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number],'' to ensure the traceability of the firearm. This language would supersede ATF Ruling 2013–3 as it applies to licensed manufacturers and importers, but the ruling would remain effective for makers of NFA firearms. This change would help avoid multiple markings on firearms that could be confusing to law enforcement and alleviate concerns of some manufacturers and importers regarding serial number duplication when firearms are remanufactured or reimported.

9. Firearm Muffler or Silencer Parts Transferred Between Qualified Licensees

Licensed and qualified firearm muffler or silencer manufacturers routinely transfer small internal muffler or silencer components to each other to produce complete devices, and between qualified licensees when repairing existing devices. Because of the difficulties and expense of marking and registering small individual components used to commercially manufacture a complete muffler or silencer device with little law enforcement benefit, this proposed rule would allow qualified manufacturers to transfer parts defined as a firearm muffler or silencer to other qualified manufacturers without immediately identifying or registering them. Once the new device is complete with the part, the manufacturer would be required to identify and register the device in the manner and within the period specified in this rule for a complete device. Likewise, the proposed rule would allow qualified manufacturers to transfer muffler or silencer replacement parts to qualified manufacturers and dealers to repair existing devices already identified and registered in the NFRTR. Further, this rule would amend the definition of ''transfer'' to clarify that the temporary conveyance of a lawfully possessed NFA firearm, including a silencer, to a qualified manufacturer or dealer for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor is not a ''transfer'' requiring additional identification or registration in the NFRTR. This change would be consistent with the definition of ''transfer'' in 26 U.S.C. 5845(j) because a temporary conveyance for these purposes is not a sale or other disposition.[71] These proposed rules are intended to reduce the practical and administrative problems of marking and registering silencer parts by the regulated industry, and avoid a potential resource burden on ATF to process numerous tax-exempt registration applications with little public safety benefit.[72]

10. Voluntary Classification of Firearms and Armor Piercing Ammunition

For many years, ATF has acted on voluntarily requests from persons, particularly manufacturers who are developing new products, by issuing determinations or ''classifications'' whether an item is a ''firearm'' or ''armor piercing ammunition'' as defined in the GCA or NFA. This helps regulated industry members and the public determine what laws and regulations may be applicable to the product, and any steps that they may need to take to be compliant with those laws and regulations. To clarify this process, this proposed rule would set forth the procedure and conditions by which persons may voluntarily submit such requests to ATF. Each request would be submitted in writing or on an ATF form executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. Upon completion of the examination, ATF may return the sample to the person who made the request unless a determination is made that return of the

[71] The definition of ''transfer'' in the NFA only includes ''selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of'' a firearm. *See United States* v. *Smith,* 642 F.2d 1179, 1182 (9th Cir. 1981) (''We cannot agree that Congress intended to impose a transfer tax and require registration whenever mere physical possession of a firearm is surrendered for a brief period.'').

[72] These changes are consistent with ATF enforcement policy. *See NFA Handbook,* ATF E-Publication 5320.8 (April 2009), pp. 46, 60 sections 7.4.6; 9.5.1. With regard to silencer repairs, in order to avoid any appearance that an unlawful ''transfer'' has taken place, ATF recommends that an Application for Tax Exempt Transfer and Registration of Firearm, ATF Form 5, be submitted for approval prior to conveying the firearm for repair or identifying the firearm. The conveyance may also be accomplished by submission of a letter from the registrant to the qualified FFL advising the FFL that the registrant is shipping or delivering the firearm for repair/identification and describing the repair or identification. Return of the registered silencer to the registrant may likewise be accomplished by submission of an ATF Form 5 or by a letter from the FFL to the registrant that accompanies the silencer.

AMERICAN OVERSIGHT

sample would be or place the person in violation of law.

ATF's decision whether to classify an item voluntarily submitted is entirely discretionary. The proposed procedure would assist ATF more efficiently to determine the design and intent of the manufacturer of the item through its written statements, and by examining the objective design features of an actual sample along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item (though ATF is not limited to examining the items submitted to make its determination). The proposed rule would further codify ATF's policy not to evaluate a firearm accessory or attachment "unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used," and would further explain that "[a] determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration."

I. Recordkeeping

1. Acquisition and Disposition Records

This proposed rule would make minor amendments to 27 CFR 478.122, 478.123, 478.125, and 478.125a, pertaining to the acquisition and disposition records maintained by importers, manufacturers, and dealers. Due to the possibility that a firearm may have more than one frame or receiver as defined in this rule, and the changes to marking regulations, this rule would make technical amendments to these recordkeeping regulations to make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) in the regulations and for the formatting of their records as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that Federal firearms licensees record more than one manufacturer, importer, or serial number, if appropriate, when acquiring or disposing of firearms with multiple components marked as the frame or receiver, or that have been remanufactured or reimported by another licensee. This is consistent with prior ATF guidance to the firearms industry.[73] However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* "closed out") or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

Over the years, licensed importers and manufacturers have asked ATF to allow them to consolidate their records of importation or manufacture and acquisition and disposition of firearms, rather than maintaining separate records as required by 27 CFR 478.122(d) and 478.123(d). Because separate records are also difficult for ATF to inspect, this rule would amend §§ 478.122 and 478.123 to require licensed importers and manufacturers to consolidate their records of importation, manufacture, or other acquisition, and their sale or other disposition in a format containing the applicable columns specified in a table included in § 478.122(b). The columns may be in a different order than the specified format provided they contain all required information. These changes would supersede ATF Rulings 2011–1 and 2016–3, and those rulings would become obsolete upon publication of a final rule.

This rule would also make minor clarifying edits to the format of the Firearms Acquisition and Disposition Record in § 478.125(e). The column titled "Name and address or name and license No." would be retitled as "Name and address of nonlicensee; or if licensee, name and License No." In addition, the column titled "Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically" would be retitled "Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically." This change would make clear that both the name and license number (not the address) of a licensee from whom firearms are received and to whom they are disposed are recorded in the A&D Record. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* "closed out") or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

The proposed changes to § 478.125 would also include a minor amendment to paragraph (f) to make it clear that in the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee must record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. This change is needed to ensure that acquisition records are closed out when firearms are no longer in inventory.[74] This would resolve a significant problem that ATF Industry Operations Investigators have when trying to reconcile the inventory of a Federal firearms licensee, and that Federal firearms licensees have when timely responding to trace requests, particularly when old A&D Records are "closed out" and stored, which, under this proposed rule, could be in a separate warehouse depending on their age (see Section II.J of the preamble).

2. Firearms Transaction Records

Some technical amendments would be needed at 27 CFR 478.124 pertaining to information recorded on the ATF Form 4473. Like changes to the recordkeeping regulations, these amendments would make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) to ensure that the Federal firearms licensee is recording more than one manufacturer, importer, and serial number, if appropriate, on Forms 4473. In addition, the proposed changes to § 478.124 would include a minor technical amendment to paragraph (f) by removing a phrase that indicates that a Federal firearms licensee must fill out the firearm description information only after filling out the information about the transferee. Making this deletion would codify ATF Procedure 2020–1, which sets forth an alternative method of complying with § 478.124(f) for non-over-the-counter firearm transactions. ATF recently issued that procedure in light of changes to ATF Form 4473 (May 2020), which now requires completion of the form in an order different from that provided in § 478.124(f).

3. Recordkeeping for Privately Made Firearms

Minor changes to the above regulations regarding recordkeeping by licensees would also be needed to account for any voluntary receipts or other acquisitions (including from a personal collection) of privately made firearms, and corresponding dispositions (including to a personal collection). Since PMFs are not

[73] *See* FFL Newsletter, May 2012, p.5 ("If a firearm is marked with two manufacturer's names, or multiple manufacturer and importer names, FFLs should record each manufacturers' and importers' name in the A&D record.").

[74] This is consistent with prior ATF guidance to the firearms industry. *See* FFL Newsletter, Sept. 2011, p.5.

AMERICAN OVERSIGHT

commercially manufactured, if a PMF were received or otherwise acquired by a licensee or disposed of, or imported, the abbreviation ''PMF'' would be recorded as the manufacturer in the appropriate column on a licensee's acquisition and disposition record, ATF Form 4473, or import application, as well as the PMF serial number beginning with the abbreviated FFL number in the serial number column. For PMFs received prior to the effective date of a final rule that are to be identified by the licensee in accordance with § 478.92, or by another licensee at the licensee's request, the licensee would be required to first record the firearm as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight). Once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce a title format change to the A&D Record to add ''and/or PMF'' in the manufacturer column until an existing paper record book is completed (*i.e.,* ''closed out'') or electronic record version updated in the normal course of business, provided each PMF received is accurately recorded as a ''PMF'' in the manufacturer column.

4. NFA Forms Update

Minor technical amendments would also be needed in 27 CFR 479.62, 479.84, 479.88, 479.90, and 479.141, pertaining to NFA Form 1 (Application to Make), NFA Form 4 (Application to Transfer), NFA Form 3 (Tax Exempt Transfers—SOTs), NFA Form 5 (Tax Exempt Transfers—Governmental Entities), and the Stolen or Lost Firearms report, respectively. Due to the new definitions and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), importer(s), serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, importer, or serial number, if appropriate, is recorded when completing the NFA forms.

5. Importation Forms Update

Minor technical amendments would also be needed in 27 CFR 447.42, 447.45, 478.112, 478.113, 478.114, and 479.112, pertaining to the importation of firearms. Again, due to the new definition and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), country or countries of manufacture, and serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, country, importer, or serial number, if appropriate, is recorded when completing importation forms.

J. Record Retention

This rule also proposes to amend 27 CFR 478.129 to remove language stating that FFL dealers and collectors need only keep A&D Records and ATF Forms 4473 for up to 20 years following the date of sale or disposition of the firearm. The proposed changes would require Federal firearms licensees to retain all records until business or licensed activity is discontinued, either on paper or in an electronic format approved by the Director,[75] at the business or collection premises readily accessible for inspection. There would also be an amendment to 27 CFR 478.50(a) to allow all licensees, including manufacturers and importers, to store paper records and forms with no open disposition entries and with no dispositions recorded within 20 years at a separate warehouse, which would be considered part of the business premises for this purpose and subject to inspection.

In view of advancements in electronic scanning and storage technology, and ATF's acceptance of electronic recordkeeping, these amendments would reverse a 1985 rulemaking allowing non-manufacturer/importer Federal firearms licensees to destroy their records after 20 years.[76] The durability and longevity of firearms means that they are often in circulation for more than 20 years, while the cost of storing firearm transaction records has decreased dramatically through electronic recordkeeping. The proposed amendments would enhance public safety by ensuring that records of active licensees will be available for tracing purposes. ATF has encountered some firearms retailers who have destroyed large numbers of records more than 20 years old so that they would no longer need to be stored physically. This resulted in some traces of firearms involved in crimes to be returned incomplete for lack of records. This provision is also essential if PMFs involved in crime are marked and traced directly to licensed dealers who, unlike licensed manufacturers and importers, are not presently required to maintain permanent records.

III. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic benefits, environmental benefits, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has determined that while this proposed rule is not economically significant, it is a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because this proposed rule raises novel legal or policy issues arising out of legal mandates. Accordingly, the rule has been reviewed by OMB.

This proposed rule would update the new definition of ''frame or receiver,'' among other items. Table 1 provides a summary of the provisions of this proposed rule, along with the estimated affected population, costs, and benefits.

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS

Category	NPRM
Applicability	• New Definition of Receiver.

[75] ATF previously approved electronic storage of certain records under the conditions set forth in ATF Rulings 2016–1 (Acquisition and Disposition Records) and 2016–2 (ATF Forms 4473).

[76] *See* 50 FR 26702 (June 28, 1985).

AMERICAN OVERSIGHT

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS—Continued

Category	NPRM
Affected Population	• Update Marking Requirements. • New Gunsmithing Definition. • Update Record Retention. • Other Technical Amendments. • 113,204 FFLs (Record Retention). • Unknown number of FFLs manufacturers and importers (Definition of Receiver). • 35 Non-FFL manufacturers (Definition of Receiver). • 6,044 FFL retailers (PMFs). • 36 Non-FFL retailers (PMFs). • Unknown number of Individual Owners.
Total Costs to Industry, Public, and Government (7% Discount Rate)	$1.1 million; $149,995 7% annualized.
Benefits (7% Discount Rate)	N/A.
Benefits (Qualitative)	• Provides clarity to courts on what constitutes a firearm frame or receiver. • Applies to new technology. • Makes consistent marking requirements. • Eases certain marking requirements. • Increases tracing of crime scene firearms to prosecute criminals.

1. New Definition of Firearm Frame or Receiver

The proposed definition of this term would maintain current classifications and current marking requirements of firearm frames or receivers, except that the licensed manufacturer or importer must mark on new designs or configurations either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, on each part defined as a frame or receiver, along with the serial number. To ensure traceability if the parts are separated, there would no longer be an option *only* to mark the FFL's name, city, and state on the slide or barrel. More specifically—

- The proposed definitions would take into account the fact that modern firearms do not house all the components as defined in the current definition. These definitions account for firearms such as split frames or multi-piece firearms;
- The proposed definition would recognize the current classifications of a firearm "frame or receiver." It is intended to encompass the majority, if not all, of existing regulated firearms, and no new marking requirements would be required for these existing designs and configurations;
- After this proposed rule is finalized, markings on new designs or configurations of firearms manufactured or imported may be accomplished by marking each frame or receiver with the licensee's name, city, and state, and serial number, or with the licensee's name and abbreviated license number prefix and number (serial number) in the manner prescribed by existing marking requirements;
- Markings would need to be accomplished within 7 days of completion of the active manufacturing process for the complete weapon (or frame or receiver of such weapon if not being sold as a complete weapon); and
- The proposed rule would require acquisition and disposition record changes to accommodate recording multiple frames or receivers that have different serial numbers if the original frames or receivers (with the same serial number) become separated and are reassembled with frames or receivers bearing different serial numbers.

ATF believes that the majority of the industry currently complies with these requirements, so the cost would be minimal. While the new definitions would mostly affect new designs or configurations of firearms, manufacturers would still be able to receive a determination or a variance on the design from ATF; therefore, they may not experience an additional cost or burden. For more details, please refer to Chapter 2 of the Regulatory Impact Analysis.[77]

2. Partially Complete, Disassembled, or Inoperable Firearm Kits

This section addresses non-FFL manufacturers who manufacture partially complete, disassembled, or inoperable frame or receiver kits, to include both firearm parts kits that allow a person to make only a frame or receiver, and those kits that allow a person to make a complete weapon. When a partially complete frame or receiver parts kit reaches a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state, it would be considered a firearm "frame or receiver" that must be marked. Further, under the proposed rule, weapon parts kits with partially complete frames or receivers containing the necessary parts such that they may readily be completed, assembled, converted, or restored to expel a projectile by the action of an explosive would be "firearms" for which each frame or receiver of the weapon, as defined under this rule, would need to be marked.

For non-FFL manufacturers of firearm parts kits containing a part defined as a firearm frame or receiver, ATF anticipates there would be a significant impact on these individual companies, but notes that the overall industry impact would also be minimal. Based on current marketing related to the unregulated sale of certain firearm parts kits, ATF anticipates that these non-FFLs would either become FFLs to sell regulated frames or receivers or complete weapons (either as kits or fully assembled), or would take a loss in revenue to sell unregulated items or parts kits that do not contain a frame or receiver (*i.e.*, unregulated raw materials or molds, fire control components, barrels, accessories, tools, jigs, or instructions), but not both. For more details, please refer to Chapter 3 of the Regulatory Impact Analysis.

3. Gunsmithing

The proposed rule would result in a one-time cost for contract gunsmithing, estimated to be $180,849. For more details, please refer to Chapter 4 of the Regulatory Impact Analysis.

[77] The Regulatory Impact Analysis is available on *www.regulations.gov* in the same docket as this rule.

AMERICAN OVERSIGHT

4. Silencers

The proposed rule would require silencers to be marked on any housing or structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device. Currently, the regulations assume that each part defined as a muffler or silencer must be marked and registered.[78] While this proposed change would increase the number of certain parts—firearm muffler or silencer frames or receivers—that need to be marked for modular silencers, this proposed change is not intended to require marking of all silencer parts so long as they are incorporated into a complete device by the original manufacturer or maker that is marked and registered. More specifically, none of the internal nonstructural parts of a complete muffler or silencer device would need to be marked so long as each frame or receiver as defined in this rule is marked. However, as with current regulations, silencer parts sold, shipped, or otherwise disposed of separately would still be considered ''silencers'' that require all markings prior to disposition except when transferred between qualified manufacturers for the production of new devices, and to qualified manufacturers and dealers for the repair of existing devices (see Section II.H.9 of the preamble).

However, the proposed rule would now require some manufacturers of silencers to mark the outer tube rather than the endcap. ATF anticipates only minimal costs associated with moving the serial number and other identifying information from the end cap or adding the same information to the outer tube on certain silencers. Furthermore, there may be a savings for individual owners of silencers. This proposed rule would expressly allow for repairs on silencer devices without having to undergo the additional NFA transfer and registration process, so long as the device is returned to the sender. For more details, please refer to Chapter 5 of the Regulatory Impact Analysis.

5. Privately Made Firearms

A firearm, including a frame or receiver, assembled or otherwise produced by a non-licensee without any markings by a licensee at the time of production or importation is defined as a ''privately made firearm (PMF)'' in the proposed rule. This does not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). Under the proposed rule, FFLs would be required to mark PMFs within 7 days of the firearm being received by a licensee, or before disposition, whichever first occurs. Licensees would have 60 days to mark PMFs already in inventory after a final rule becomes effective. FFLs would have the option to mark their existing PMFs themselves. Both FFLs and non-FFLs would have the option to contract with an FFL, such as a gunsmith, for this purpose, dispose of them, or send them to ATF or another law enforcement agency for disposal. The industry cost for this section is $563,340. For more details, please refer to Chapter 6 of the Regulatory Impact Analysis.

6. Record Retention

Currently, licensees other than manufacturers and importers do not have to store their ATF Forms 4473 or A&D records beyond 20 years. This proposed rule would require licensed dealers and collectors to store their Forms 4473 or A&D records indefinitely. The industry cost for this section would be minimal because FFLs could drop off their overflow records to ATF or have ATF ship them directly. The government cost for this provision is $68,939 annually. For more details, please refer to Chapter 7 of the Regulatory Impact Analysis.

7. ATF Form Updates

This proposed rule would modify existing forms and records, such as ATF Forms 4473, NFA forms, importation forms, the Stolen or Lost Firearms Reports, and A&D Records, to help ensure that if more than one manufacturer or serial number is identified on any firearm, those names or serial numbers are recorded. As paper forms run out, FFLs would be able to order forms as part of their normal operations. In other words, FFLs using paper forms requested from ATF are not anticipated to incur any additional cost. For FFLs maintaining transaction records electronically, these FFLs would also only be required to update their software during their next regularly scheduled update. Because software updates occur regularly, and costs are already incorporated for those, ATF does not anticipate any additional costs would be incurred for these changes. There is no cost associated with this section. For more details, please refer to Chapter 8 of the Regulatory Impact Analysis.

8. Total Cost of the Proposed Rule

The total 10-year undiscounted cost of this proposed rule is estimated to be $1.3 million. The total 10-year discounted cost of the rule is $1.0 million and $1.2 million at 7 percent and 3 percent respectively. The annualized cost of this proposed rule would be $147,048 and $135,750, also at 7 percent and 3 percent, respectively.

9. Alternatives

ATF considered various alternatives when preparing this proposed rule. For a more detailed analysis, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

a. This Proposed Rule

ATF chose to propose promulgating new definitions of ''frame or receiver,'' ''privately made firearm,'' ''gunsmithing,'' and an update to records retention and new requirements for marking silencers, because they would maximize benefits.

b. Other Considered Alternatives

Alternative 1—No change. While this alternative minimizes cost, it does not meet any of the objectives outlined in this proposed rule.

Alternative 2—Everytown for Gun Safety petition. ATF received a petition for rulemaking from Everytown for Gun Safety, a non-profit organization, proposing to define ''firearm frame or receiver'' in 27 CFR 478.11. That proposed definition focused on housing the ''trigger group''; however, it did not define ''trigger group'' and even if it did, it would not address firearms that do not house trigger components within a single housing, or which have a remote trigger outside the weapon. In other words, this alternative would fall short of addressing all technologies or designs of firearms that are currently available, or may become available in the future. It also does not address potential changes in firearms terminology. Thus, while the alternative requested by that petition would reduce the cost by reducing the number of entities affected, it does not fully address the objectives of this proposed rule.

Alternative 3—Grandfather all existing firearms and receivers. This alternative would grandfather in all existing firearms that would not meet the serialization standard for partially complete and split frames or receivers. This was considered and incorporated into the proposed alternative, where feasible. However, in order to enforce the regulation, a complete grandfathering of existing firearms and silencers is problematic in that manufacturers could continue to

[78] *See* footnote 47, *supra.*

AMERICAN OVERSIGHT

produce non-compliant firearm frames or receivers and falsely market them as grandfathered firearms. This could potentially pose an enforcement issue that may not be resolved for years if not decades.

Alternative 4—Require serialization of all partially complete firearms or split receivers. This would require all firearms purchased by individuals to be retroactively serialized. However, the cost would increase considerably and the GCA only regulates the manufacture of firearms by Federal firearm licensees, not the making of firearms for personal use by private unlicensed individuals.

B. Executive Order 13132

This proposed rule will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. This rule is not intended to supersede State requirements unless there is a direct and positive conflict between them such that they cannot be reconciled or consistently stand together.[79] States can require markings on firearms for individuals. This rule does not require individuals to mark their personal firearms. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

D. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (''RFA''), ATF prepared an Initial Regulatory Flexibility Analysis (''IRFA'') that examines the impacts of the proposed rule on small entities (5 U.S.C. 601 *et seq.*). The IRFA is included here and as part of the RFA. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000 people. 5 U.S.C. 601(6).

Because this proposed rule affects different populations in different ways, the analysis for the IRFA has been broken up by provision. Certain provisions may have a significant impact on certain small entities, such as non-FFL manufactures of firearm parts kits with incomplete firearm frames or receivers. Based on the information from this analysis:

- ATF estimates that this proposed rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufacturers and retailers of firearm parts kits with incomplete firearm frames or receivers, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- Non-FFL manufacturers are anticipated to be small and would potentially have a significant impact on their individual revenue.
- The second largest impact would be $12,828 if a manufacturer had to retool their existing production equipment, but ATF anticipates this is unlikely because this proposed rule encompasses the majority of existing technology. This would not affect future production because this work would be part of their normal operations in creating new firearms.
- ATF estimates the majority of affected entities are small entities that would experience a range of costs; therefore, this rule may have a significant impact on small entities.

Under the RFA, we are required to consider what, if any, impact this rule would have on small entities. Agencies must perform a review to determine whether a rule will have such an impact. Because the agency has determined that it will, the agency has prepared an initial regulatory flexibility analysis as described in the RFA. Under Section 603(b) of the RFA, the regulatory flexibility analysis must provide or address:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and
- Descriptions of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

1. A Description of the Reasons Why Action by the Agency Is Being Considered

One of the reasons ATF is considering this proposed regulation is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the by-product of a transaction between two parties that is not accounted for in the transaction.

This proposed rule would update the existing definition of frame or receiver to account for the majority of technological advances in the industry and ensure that these firearms continue to remain under the regulatory regime as intended by the enactment of the GCA, including accounting for manufacturing of firearms using multiple manufacturers. In light of recent court cases, the majority of regulated firearms may not meet the existing definition of firearm frame or receiver. This may result in no part of a firearm being regulated as a ''frame or receiver'' contrary to the requirements in the GCA that ensure tracing to solve crime and help prevent prohibited persons from coming into possession of weapons. Furthermore, finding information in support of criminal cases may be hindered because records are destroyed after 20 years despite the fact that firearms may last longer than 20 years and be used in criminal activities.

This proposed rule would also account for advances in technology in performing transactions such as electronic storage. For more specific details regarding the need for regulation, please refer to the specific chapters pertaining to each provision of this proposed rule.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The Attorney General is responsible for enforcing the GCA, as amended, and the NFA, as amended. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A); *id.* at 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See*

[79] *See* 18 U.S.C. 927.

AMERICAN OVERSIGHT

28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing both the GCA and the NFA. *See* 27 CFR parts 478, 479.

The proposed rule provides new regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' because they are outdated. The proposed rule would also amend ATF's definitions of ''firearm'' and ''gunsmith'' to clarify the meaning of those terms, and to add new regulatory terms such as ''complete weapon,'' ''complete muffler or silencer device,'' ''privately made firearm,'' and ''readily'' for purposes of clarity given advancements in firearms technology. Further, the proposed rule would amend ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

- ATF estimates that this rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufactures and retailers of firearm kits, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- ATF anticipates the majority of affected entities are small entities and would experience any range of costs; therefore this rule would have a significant impact on a substantial number of small entities.

4. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

This proposed rule does not duplicate or conflict with other Federal rules.

5. Descriptions of any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

The significant alternatives considered are set forth in Section IV(A)(9) of this preamble. For more details, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804.

F. Unfunded Mandate Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

G. Paperwork Reduction Act of 1995

This proposed rule would call for collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–20). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Under the provisions of this proposed rule, there would be a one-time increase in paperwork burdens of identification markings placed on firearms as well as additional transaction records. This requirement would be added to an existing approved collection covered by OMB control number 1140–0050 and 1140–0067.

Title: Identification Markings Placed on Firearms.

OMB Control Number: OMB 1140–0050.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information in fighting crime by facilitating the tracing of firearms used in criminal activities. The systematic tracking of firearms from the manufacturer or U.S. importer to the retail purchaser also enables law enforcement agencies to identify suspects involved in criminal violations, determine if a firearm is stolen, and provide other information relevant to a criminal investigation.

Description and Number of Respondents: Currently there are 12,252 licensed manufacturers of firearms and 1,343 licensed importers. Of the potential number of licensed dealers and licensed pawnbrokers, ATF estimates that those directly affected would be a one-time surge of 5,298 licensed dealers, 710 licensed pawnbrokers, and 36 non-licensed dealers that would be affected. This proposed rule would affect a one-time surge of 6,044 respondents.

Frequency of Response: There will be a recurring response for all currently existing 13,595 licensed manufactures and licensed importers. This proposed rule would affect a one-time number of responses of 12,088 responses (6,044 respondents * 2 responses).

Burden of Response: This includes recurring time burden of 1 minute. ATF anticipates a one-time hourly burden of 0.25 hours per respondent.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 85,630 hours. The new burden, as a result of this proposed rulemaking, is a one-time hourly burden of 3,022 (6,044 respondents * 2 responses * 0.25 hourly burden per respondent).

Title: Licensed Firearms Manufactures Records of Production, Disposition, and Supporting Data.

OMB Control Number: OMB 1140–0067.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information for criminal investigation or regulatory compliance with the Gun Control Act of 1968. The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer, without such reasonable cause or warrant, and during the course of a criminal investigation of a person or persons other than the licensee in order to ensure compliance with the recordkeeping requirements of 18 U.S.C. 923(g)(1)(A) and (B). The Attorney General may also inspect or examine any records relating to firearms involved in a criminal investigation that is traced to the licensee, or firearms that may have been disposed of during the course of a bona fide criminal investigation.

Description and Number of Respondents: The current number of respondents is 9,056 firearm manufacturers, but this proposed rule would have a one-time surge for an unknown select few licensed manufacturers.

Frequency of Response: There will be a recurring response for all 9,056 licensed manufacturers, but only a one-time surge of 6,790 responses ((2,649 licensed dealer submissions + 710 license pawnbroker submissions + 36 non-licensed dealers) * 2 firearms or firearm kits) to licensed manufactures.

Burden of Response: This includes recurring time burden of 1.05 minutes. The burden resulting from this proposed

AMERICAN OVERSIGHT

rule is 0.25 hours per set of submittals by licensed dealers and licensed pawnbrokers to licensed manufacturers.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 201,205 hours. The new burden, as a result of this proposed rulemaking, is 1,698 hours (6,790 responses * 0.25 hours).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), a copy of this proposed rule will be submitted to OMB for its review of the collections of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information becomes effective, we will publish a notice in the **Federal Register** and request additional comments regarding the collection of information prior to OMB's decision to approve, modify, or disapprove the proposed collection.

IV. Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on the feasibility of implementing the new definition of firearm ''frame or receiver'' in 27 CFR 478.11 and 27 CFR 479.11, and related definitions and amendments that ensure the proper marking, recordkeeping, and traceability of all firearms manufactured, imported, acquired and disposed by Federal firearms licensees. ATF also requests comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits.

All comments must reference this document's docket number ATF 2021R–05, be legible, and include the commenter's complete first and last name and full mailing address. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity. ATF will retain all comments as part of this rulemakings administrative record. ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if ATF cannot read your comment due to technical difficulties and cannot contact you for clarification, ATF may not be able to consider your comment.

ATF will carefully consider all comments, as appropriate, received on or before the closing date, and will give comments after that date the same consideration if practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at ATF and on the internet through the Federal eRulemaking Portal, and subject to the Freedom of Information Act (5 U.S.C. 552). Commenters who do not want their name or other personal identifying information posted on the internet should submit comments by mail or facsimile, along with a separate cover sheet containing their personal identifying information. Both the cover sheet and comment must reference this docket number (2021R–05). For comments submitted by mail or facsimile, information contained on the cover sheet will not appear when posted on the internet but any personal identifying information that appears within a comment will not be redacted by ATF and it will appear on the internet.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter shall place any portion of a comment that is proprietary or confidential business information under law on pages separate from the balance of the comment with each page prominently marked ''PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION'' at the top of the page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it received, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal process.

C. Submitting Comments

Submit comments in any of three ways (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

- *Federal eRulemaking Portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at *www.regulations.gov* and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.
- *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's first and last name and full mailing address, be signed, and may be of any length.
- *Facsimile:* Submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

1. Be legible and appear in minimum 12 point font size (.17 inches);
2. Be 8½″ x 11″ paper;
3. Be signed and contain the commenter's complete first and last name and full mailing address; and
4. Be no more than five pages long.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for ATF 2021R–05), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects

27 CFR Part 447

Administrative practice and procedure, Arms control, Arms and

AMERICAN OVERSIGHT

munitions, Authority delegation, Chemicals, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements, Scientific equipment, Seizures and forfeitures.

27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

27 CFR Part 479

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, 27 CFR parts 447, 478, and 479 are proposed to be amended as follows:

PART 447—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

■ 1. The authority citation for 27 CFR part 447 continues to read as follows:

Authority: 22 U.S.C. 2778; Exec. Order 13637, 78 FR 16129 (Mar. 8, 2013).

§ 447.42 [Amended]

■ 2. Amend § 447.42 as follows:
■ a. In paragraph (a)(1)(ii), remove the word "country" and add in its place the term "country or countries";
■ b. In paragraph (a)(1)(iv)(A), remove "manufacturer" and add in its place "manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)"; and
■ c. In paragraph (a)(1)(iv)(G), remove "serial number" and add in its place "serial number(s)".

§ 447.45 [Amended]

■ 3. Amend § 447.45 as follows:
■ a. In paragraph (a)(2)(ii), remove "manufacturer of the defense article" and add in its place "manufacturer(s) of the defense article or privately made firearm (if privately made in the United States)";
■ b. In paragraph (a)(2)(iii), remove the word "country" and add in its place the term "country or countries"; and
■ c. In paragraph (a)(2)(vii), remove "serial number" and add in its place "serial number(s)".

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 4. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

■ 5. In § 478.11:
■ a. Add, in alphabetical order, definitions for "Complete muffler or silencer device" and "Complete weapon";
■ b. Revise the definition of "Engaged in the business" paragraph (d) "Gunsmith" and the definition of "Firearm";
■ c. Remove the definition of "Firearm frame or receiver"; and
■ d. Add, in alphabetical order, definitions for "Frame or receiver", "Importer or manufacturer's serial number", "Privately made firearm (PMF)", and "Readily".

The additions and revisions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Engaged in the business— * * *

(d) Gunsmith. A person who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms;

* * * * *

Firearm. Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. The term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed.

* * * * *

Frame or receiver. A part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure. Any such part identified with a serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be a frame or receiver. For purposes of this definition, the term "fire control component" means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. The following are nonexclusive examples that illustrate this definition:

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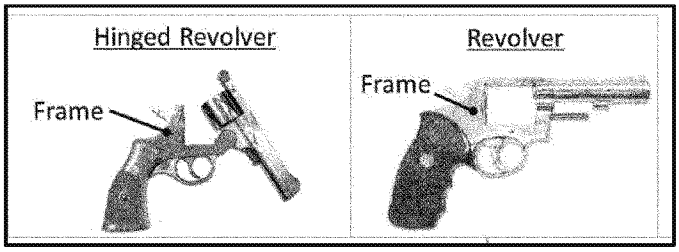
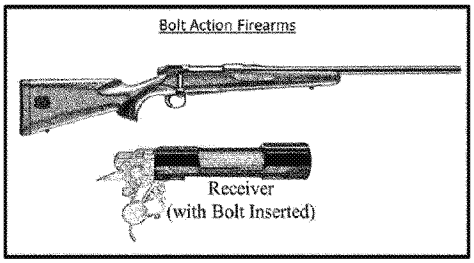
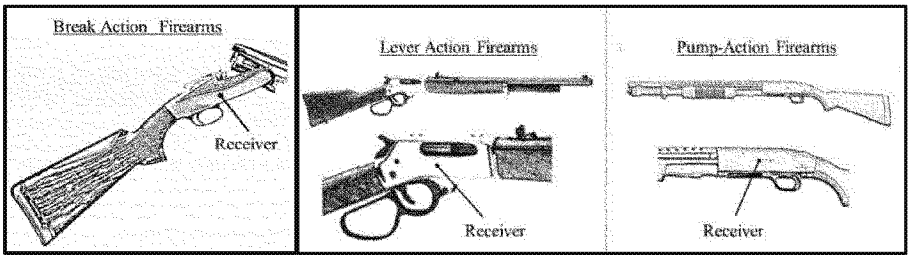
Example 1 – Hinged or single framed revolver: The frame or receiver is the part of the revolver that provides a structure designed to hold the trigger, hammer, and cylinder.



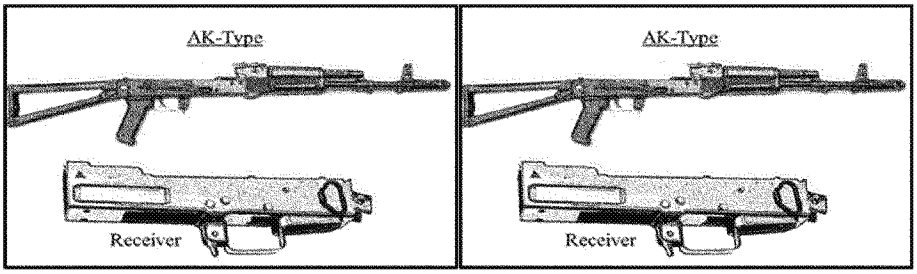
Example 2 – Bolt action rifle: The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



Example 3 – Break action, lever action, or pump action rifle or shotgun: The frame or receiver is the part of the rifle or shotgun that provides housing for the bolt and firing pin, or a structure designed to integrate the breechblock.



Example 4 - Semiautomatic firearm or machinegun with a single receiver housing all fire control components: The frame or receiver is the part of the firearm that provides housing for the hammer, bolt, trigger mechanism, and firing pin (*e.g.*, AK-type firearms).



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(a) *Firearm muffler or silencer frame or receiver.* The term ''frame or receiver'' shall mean, in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: Baffles, baffling material, or expansion chamber.

(b) *Split or modular frame or receiver.* (1) In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (*e.g.,* a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. In making this determination, the Director will consider the following factors, with no single factor being controlling:

(i) Which component the manufacturer intended to be the frame or receiver;

(ii) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;

(iii) How the component fits within the overall design of the firearm when assembled;

(iv) The design and function of the fire control components to be housed or integrated;

(v) Whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed;

(vi) Whether classifying the particular component is consistent with the legislative intent of the Act and this part; and

(vii) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

(2) Frames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.

(3) The Director has previously determined that a specific part is the frame or receiver with respect to certain weapons with split or modular frames or receivers. The following is a nonexclusive list of such weapons and the specific part identified as the frame or receiver as they existed on [date of publication of the final rule]:

(i) *Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols:* The lower portion of the pistol, or grip, that provides housing for the trigger mechanism and hammer, and a structure designed to integrate the slide rails.

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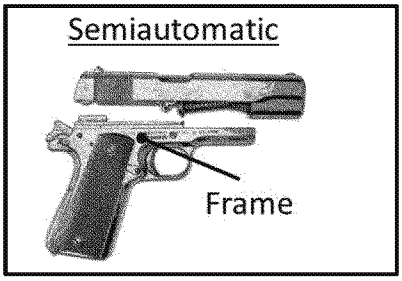
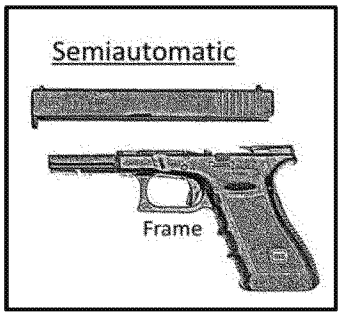
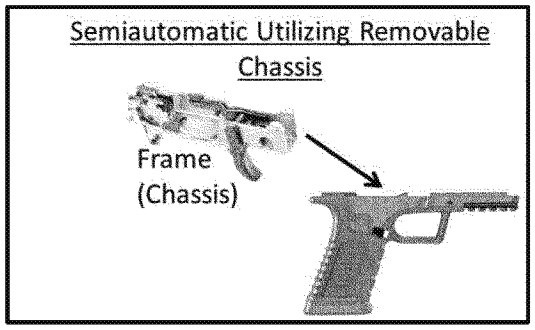
AMERICAN OVERSIGHT



(ii) *Glock-type striker-fired semiautomatic pistols:* the lower portion of the pistol, or grip, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(iii) *Sig Sauer P320-type semiautomatic pistols:* the internal removable chassis of the pistol, partially exposed to the exterior to allow identification, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(iv) *Certain locking block rail system semiautomatic pistols:* the internal removable frame of the pistol that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails, provided a portion is partially exposed to the exterior to allow identification.

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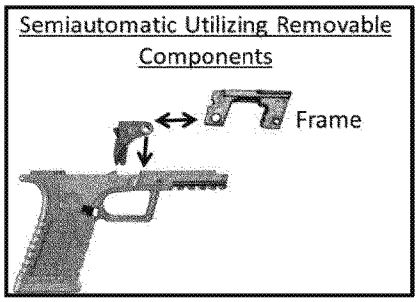
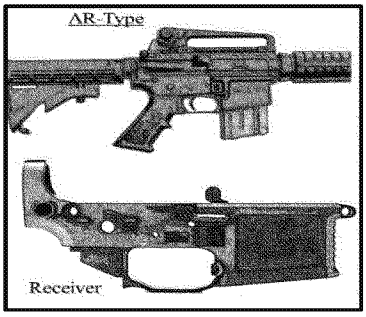
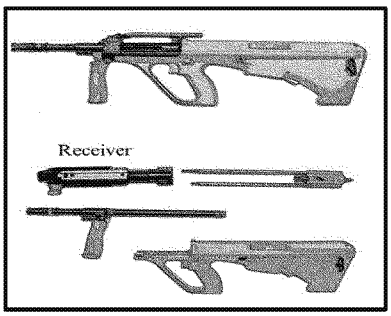


(v) *AR-15-type, and Beretta AR-70-type firearms:* the lower part of the weapon that provides housing for the trigger mechanism and hammer.

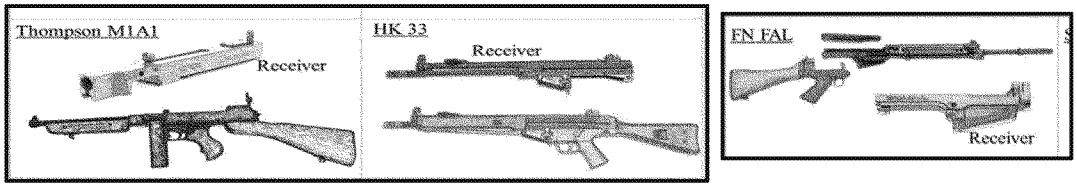


(vi) *Steyr AUG-type firearms:* the central part of the weapon that provides housing for the rods in the bolt carrier sub-assembly and a structure designed to attach the barrel.

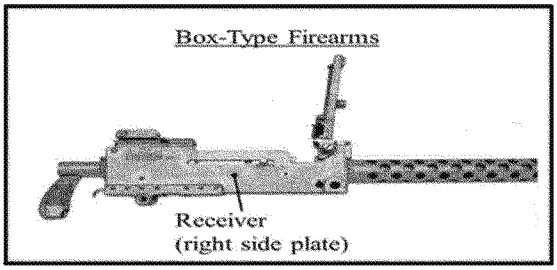


(vii) *Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants:* the upper part of the weapon that provides housing for the bolt and firing pin.

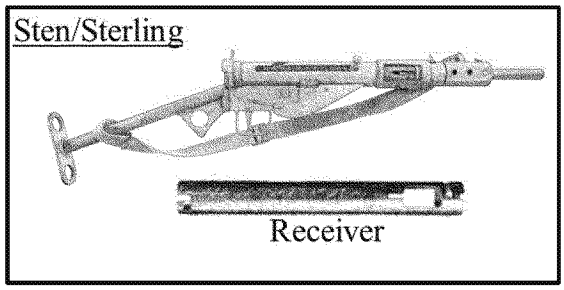
AMERICAN OVERSIGHT



(viii) *Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof:* the side plate of the weapon that provides a structure designed to hold the charging handle.



(ix) *Sten, Sterling, and Kel-Tec SUB-2000-type firearms:* the central part of the weapon, or tube, that provides housing for the bolt and firing pin.



BILLING CODE 4410–FY–C

(c) *Partially complete, disassembled, or inoperable frame or receiver.* The term ''frame or receiver'' shall include, in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state. In determining whether a partially complete, disassembled, or inoperable frame or receiver may readily be assembled, completed, converted, or restored to a functional state, the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials. For purposes of this definition, the term ''partially complete,'' as it modifies ''frame or receiver,'' means a forging, casting, printing, extrusion, machined body or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.

(d) *Destroyed frame or receiver.* The term ''frame or receiver'' shall not include a frame or receiver that is destroyed. For purposes of this definition, the term ''destroyed'' means that the frame or receiver has been permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and may not readily be assembled, completed, converted, or restored to a functional state. Acceptable methods of destruction include completely melting, crushing, or shredding the frame or receiver, or by completely severing at least three critical areas of the frame or receiver using a cutting torch having a tip of sufficient size to displace at least ¼ inch of material at each location.

* * * * *

Importer's or manufacturer's serial number. The identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number. When used in this part, the term ''serial number'' shall mean the ''importer's or manufacturer's serial number.''

* * * * *

Privately made firearm (PMF). A firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings

AMERICAN OVERSIGHT

placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date).

* * * * *

Readily. A process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process. Factors relevant in making this determination, with no single one controlling, include the following:

(a) Time, *i.e.,* how long it takes to finish the process;

(b) Ease, *i.e.,* how difficult it is to do so;

(c) Expertise, *i.e.,* what knowledge and skills are required;

(d) Equipment, *i.e.,* what tools are required;

(e) Availability, *i.e.,* whether additional parts are required, and how easily they can be obtained;

(f) Expense, *i.e.,* how much it costs;

(g) Scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and

(h) Feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction.

* * * * *

§ 478.50 [Amended]

■ 6. In § 478.50(a), add the phrase "or as otherwise provided in § 478.129" after "at the licensed premises served by such warehouse".

■ 7. Revise § 478.92 to read as follows:

§ 478.92 Identification of firearms and armor piercing ammunition.

(a)(1) *Firearms manufactured or imported by licensees.* Licensed manufacturers and licensed importers of firearms must legibly identify each firearm they manufacture or import as follows:

(i) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. Except as provided in paragraph (a)(4)(v) of this section, each frame or receiver thereof must also be marked with either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* "12345678–[number]"; and

(ii) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (a)(4)(v) of this section, the additional information shall include:

(A) The model, if such designation has been made;

(B) The caliber or gauge;

(C) When applicable, the name of the foreign manufacturer; and

(D) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(iii) *Frame or receiver, machinegun conversion part, or muffler or silencer part disposed of separately.* Except as provided in paragraph (a)(4)(iv) of this section, each part defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by the licensee must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(iv) *Size and depth of markings.* The engraving, casting, or stamping (impressing) of the serial number and additional information must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(v) *Period of time to identify firearms.* Licensed manufacturers must identify a complete weapon or complete muffler or silencer device no later than seven days following the date of completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except as provided in paragraph (a)(4)(iv) of this section, licensed manufacturers must identify each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

(2) *Privately made firearms.* Unless previously identified by another licensee in accordance with this section, and except as provided in paragraph (a)(4)(vi) of this section, licensees must legibly and conspicuously identify each privately made firearm within seven days following the date of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner. PMFs must be identified by placing on each part (or specific part(s) previously determined by the Director) of a weapon defined as a frame or receiver, the same serial number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. The serial number(s) must begin with the licensee's abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* "12345678–[number]". The serial number(s) must be placed in a manner otherwise in accordance with this section, including the requirements that the serial number(s) be at the minimum size and depth, and not susceptible of being readily obliterated, altered, or removed.

(3) *Meaning of marking terms.* For purposes of this section, the terms "legible" and "legibly" mean that the identification markings use exclusively

AMERICAN OVERSIGHT

Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(4) *Exceptions*—(i) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from the licensee showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(ii) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from the licensee. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested period is reasonable and will not hinder the effective administration of this part.

(iii) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number]''.

(iv) *Firearm muffler or silencer parts*—(A) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under part 479 may transfer a part defined as a firearm muffler or firearm silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(B) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under part 479 may transfer a replacement part defined as a firearm muffler or firearm silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

(v) *Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE].* Licensed manufacturers and licensed importers may continue to identify firearms (other than PMFs) of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1)(i) and (ii) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

(vi) *Privately made firearms acquired before [EFFECTIVE DATE OF THE FINAL RULE].* Licensees shall identify in the manner prescribed by this section, or cause another licensee to so identify, each privately made firearm received or otherwise acquired (including from a personal collection) by the licensee before [EFFECTIVE DATE OF THE FINAL RULE] within sixty (60) days from that date, or prior to the date of final disposition (including to a personal collection), whichever is sooner.

(b) *Armor piercing ammunition.* (1) Marking of ammunition. Each licensed manufacturer or licensed importer of armor piercing ammunition shall identify such ammunition by means of painting, staining or dying the exterior of the projectile with an opaque black coloring. This coloring must completely cover the point of the projectile and at least 50 percent of that portion of the projectile which is visible when the projectile is loaded into a cartridge case.

(2) *Labeling of packages.* Each licensed manufacturer or licensed importer of armor piercing ammunition shall clearly and conspicuously label each package in which armor piercing ammunition is contained, *e.g.,* each box, carton, case, or other container. The label shall include the words ''ARMOR PIERCING'' in block letters at least ¼ inch in height. The lettering shall be located on the exterior surface of the package which contains information concerning the caliber or gauge of the ammunition. There shall also be placed on the same surface of the package in block lettering at least ⅛ inch in height the words ''FOR GOVERNMENTAL ENTITIES OR EXPORTATION ONLY.'' The statements required by this subparagraph shall be on a contrasting background.

(c) *Voluntary classification of firearms and armor piercing ammunition.* The Director may issue a determination to a person whether an item is a firearm or armor piercing ammunition as defined in this part upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 478.112 [Amended]

■ 8. Amend § 478.112 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)''; and

■ b. In paragraph (b)(1)(iv)(G), remove ''serial number'' and add in its place ''serial number(s)''.

§ 478.113 [Amended]

■ 9. Amend § 478.113 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove the word ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)'';

■ b. In paragraph (b)(1)(iv)(G), remove the words ''serial number'' and add in

AMERICAN OVERSIGHT

their place the words "serial number(s)";
■ c. In paragraph (c)(2)(ii), remove the word "manufacturer" and add in its place the word "manufacturer(s)";
■ d. In paragraph (c)(2)(iii), remove "country of manufacturer" and add in its place "country or countries of manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)"; and
■ e. In paragraph (c)(2)(vii), remove the words "serial number" and add in their place "serial number(s)".

§ 478.114 [Amended]

■ 10. Amend § 478.114 as follows:
■ a. In paragraph (a)(1)(v)(A), remove the word "manufacturer" and add in its place "manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)";
■ b. In paragraph (a)(1)(v)(G), remove the words "serial number" and add in their place "serial number(s)"; and
■ c. In paragraph (b)(2)(ii), add "or privately made firearm (if privately made in the United States)" after "ammunition".
■ 11. Revise § 478.122 to read as follows:

§ 478.122 Records maintained by importers.

(a) Each licensed importer shall record the name of the importer(s), manufacturer(s) and/or privately made firearm (if privately made in the United States), type, model, caliber or gauge, country or countries of manufacture (if imported), and serial number(s) of each firearm imported or otherwise acquired (including a frame or receiver to be disposed of separately), the date of such importation or other acquisition, and if otherwise acquired, the name and address, or the name and license number of the person from whom it was received. The information required by this paragraph shall be recorded not later than 15 days following the date of importation or other acquisition in a format with the applicable columns set forth in paragraph (b) of this section.

(b) A record of each firearm disposed of by an importer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed importer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearm was transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.*, date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns below, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles:

IMPORTER'S OR MANUFACTURER'S FIREARMS ACQUISITION AND DISPOSITION RECORD

Description of firearm						Import/manufacture/acquisition		Disposition		
Importer(s), manufacturer(s), and/or PMF (if privately made in the U.S.)	Type	Model	Caliber or gauge	Country or countries of manufacture (if imported)	Serial number(s)	Date of import, manufacture, or acquisition	Name and address of nonlicensee; or if licensee, name and license No. (if acquired)	Date of disposition	Name	Address of nonlicensee; license No. of licensee; or Form 4473 Serial No. if filed numerically

IMPORTER'S OR MANUFACTURER'S ARMOR PIERCING AMMUNITION DISPOSITION RECORD

Date of disposition	Manufacturer	Caliber or gauge	Quantity of projectiles	Purchaser—name and address

(c) The Director may authorize alternate records to be maintained by a licensed importer to record the acquisition and disposition of firearms and armor piercing ammunition when it is shown by the licensed importer that such alternate records will accurately and readily disclose the information required by this section. A licensed importer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate records and the need therefor. Such alternate records shall not be employed by the licensed importer until approval in such regard is received from the Director.

■ 12. Revise § 478.123 to read as follows:

§ 478.123 Records maintained by manufacturers.

(a) Each licensed manufacturer shall record the name of the manufacturer(s), importer(s) (if any) and/or privately made firearm (if privately made in the United States), type, model, caliber or gauge, and serial number(s) of each firearm manufactured or otherwise acquired (including a frame or receiver to be disposed of separately), the date of such manufacture or other acquisition, and if otherwise acquired, the name and address or the name and license number of the person from whom it was received. The information required by this paragraph shall be recorded not later than the close of the next business day following the date of such manufacture or other acquisition, except that, when a commercial record is held by the licensed manufacturer separately from other commercial documents and readily available for inspection, containing all acquisition information required for the record, the period for making the required entry into the record may be delayed not to exceed the seventh day following the date of receipt. The information required by this paragraph shall be recorded in a format containing the applicable columns prescribed by § 478.122.

AMERICAN OVERSIGHT

(b) A record of each firearm disposed of by a manufacturer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed manufacturer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearms were transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns prescribed by § 478.122, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles.

(c) The Director may authorize alternate records to be maintained by a licensed manufacturer to record the acquisition or disposition of firearms and armor piercing ammunition when it is shown by the licensed manufacturer that such alternate records will accurately and readily disclose the information required by this section. A licensed manufacturer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate record and the need therefor. Such alternate records shall not be employed by the licensed manufacturer until approval in such regard is received from the Director.

§ 478.124 [Amended]

■ 13. Amend § 478.124 as follows:

■ a. In paragraph (c)(4), remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ b. In the fourth sentence of paragraph (f), remove ''Upon receipt of such Forms 4473, the'' and add in its place ''The'', remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''.

■ 14. Amend § 478.125 as follows:

■ a. In paragraph (e):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'', wherever they appear, and add in their place ''serial number(s)'', and remove ''as provided in paragraph (g)'' and add in its place ''as provided in paragraphs (g) and (i)'';

■ ii. Add a sentence after the sixth sentence; and

■ iii. In the table Firearms Acquisition and Disposition Record remove ''Name and address or name and license No.'' and add in its place ''Name and address of nonlicensee; or if licensee, name and License No.'', and remove ''Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically'' and add in its place ''Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically'';

■ b. In paragraph (f)(1):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ ii. Add a sentence after the fifth sentence;

■ c. In paragraph (f)(2) table Firearms Collectors Acquisition and Disposition Record, remove ''Manufacturer'' and add in its place ''Manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''Serial No.'' and add in their place ''Serial number(s)''; and

■ d. Add paragraph (j).

The additions read as follows:

§ 478.125 Record of receipt and disposition.

* * * * *

(e) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(f) * * *

(1) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(j) *Privately made firearms.* Licensees must record each receipt (whether or not kept overnight) or other acquisition (including from a personal collection) and disposition (including to a personal collection) of a privately made firearm as required by this part, except that such information need not be recorded if the firearm is being identified under the direct supervision of another licensee with their information. Once a privately made firearm is identified by the licensee in accordance with section 478.92(a)(2), the licensee shall update the record of acquisition entry with the identifying information.

§ 478.125 [Amended]

■ 15. Amend § 478.125a as follows:

■ a. In the first sentence of paragraph (a)(4), remove ''manufacturer and importer (if any)'' and add in its place ''manufacturer(s) and importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)'', remove ''Manufacturer and importer (if any)'' and add in its place ''Manufacturer(s) and importer(s) (if any)'', and remove the words ''Serial No.'' and add in their place ''serial number(s)''.

■ 16. In § 478.129, revise paragraphs (b), (d), and (e) to read as follows:

§ 478.129 Record retention.

* * * * *

(b) *Firearms Transaction Record.* Licensees shall retain each Form 4473 until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the

AMERICAN OVERSIGHT

business premises readily accessible for inspection under this part. Paper forms over 20 years of age may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part. Forms 4473 shall be retained in the licensee's records as provided in § 478.124(b): Provided, that Forms 4473 with respect to which a sale, delivery or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

* * * * *

(d) *Records of importation and manufacture.* Licensees shall maintain records of the importation, manufacture, or other acquisition of firearms, including ATF Forms 6 and 6A as required by subpart G of this part, until business is discontinued. Licensed importers' records and licensed manufacturers' records of the sale or other disposition of firearms after December 15, 1968, shall be retained until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

(e) *Records of dealers and collectors.* The records prepared by licensed dealers and licensed collectors of the sale or other disposition of firearms and the corresponding record of receipt of such firearms shall be retained until business or licensed activity is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business or collection premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

* * * * *

PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

■ 17. The authority citation for 27 CFR part 479 continues to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

■ 18. In § 479.11:

■ a. Add definitions for "Complete muffler or silencer device" and "Complete weapon";

■ b. Revise the definition of "Frame or receiver";

■ c. Add a definition for "Readily"; and

■ d. Add a sentence at the end of the definition of "Transfer".

The additions and revision read as follows:

§ 479.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Frame or receiver. The term "frame or receiver" shall have the same meaning as in 27 CFR 478.11.

* * * * *

Readily. A process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process. Factors relevant in making this determination, with no single one controlling, include the following:

(a) Time, *i.e.,* how long it takes to finish the process;

(b) Ease, *i.e.,* how difficult it is to do so;

(c) Expertise, *i.e.,* what knowledge and skills are required;

(d) Equipment, *i.e.,* what tools are required;

(e) Availability, *i.e.,* whether additional parts are required, and how easily they can be obtained;

(f) Expense, *i.e.,* how much it costs;

(g) Scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and

(h) Feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction.

* * * * *

Transfer. * * * For purposes of this part, the term shall not include the temporary conveyance of a lawfully possessed firearm to a manufacturer or dealer qualified under this part for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor.

* * * * *

§ 479.62 [Amended]

■ 19. In § 479.62(b)(3), remove "manufacturer" and add in its place "manufacturer(s)" and remove the words "serial number" and add in their place "serial number(s)".

§ 479.84 [Amended]

■ 20. In § 479.84(b)(8), remove "manufacturer" and add in its place "manufacturer(s)", remove the words "importer (if known)" and add in their place "importer(s) (if known)", and remove the words "serial number", wherever they may be, and add in their place "serial number(s)".

§ 479.88 [Amended]

■ 21. In § 479.88(b), remove "manufacturer" and add in its place "manufacturer(s)", remove the word "importer" and add in its place "importer(s)", and remove the words "serial number" and add in their place "serial number(s)".

§ 479.90 [Amended]

■ 22. In § 479.90(b), remove the words "manufacturer", wherever they may be, and add in their place "manufacturer(s)", remove the word "importer" and add in its place "importer(s)", and remove the words "serial number" and add in their place "serial number(s)".

■ 23. Revise § 479.102 to read as follows:

§ 479.102 Identification of firearms.

(a) *Identification required.* You, as a manufacturer, importer, or maker of a firearm, must legibly identify the firearm as follows:

(1) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon, including a weapon parts kit, defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee or maker on any other firearm. Except as provided in paragraph (b)(5) of this section, each frame or receiver thereof must also be marked with either: Your name (or recognized abbreviation), and city and State (or recognized abbreviation) where you as a manufacturer or importer maintain your place of business, or in the case of a maker, where you made the

AMERICAN OVERSIGHT

firearm; or if a licensee, your name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.*, ''12345678–[number]''; and

(2) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (b)(5) of this section, the additional information shall include:

(i) The model, if such designation has been made;

(ii) The caliber or gauge;

(iii) When applicable, the name of the foreign manufacturer or maker; and

(iv) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(3) *Frame or receiver, machine gun conversion part, or silencer part disposed of separately.* Except as provided in paragraph (b)(4) of this section, each part defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by you must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(4) *Size and depth of markings.* The engraving, casting, or stamping (impressing) of the serial number and additional information must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(5) *Period of time to identify firearms.* You must identify a complete weapon or complete muffler or silencer device no later than seven days following the date of completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except as provided in paragraph (b)(4) of this section, you must identify each part, including a replacement part, defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

(6) *Meaning of marking terms.* For purposes of this section, the terms ''legible'' and ''legibly'' mean that the identification markings use exclusively Roman letters (*e.g.*, A, a, B, b, C, c) and Arabic numerals (*e.g.*, 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(b) *Exceptions*—(1) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from you showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(2) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from you. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested time period is reasonable and will not hinder the effective administration.

(3) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.*, ''12345678–[serial number]''.

(4) *Firearm muffler or silencer parts*—(i) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under this part may transfer a part defined as a muffler or silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a new complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(ii) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under this part may transfer a replacement part defined as a muffler or silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

(5) *Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE].* Licensed manufacturers and licensed importers may continue to identify firearms of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1) and (2) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

(c) *Voluntary classification of firearms.* The Director may issue a determination to a person whether an item is a firearm as defined in this part

AMERICAN OVERSIGHT

upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 479.103 [Amended]

■ 24. In § 479.103, at the end of the third sentence, add ", except as provided in § 479.102(b)(4)."

§ 479.112 [Amended]

■ 25. In § 479.112(a), second sentence, remove the words "serial number" and add in their place the words "serial number(s)".

§ 479.141 [Amended]

■ 26. In § 479.141, remove the word "manufacturer" and add in its place "manufacturer(s)" and remove the words "serial number" and add in their place "serial number(s)".

Dated: May 7, 2021.

Merrick B. Garland,

Attorney General.

[FR Doc. 2021–10058 Filed 5–20–21; 8:45 am]

BILLING CODE 4410–FY–P

AMERICAN OVERSIGHT

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-2523

BRIAN HOPE, *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF INDIANA DEPARTMENT OF CORRECTION, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-2865 — **Richard L. Young**, *Judge*.

ARGUED MAY 20, 2021 — DECIDED AUGUST 16, 2021

Before SYKES, *Chief Judge*, and EASTERBROOK, KANNE, ROVNER, WOOD, HAMILTON, BRENNAN, SCUDDER, ST. EVE, and KIRSCH, *Circuit Judges*.[1]

[1] Circuit Judge Jackson-Akiwumi did not participate in the consideration or decision of this case.

AMERICAN OVERSIGHT

ST. EVE, *Circuit Judge*. Indiana's Sex Offender Registration Act ("SORA") imposes registration requirements and restrictions on sex offenders who reside, work, or study in the State. Ind. Code § 11-8-8-1 *et seq*. By virtue of the State supreme court's construction of the Indiana Constitution, Indiana's Ex Post Facto Clause prohibits retroactive application of SORA to offenders convicted before its enactment unless the marginal effects of doing so would not be punitive. *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009). If an offender was under no registration requirement prior to SORA's passage, imposing a registration requirement in the first instance is impermissibly punitive. *Wallace*, 905 N.E.2d at 371. The Indiana Supreme Court has held, however, that if another state previously subjected a pre-SORA offender to a registration requirement, requiring him to register in Indiana is not punitive. *See, e.g.*, *Tyson v. State*, 51 N.E.3d 88 (Ind. 2016). Indiana caselaw thus has the peculiar effect of permitting the State to treat similarly situated offenders differently based solely on whether an offender had an out-of-state registration obligation. That feature underlies the present appeal.

The plaintiffs, six sex offenders residing in Indiana, were convicted prior to SORA's passage. Each of them had to register in another state. After moving to Indiana, the State required them to register under SORA. Absent their out-of-state registration obligations, Indiana's Constitution would prohibit SORA's application to them. Plaintiffs challenge the constitutionality of SORA on three fronts, arguing that it violates their right to travel under the Privileges or Immunities Clause, their right to equal protection under the Fourteenth Amendment, and Article I's prohibition on ex post facto laws. The district court granted summary judgment for the

AMERICAN OVERSIGHT

plaintiffs on all claims, and Indiana appealed. A divided panel of this Court affirmed the district court, but we subsequently agreed to hear the case en banc.

We now reverse. SORA does not violate the right to travel because it does not expressly discriminate based on residency, as consistently required by the Supreme Court. Plaintiffs' ex post facto claim is likewise precluded by precedent. Applying *Smith v. Doe*, 538 U.S. 84 (2003), we hold that SORA is not "so punitive either in purpose or effect" as to surmount Indiana's nonpunitive intent for the law. But because the district court did not address whether SORA passes rational basis scrutiny under an equal protection analysis, we remand for consideration of the equal protection claim.

I.

A.

The Indiana General Assembly enacted SORA, also known as "Zachary's Law," in 1994. SORA establishes both requirements and restrictions for qualifying sex offenders, and it authorizes the Indiana Department of Correction ("IDOC") to collect and publish data about them. Ind. Code § 11-8-2-13(b). Under SORA, offenders must register by reporting to local law enforcement at least once annually in every county where they reside, work, or study. §§ 11-8-8-14, 11-8-8-7. Reporting requirements are more frequent for "sexually violent predators"—every 90 days—and offenders without permanent housing—every 7 days. §§ 11-8-8-14, 11-8-8-12. Registration entails providing detailed personal information, including: a photograph; legal name, date of birth, and physiological features; identification numbers; internet usernames and email addresses; residential, school, and

AMERICAN OVERSIGHT

workplace addresses; vehicle information and license plate number; and any "other information required by the [IDOC]." § 11-8-8-8(a). Offenders must report any change to this information within 72 hours. SORA also mandates that law enforcement officers contact offenders once a year to verify their residences (every 90 days for sexually violent offenders). § 11-8-8-13(a). And offenders pay a yearly $50 registration fee, plus a $5 fee any time they must register a change of address. § 36-2-13-5.6.

Certain offenders are subject to more stringent requirements. A "sexually violent predator" must notify law enforcement if he plans to be absent from his residence for more than 72 hours and must register in the county that he visits. § 11-8-8-18. An "offender against children" may not work or volunteer at a school, daycare, youth program center, or public park and cannot live within 1,000 feet of these locations. §§ 35-42-4-10(c), 35-42-4-11. A "serious sex offender" may not enter school property. § 35-42-4-14. An offender's failure to comply with SORA can result in criminal sanctions.

Following its enactment, SORA underwent several expansions. Indiana broadened the list of crimes that trigger registration requirements, and it amended SORA to require registration for individuals convicted of substantially similar offenses in another state. On July 1, 2006, the General Assembly extended SORA's requirements to any "person who is required to register as a sex offender in any jurisdiction." § 11-8-8-5(b)(1). In its current form, SORA requires offenders to register if they were:

> (1) convicted of an enumerated Indiana criminal offense, §§ 11-8-8-4.5, 11-8-8-5(a);

AMERICAN OVERSIGHT

(2) convicted of a "substantially similar" offense in another jurisdiction, § 1-1-2-4(b)(3); or

(3) required to register by another state (the "other-jurisdiction provision"), § 11-8-8-5(b)(1).

By its plain terms, SORA covers any offender who fits within these categories—regardless of his date of conviction.

B.

While SORA is fully retrospective as a statutory matter, the Indiana Constitution constrains its applicability to offenders with pre-SORA offenses. The Indiana Supreme Court articulated these constitutional boundaries in a series of decisions, beginning with *Wallace v. State*. In *Wallace*, the court applied its own version of the Supreme Court's "intent-effects" test and held that SORA had a punitive effect as applied to Wallace—who had been charged, convicted, and served his sentence before Indiana enacted SORA—and that it thus violated Indiana's Ex Post Facto Clause. 905 N.E.2d at 379, 384.

Wallace did not foreclose all retroactive applications of SORA, however. Indeed, the same day that it decided *Wallace*, the Indiana Supreme Court issued its opinion in *Jensen v. State*. Unlike Wallace, Jensen pleaded guilty in 2000—after SORA's enactment. 905 N.E.2d at 388. At the time of his conviction, SORA required that he register as a sex offender for ten years. *Id.* at 389. Before the expiration of Jensen's ten-year registration requirement, the Indiana General Assembly amended SORA in 2006 to mandate that offenders like him register for life. He argued that this extension as applied to him violated Indiana's Ex Post Facto Clause, but the Indiana Supreme Court disagreed. In contrast to Wallace, who had no obligations before the legislature amended SORA to cover

AMERICAN OVERSIGHT

him, the "'broad and sweeping' disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January 2000. Nothing in that regard was changed by the 2006 amendments." *Id.* at 394. Increasing only the length of an *existing* registration obligation did not rise to the level of "punishment" such that it violated the Indiana Constitution. *Id.* at 391–93.

After *Jensen*, the Indiana Supreme Court continued to focus on the marginal effects of SORA and its amendments. In *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), it said that retroactively applying a new residency restriction was "adding punishment." *Id.* at 1154. The court's decision in *Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011), though, concluded that an amendment that reclassified someone from a sex offender to a "sexually violent predator" was not punitive because, just like for Jensen, it amounted only to an extension of pre-existing obligations and was not "any more punitive." *Id.* at 810–11, 813 n.19.

Up to this point, each case had asked whether SORA had a marginal punitive effect compared to those requirements already imposed by *Indiana* law. A trio of 2016 cases fleshed out the retroactive applicability of SORA to offenders whose initial registration requirements originated in other states. In *Tyson v. State*, the court upheld the registration requirement for an offender obligated to register under Texas law at the time of his conviction. 51 N.E.3d at 90. It did so even though his conviction and Texas registration obligation occurred before Indiana's SORA covered his offense. *Id.* In reaching this result, the court concluded that the effect of "maintaining a registry requirement across state lines does not amount to a punitive burden" in violation of the state constitution. *Id.*

AMERICAN OVERSIGHT

The court extended this reasoning in *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016). Zerbe was convicted in Michigan in 1992, before either Michigan or Indiana had enacted sex offender registration laws. *Id.* at 369. Michigan nevertheless required Zerbe to register upon his release from prison because Michigan did not share Indiana's stricter Ex Post Facto Clause and applied its law retroactively. *Id.* at 371. This twist changed nothing: the effect of maintaining that registration in Indiana was not punitive. *Id.* at 370–71. As the court clarified, "it is not Zerbe's *crime* that triggers his obligation to register as a sex offender in Indiana; rather, it is his *Michigan registry requirement* that does so." *Id.* at 370. The trilogy concluded with *Ammons v. State*, 50 N.E.3d 143 (Ind. 2016) (per curiam). Ammons had been convicted in Indiana before the passage of SORA, but he moved to Iowa, which obligated him to register for his Indiana crime. *Id.* When he moved back to Indiana in 2013, the Indiana Supreme Court confirmed that, just like for Tyson and Zerbe, maintaining Ammon's Iowa registration requirement for his Indiana crime did not amount to "additional punishment." *Id.* at 145.

To summarize, the question under Indiana's Ex Post Facto Clause is whether SORA's marginal effect is punitive. Maintaining, extending, or modifying a duty under SORA generally is not punitive, but imposing a new duty is. It is immaterial to the analysis whether Indiana law is maintaining, extending, or modifying its own duties or those of another state. Likewise, it is irrelevant where or when the conviction occurred, as long as another state imposed a lawful registration obligation on the offender and SORA does not so significantly alter that obligation to result in added punishment.

AMERICAN OVERSIGHT

C.

Plaintiffs Brian Hope, Gary Snider, Joseph Standish, Adam Bash, Patrick Rice, and Scott Rush are sex offenders whose convictions predate the enactment of SORA. With the exception of Hope, each plaintiff's conviction occurred in another state, and all the plaintiffs had to register pursuant to the sex offender registration laws of another state. Upon moving or returning to Indiana, the State required the plaintiffs to register as sex offenders. The circumstances leading to the plaintiffs' registration obligations under SORA fall into the same factual patterns addressed by the Indiana Supreme Court in *Zerbe* and *Ammons*.

Hope was charged with child molestation in Indiana in 1993, prior to SORA's passage, and pleaded guilty. He then moved to Texas, which required him to register under its law. As in *Ammons*, Indiana applied SORA's requirements to him upon his return to the State in 2013. Snider, Standish, Bash, Rice, and Rush mirror *Zerbe*.[2] Each had to register in another state under its retroactive sex offender registration law and

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[2] Bash's and Snider's cases differ from the earlier Indiana cases in one significant respect: both moved to Indiana before the 2006 enactment of the other-jurisdiction provision. In all three of the Indiana cases upholding the retroactive application of SORA to offenders with out-of-state registration requirements, the plaintiffs had moved to Indiana after July 1, 2006. There thus was no question whether Indiana's Constitution permits retroactive application of the other-jurisdiction provision. This wrinkle does not affect the remaining plaintiffs, who moved to Indiana after 2006. And we ultimately find it nondeterminative in Bash's and Snider's cases. On its face, the provision applies retroactively, and nothing in Indiana Supreme Court caselaw suggests that the state constitution would forbid this.

AMERICAN OVERSIGHT

later moved to Indiana, where Indiana required them to register under SORA.[3]

The plaintiffs filed this suit alleging that as applied to them, SORA violates their right to travel and equal protection and that it runs afoul of the federal prohibition on ex post facto laws.[4] The plaintiffs articulated the burdens that SORA places on them in detail. Each of them is subject to SORA's more onerous reporting requirements and living and working restrictions given the nature of their offenses.[5] SORA classifies all the plaintiffs as "offender[s] against children" and as "serious sex offender[s]"; four of them also qualify as "sexually violent predator[s]." For Snider, Standish, Rush, and Bash (who has full custody of his minor son), this means that they cannot attend school functions or parent-teacher conferences for their children or grandchildren or drive them to school. Hope, who lacks a residence, has been required to leave a

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[3] There has been some disagreement throughout this litigation regarding whether Indiana required the plaintiffs to register pursuant to the other-jurisdiction provision or because they committed registrable offenses under SORA (or substantially similar offenses under the law of another state). Regardless, the State's view of SORA when enforcing it is not pertinent to our understanding of the law and the state constitutional limits on it. We determine that SORA obligated each of the plaintiffs to register under the other-jurisdiction provision alone.

[4] The plaintiffs originally filed two lawsuits, which the district court consolidated.

[5] Hope pleaded guilty to child molestation, and Standish pleaded no contest to attempted sexual contact with a child under 13. Rush was convicted of sexual battery of a child under 12 years old. Snider was convicted of criminal sexual conduct in the first degree (rape), and Rice was convicted of aggravated rape. Bash pleaded guilty but mentally ill to rape and sodomy.

AMERICAN OVERSIGHT

homeless shelter because it was located within 800 feet of a park. Snider had to move from the home he shared with his wife in 2006 because it fell within 1,000 feet of a daycare. Rush must take a day off work every time he reports. Bash, who relies on government financial assistance, has at times been unable to afford SORA's annual registration fee and been placed on a payment plan.

The district court granted summary judgment to the plaintiffs on all claims and enjoined Indiana from requiring them to register.[6] On appeal, a divided panel of this Court affirmed the district court's summary judgment determination based on the right to travel claim. *Hope v. Comm'r of Ind. Dep't of Corr.*, 984 F.3d 532 (7th Cir. 2021). It did not reach the equal protection or ex post facto claims. We then granted Indiana's petition for rehearing en banc and vacated the panel opinion.

We review the district court's summary judgment determination de novo, drawing all reasonable inferences in favor of the nonmovant. *Peerless Network, Inc. v. MCI Commc'n Serv., Inc.*, 917 F.3d 538, 545 (7th Cir. 2019). Upon review, we reverse and remand.

II.

A.

The plaintiffs argue that SORA violates their right to travel by treating them differently based on their length of residency in Indiana. We disagree. SORA may affect newer residents disproportionately, but it does not discriminate based on

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[6] The plaintiffs sued multiple parties, including IDOC and several county prosecutors and sheriffs in their official capacities. We reference the defendants collectively as "Indiana" or "the State."

AMERICAN OVERSIGHT

residency. Consequently, it does not violate the right to travel as the Supreme Court has articulated it.

The Supreme Court has identified three components of the right to travel: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Only the third right is at issue here.

That right has evolved over time. Although it is constitutionally safeguarded, there is no mention of a right to travel in the text of the Constitution. As early as 1872, however, the Supreme Court recognized this right as protected by the Constitution and has articulated its contours through subsequent cases. *Id.* at 503 (tracing the right's constitutional pedigree). Throughout that caselaw development, the source of the right to travel has shifted. In many of its earlier decisions, the Supreme Court discussed the right in equal protection parlance. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) ("Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents."). But in its most recent right to travel case, *Saenz v. Roe*, the Court underscored that the right is grounded in the Privileges or Immunities Clause of the Fourteenth Amendment.[7] U.S. Const. amend. XIV, § 1; *Saenz*, 526 U.S. at 502–03.

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[7] The Court has traced the three components of the right to travel to different parts of the Constitution. It is the third component—the right of new residents and longer-term residents to be treated alike—that is

AMERICAN OVERSIGHT

In *Saenz*, the plaintiffs challenged the constitutionality of a California statute that limited new residents of one year or less to only the welfare benefits to which they would have been entitled in their prior state of residence. 526 U.S. at 492. The Supreme Court held that this rule violated the third aspect of the right to travel. The Court was not concerned with whether California was trying to penalize or deter travel or even if it was succeeding. *Id.* at 504. Instead, the Court found that "the right to travel embraces the citizen's right to be treated equally in her new State of residence" and that "the discriminatory classification is itself a penalty." *Id.* at 505. In addressing this discrimination, the Court applied strict scrutiny, which California's law failed.[8] *Id.* at 504–05. The duration of a citizen's residency and the location of his or her prior residence had no relevance to the citizen's welfare needs, and the bare desire to reduce the state's budget was not compelling enough to justify a complex layered hierarchy among bona fide California residents. *Id.* at 507.

Saenz solidified that laws infringing the right to travel must pass strict scrutiny. *See id.* at 504. The full scope of the right, however, remains uncertain. There have been no Supreme Court decisions interpreting the third component of the right to travel since *Saenz*. Cases before it held other durational-residency requirements unlawful but did so under the

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covered by the Fourteenth Amendment Privileges or Immunities Clause. *Saenz*, 526 U.S. at 502–03. The second component is protected by Article IV. *Id.* at 501. The Court has found support for the first component in various clauses but has not spoken definitively on it. *Id.*

[8] Like the question of the right to travel's constitutional footing, opinions discussing the appropriate scrutiny for the right have arrived at different answers. After *Saenz*, however, we apply strict scrutiny.

AMERICAN OVERSIGHT

Equal Protection Clause. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 251, 261–62 (1974) (striking down a state law requiring an indigent person to be a county resident for one year to receive free medical care); *Dunn v. Blumstein*, 405 U.S. 330, 334–35, 360 (1972) (holding unlawful a state law permitting only residents who have lived in state for one year to vote); *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969) (invalidating statutes that deny welfare assistance to individuals during their first year of residency). *But see Sosna v. Iowa*, 419 U.S. 393, 396, 409 (1975) (upholding an Iowa law requiring a resident to live in state for one year to obtain a divorce decree).

We agree with the plaintiffs, however, that the right to travel should be understood to go beyond prohibiting only durational-residency requirements that place a waiting period on benefits. It seems unlikely that a permanent distinction between bona fide residents based on their time residing in a state would be any more lawful than a temporary one. The Supreme Court's cases illustrate this point, although a majority of the Court has yet to endorse it. In *Zobel*, Alaska implemented a natural resource dividend statute that created "fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." 457 U.S. at 59. The Supreme Court held that this scheme was improper even under rational basis review. *Id.* at 64. The Court did the same thing with a New Mexico tax exemption for Vietnam veterans who were state residents before a specific date. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985).

Although the Supreme Court did not directly hold that the laws at issue in *Zobel* and *Hooper* implicated the right to travel, a plurality of the Court later concluded that the right drove

AMERICAN OVERSIGHT

those decisions. *See Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 907–08 (1986) (plurality opinion). In the plurality's view, "a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their right to migrate" and thus mandated strict scrutiny. *Id.* at 909.

At bottom, the Supreme Court's decisions in this area share a defining feature: each involved a rule that explicitly discriminated between old and new residents. As the Court noted in *Saenz*, the challenged classifications were "defined *entirely* by (a) the period of residency in California and (b) the location of the prior residences of the [plaintiffs]." 526 U.S. at 505. Likewise, in *Soto-Lopez*, the plurality emphasized that New York had deprived the plaintiffs "of a significant benefit, based *only* on the fact of nonresidence at a past point in time." 476 U.S. at 909. In each case, there has been a direct causal connection between a person's status as a new resident and the deprivation of a benefit. In legal parlance, each involved a "disparate treatment" claim.

B.

The critical inquiry in this case is whether Indiana's registration requirement, as applied consistently with the Indiana Supreme Court's marginal-effects test, violates the right to travel as it has been identified by the Supreme Court. Put another way, we ask whether SORA treats bona fide residents differently based on when they become residents. It does not.

Neither SORA nor Indiana's Ex Post Facto Clause discriminates based on residency. As a statutory matter, SORA obligates all offenders—both old and new residents—to register based on prior convictions. Indiana's Ex Post Facto Clause

AMERICAN OVERSIGHT

then relieves a subset of those who must register from that statutory obligation. Receiving the clause's benefits, though, does not depend on when an offender became an Indiana resident but on whether one is subject to an existing registration requirement. That requirement can come from Indiana, *Jensen*, 905 N.E.2d at 391–93, or from another state, *Tyson*, 51 N.E.3d at 90. The twist in this case is that for those offenders like the plaintiffs, convicted before Indiana's SORA covered their crimes, such a registration obligation must come from elsewhere.

The dissent takes issue with this feature of SORA but concedes that unlike *Saenz* and its predecessors, SORA has neither a durational-residency requirement nor a true, fixed-point residency scheme. That distinction is fatal to the plaintiffs' claim. Right to travel violations under the third component of the right exist only when a law expressly differentiates between residents based on their length or timing of residency. SORA does neither.

Instead, the dissent notes that SORA "does take notice of an individual's treatment in another jurisdiction" and argues that it thus "necessarily implicates his travel history." While true, that does not constitute a violation of the right to travel. The third component of the right—which the parties agree is the only aspect at issue in this appeal—deals only with discrimination based on residency. It is not triggered by every law that tangentially relates to a person's travel to or from another state.

In the absence of a true durational-residency requirement or any discriminatory purpose, the plaintiffs look to the effect of SORA on newer residents. As a practical effect of Indiana's SORA, the plaintiffs argue, out-of-state residency is a

AMERICAN OVERSIGHT

determinative factor for them and similar offenders. Undoubtedly having a registration obligation in another state is correlated with changing one's state of residence, as we can see not only from the six plaintiffs here but also from those in *Tyson*, *Zerbe*, and *Ammons*, all of whom had to register after moving to Indiana. But the correlation is imperfect. Some lifelong Indiana residents who committed crimes before SORA might well have a registration obligation based on their employment or schooling in an adjacent state. *See, e.g.*, 730 ILCS 150/3(a-5) (requiring out-of-state students or employees to register in Illinois). The inverse is also true: some new Indiana residents who committed their crimes elsewhere might have no registration requirement in their prior state because of state-law protection against retroactivity. *See, e.g.*, *Doe v. State*, 189 P.3d 999, 1004 (Alaska 2008) (holding that the state's Ex Post Facto Clause prohibits retroactive application of SORA). While prior, out-of-state residency is often an element in the application of SORA's registration requirements, residency is not the trigger for the other-jurisdiction provision.

The dissent acknowledges this but suggests that the law may still be unconstitutional even though some new residents are not adversely affected by SORA's requirements. For support, the dissent looks to *Saenz*. There, the Supreme Court struck down the law, even though some of the new residents received welfare benefits on equal footing as long-term Californians. *Saenz*, 526 U.S. at 497. What mattered, the Court concluded, was that California explicitly based its provision of benefits to new Californians—favorable or not—on the duration of their residence in California. *Id.* at 497, 505. The upshot of the dissent's *Saenz* analogy is that SORA likewise cannot be saved by the fact that some new Hoosiers may not be subject to the registration requirements while some lifelong Hoosiers

AMERICAN OVERSIGHT

may be covered. That is a false equivalence. California employed an express, durational-residency classification; it applied to all persons who had resided in California for less than a year and happened to produce a favorable effect for some of them. In contrast, as the dissent admits, SORA by its terms does not base its application on any length of residency in Indiana. New Indiana residents who arrive in Indiana without any prior registration requirements do not experience a favorable effect under SORA—the law simply does not apply to them at all. In sum, *Saenz* involved a discriminatory test that some new residents passed, while SORA involves a nondiscriminatory test that some new residents fail.

Prior, out-of-state residency represents neither causation nor perfect correlation for the application of SORA's registration requirements, and there is no evidence that anyone in Indiana intended to deter travel through the other-jurisdiction provision. The result? Only a disparate-impact claim remains—an argument that, as a practical matter, more new residents than old residents must register under the law. The difficulty with that approach, though, is that the Supreme Court has never extended the right to travel this far. *Cf. Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that only disparate treatment or discriminatory purpose violates the Equal Protection Clause). To the contrary, every Supreme Court case involving a violation of the right to travel has featured a law that expressly imposes either a durational-residency requirement or a fixed-point residency restriction. *See, e.g.*, *Saenz*, 526 U.S. at 505; *Soto-Lopez*, 476 U.S. at 905; *Hooper*, 472 U.S. at 621–22; *Zobel*, 457 U.S. at 57; *Mem'l Hosp.*, 415 U.S. at 251, 261–62; *Dunn*, 405 U.S. at 334–35, 360. This case does not involve such a disparate treatment claim.

AMERICAN OVERSIGHT

The dissent's approach thus expands the right to travel to an unprecedented extent. And it does so through a legal analysis that the Court has rejected repeatedly in the analogous Fourteenth Amendment equal protection context. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."); *see also Washington*, 426 U.S. at 242. Equal protection jurisprudence is unequivocal: the only relevant consideration is a law's express categorization and any discriminatory purpose. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring).

The Supreme Court has never indicated that the neighboring Fourteenth Amendment Privileges or Immunities Clause ought to be evaluated differently, and it is difficult to justify such a distinction. It would be strange indeed if a law that created a disparate impact based on race would be subject to less exacting scrutiny than laws with a disparate impact on the right to travel. Further, one of the primary bases that the Supreme Court gave for rejecting disparate-impact theory—the potential invalidation of many neutral laws—applies with equal force in the right to travel context. *See Washington*, 426 U.S. at 248 (observing that a disparate-impact approach to equal protection claims "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes"). There is no reason for permitting disparate-impact theory in one context but not the other, especially given how

AMERICAN OVERSIGHT

historically intertwined the Supreme Court's right to travel jurisprudence has been with the Equal Protection Clause.[9]

The Third Circuit has actively refused to take this step. In *Connelly v. Steel Valley School District*, 706 F.3d 209 (3d Cir. 2013), a Pennsylvania school district set its teachers' salaries based on years of teaching experience but gave full credit for years teaching in the district, partial credit for years teaching in Pennsylvania, and reduced credit for years teaching elsewhere. *Id.* at 211–12. A teacher who taught for nine years in Maryland and received one year of credit argued that the school district's salary scheme violated his right to travel. *Id.* at 213. The Third Circuit recognized that the district was not discriminating based on duration of residency but on location of teaching experience. *Id.* at 214. A lifelong Pennsylvania resident who taught across the border in Maryland would have received the same treatment as a similar Maryland resident who moved to Pennsylvania. *Id.* at 214–15. In the Third Circuit's view, "[t]he right to travel simply is not implicated when there is no discrimination based on the duration of one's residency." *Id.* at 215. We agree.

There are good reasons for limiting the right to travel to disparate treatment claims, as we recognized more than a decade before *Saenz*. In *Sklar v. Byrne*, 727 F.2d 633 (7th Cir. 1984), we rejected the suggestion that laws with a disproportionate impact on new residents violate the right to travel. *Sklar* presented a right to travel objection to an ordinance banning

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[9] Recall that prior to *Saenz*, the Supreme Court often positioned the right to travel within the Equal Protection Clause. *See Zobel*, 457 U.S. at 60 n.6.

AMERICAN OVERSIGHT

unregistered handguns in the City of Chicago. Because one needed to be a Chicago resident to register a handgun for lawful possession—and Chicago stopped new registrations after 1982—Sklar argued that the ordinance violated the right to travel. *Id.* We explained then that this could not be how the right to travel functions, for applying strict scrutiny "based merely on a showing that newer residents would not benefit" would make huge swaths of the law vulnerable. *Id.* at 639. As in *Sklar*, the plaintiffs here want to apply strict scrutiny on the showing that they, as new residents, are "merely one group among several who do not benefit" from the protections of Indiana's Ex Post Facto Clause. *Id.* at 639. We refused the invitation in 1984 and decline it again today.

The Privileges or Immunities Clause of the Fourteenth Amendment simply does not prohibit a state from incidentally burdening travel to or from the state. It guarantees only "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Saenz*, 526 U.S. at 502. Because both old and new Indiana residents are treated equally under SORA and Indiana's Ex Post Facto Clause, we hold that the law does not violate plaintiffs' right to travel.

III.

The plaintiffs' equal protection claim is closely intertwined with their right to travel claim, but it remains distinct. Equal protection and right to travel claims require independent analyses—even when the basis for the claims is identical. Under the Privileges or Immunities Clause, if the right to travel is not implicated, that is the end of the plaintiffs' claim. The challenged law either is reviewed under strict scrutiny or not at all. Under the Equal Protection Clause, by contrast,

AMERICAN OVERSIGHT

failure to trigger heightened scrutiny does not end the claim. Courts still review the challenged law to ensure that the state has a rational basis for treating similarly situated people differently. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

The Fourteenth Amendment's Equal Protection Clause guarantees that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Unlike the right to travel, which requires strict scrutiny when implicated, the standard of review applied to laws in equal protection cases varies. We apply strict scrutiny to a law if the plaintiffs' unequal treatment is based on membership in a protected class—race, national origin, religion, or alienage—or denial of a fundamental right. *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019). When a plaintiff's unequal treatment is premised on a quasi-suspect classification, like gender, we apply intermediate scrutiny. *Id.* at 1008 n.3. In all other cases, courts default to rational basis review. *Id.* at 1008.

Here, plaintiffs argue that the district court correctly applied strict scrutiny when it evaluated SORA. That is because their equal protection theory assumes that SORA violates a fundamental right—the right to travel. We have already held that it does not. SORA treats the plaintiffs differently from other, pre-SORA offenders based on their out-of-state registration requirements—not based on their length of residency. Because Indiana's treatment of the plaintiffs is not based on their membership in a protected class or the denial of a fundamental right, strict scrutiny is inapplicable. Nor does intermediate scrutiny apply. Neither gender nor any other quasi-suspect class serves as the catalyst for the plaintiffs' differential treatment under SORA.

AMERICAN OVERSIGHT

Our determination that heightened scrutiny is inapplicable is not fatal to their equal protection claim, however. It just means that SORA will be assessed under rational basis review. The plaintiffs may still challenge Indiana's application of SORA to them because it treats them differently than similarly situated Indiana offenders. SORA, as modified by the Indiana Supreme Court's constitutional overlay, creates two classes of pre-SORA offenders—those who must register in Indiana, and those who are free from that requirement. Indiana distinguishes between the two groups based solely on whether the pre-SORA offender had a registration obligation in another state. For example: two lifelong Indiana residents, both with pre-SORA convictions, will be treated differently if one commutes into Chicago for work—and so is subject to Illinois's reporting requirements—while the other never leaves Indiana. The distinction holds true for offenders who attend school in another state or who have lived in another state imposing registration obligations on them. In short, two similarly situated Indiana offenders may have vastly different legal obligations simply because one of them has an out-of-state registration obligation. The question is whether Indiana's differential treatment on this basis is rationally related to a legitimate government purpose. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012); *FCC*, 508 U.S. at 313 ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

Because the district court did not address whether SORA satisfies rational basis review, we remand the equal protection claim for this purpose. In doing so, we stress that this review

AMERICAN OVERSIGHT

should be undertaken with care and that the district court should thoroughly develop the factual record on this score. Rational basis review favors the State but does not ensure an automatic win. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989) (invalidating a tax assessment on equal protection grounds for failing rational basis review).

IV.

The plaintiffs' final claim is an ex post facto challenge to SORA. Because we determine that SORA is not a punitive statute, it does not violate the federal Ex Post Facto Clause.

Article I, section 10, clause 1 of the United States Constitution prohibits states from passing ex post facto laws—those which "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 391–92 (1798)). Statutes that transgress the Ex Post Facto Clause, then, share two characteristics: They are "*both* retroactive *and* penal." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018); *see also Johnson v. United States*, 529 U.S. 694, 699 (2000).

There is tension in the caselaw regarding the requirements of the retroactivity prong. *Compare United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (deciding that SORAs are prospective regardless of their reach because they "merely create[] new, prospective legal obligations based on the person's prior history"), *with Does #1-5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016) (holding Michigan's version of SORA retroactive because it applied to offenders convicted prior to the law's enactment), *and Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016) (holding the same with respect to Oklahoma's version

AMERICAN OVERSIGHT

of SORA). While we recognize this tension, we need not—and do not—revisit our decisions on retroactivity at this time. Here, the plaintiffs did not ask us to overrule our prior decisions, and their ex post facto challenge fails regardless because SORA is not punitive.

In determining whether a statute is punitive, *Smith v. Doe* is our guidepost. There, the Supreme Court addressed whether Alaska's sex offender registration and notification law violated the federal Ex Post Facto Clause. The Court applied what is commonly called the intent-effects test to hold that Alaska's sex offender registration act was not punitive. *Smith*, 538 U.S. at 105–06. Applying that two-step standard, courts first query whether the legislature intended to enact a punitive, rather than a civil, law. If not, the inquiry becomes whether the law is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* at 92 (internal quotation and citation omitted). To assess a law's effects, *Smith* considered five of the factors originally articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Those factors are "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

This is a challenging standard for plaintiffs. When assessing whether a law is punitive, "we ordinarily defer to the legislature's stated intent." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the legislative intent is to enact a civil law, only the "clearest proof that the statutory scheme is so punitive in either purpose or effect" will suffice to override it. *Seling v.*

AMERICAN OVERSIGHT

Young, 531 U.S. 250, 261 (2001); *Hudson v. United States*, 522 U.S. 93, 104 (1997); *see also Smith*, 538 U.S. at 92.

The plaintiffs have conceded that Indiana intended to enact a civil, regulatory scheme when it passed SORA. We thus consider only whether SORA is so punitive in effect as to override Indiana's nonpunitive intent. To that end, we address the *Mendoza-Martinez* factors in turn.

1. Historical and traditional forms of punishment

Plaintiffs present three historical forms of punishment—shaming, banishment, and parole/probation—and argue that SORA's requirements are tantamount to these sanctions. All three comparators suffer the same infirmity: SORA does not *actually* inflict what is historically and traditionally considered punishment.

The plaintiffs first argue that SORA's publication of their classifications—such as "sexually violent offender" or "offender against children"—is "designed to outrage" and stigmatizes without a present assessment of individual dangerousness. In this regard, SORA goes further than the statute in *Smith*, which assigned no categorical labels to offenders. But SORA's classification scheme falls short of public shaming for the same reason as the Alaska statute in *Smith*. Indiana classifies offenders based on offense type and in doing so, transmits accurate information about the underlying conviction—a matter of public record. To the extent that stigma results, it arises "not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record." *Smith*, 538 U.S. at 98. *But see Does #1-5*, 834 F.3d at 703 (concluding that the "ignominy" results from the statute's application of labels, not from conviction information).

AMERICAN OVERSIGHT

The plaintiffs also suggest that SORA's residency restrictions are akin to banishment, but we rejected this assertion when evaluating the Illinois sex offender registration statute. *Vasquez*, 895 F.3d at 521. We reasoned that although residency restrictions limit offenders' living and employment options, they do not amount to banishment—which traditionally meant that persons "could neither return to their original community nor … be admitted easily into a new one." *Id.* (internal quotation and citation omitted). The plaintiffs acknowledge our precedent but note that the Indiana restriction is 500 feet greater than the Illinois restriction. The difference between a 500- and 1,000-foot residency restriction is not constitutionally significant, however, because it does not render SORA's requirements any more similar to banishment.

Lastly, the plaintiffs contend that SORA's restrictions on where they may live or work, in tandem with its in-person reporting requirements, make it analogous to parole or probation. This is a closer call. In *Smith*, the Supreme Court acknowledged that a comparison between the Alaska statute and parole "has some force." *Smith*, 538 U.S. at 101. Even so, the Court held that the statute was distinguishable because it lacked two key characteristics of parole: (1) mandatory conditions, and (2) the option for a supervisor "to seek the revocation of probation or release in case of infraction." *Id.* The Court emphasized that Alaska's reporting requirements were not in-person and that offenders could "move where they wish" and live and work without supervision. *Id.* SORA differs from the Alaska statute on these points.[10] We conclude, however,

[10] While SORA employs mechanisms like those used in parole and probation, we note that it does not subject offenders to the same degree of

AMERICAN OVERSIGHT

that it is still distinct from parole because it lacks the second defining feature of parole discussed by *Smith*. To be sure, plaintiffs may face criminal prosecution for failure to comply with reporting requirements. But that would be a consequence distinct from the plaintiffs' original offenses; parole and the supervisor's ability to seek revocation of it are tied to the terms of the original offense. A sex offender who violates SORA is not subject to revocation—but rather a new criminal prosecution for violating state law. *Shaw*, 823 F.3d at 566. *But see Snyder*, 834 F.3d at 703. Thus, a sex offender covered by SORA is not under the same type of supervision as a parolee.

On balance, SORA's requirements do not amount to traditional forms of punishment. So, this factor, while close, tips in favor of Indiana.

2. Affirmative disabilities or restraints

The next factor considers whether SORA subjects the plaintiffs to an "affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168. The boundaries of this factor are undefined. The Alaska law in *Smith* required offenders to register and mandated reporting of any changes to facial features or plans to borrow a car or procure psychiatric treatment. *Smith*, 538 U.S. at 101. The Court held that these requirements

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scrutiny or control. *See Vasquez*, 895 F.3d at 521 (concluding that Illinois's SORA, despite limiting where offenders could live, did not resemble the "comprehensive control" of probation). For example, SORA entails some supervision—law enforcement officers must do annual check-ins to verify an offender's physical address—but this differs in degree and type from the monitoring of parolees and probationers. *See Shaw*, 823 F.3d at 564–65 ("Historically, a probation officer took a far more active role in a probationer's life than simply collecting information for a database.").

AMERICAN OVERSIGHT

"make a valid regulatory program effective and do not impose punitive restraints." *Id.* at 102. In doing so, the Court underscored that the statute "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Id.* at 100. It also emphasized that the "Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive." *Id.* While the Court observed that Alaska's SORA did not require in-person reporting or restrict offenders' ability to change jobs or residences, the Court gave no indication whether such requirements would constitute punitive disabilities or restraints. *Id.* at 100–01.

Outside the "paradigmatic" example of physical restraint, it is not evident what statutory requirements amount to a restraint or disability. What is clear is that very few burdens are significant enough to tip the scale. *See, e.g.*, *Hudson*, 522 U.S. at 104 (monetary fine and occupational debarment are not affirmative disabilities or restraints "as that term is normally understood"); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (denial of a noncontractual government benefit is not an affirmative disability or restraint); *see also Vasquez*, 895 F.3d at 522 ("[L]ike the registration scheme at issue in *Smith*, the residency law imposes no physical restraint[] and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." (internal quotation and citation omitted)). Even when the Supreme Court confronted a state law imposing a paradigmatic form of restraint—involuntary confinement—the Court held that this did not make the law punitive. *Hendricks*, 521 U.S. at 363. Here, it is sufficient to note that to the extent that SORA's obligations amount to restraints or disabilities, standing alone

AMERICAN OVERSIGHT

they are not sufficiently severe in view of Supreme Court precedent to make SORA punitive.

3. Promotion of traditional aims of punishment

Plaintiffs next suggest that SORA has punitive aims—specifically, incapacitation, deterrence, and retribution. The Supreme Court has rejected these arguments in the context of other sex offender registration laws, however. *See, e.g.*, *Smith*, 538 U.S. at 102 ("Any number of governmental programs might deter crime without imposing punishment."); *Hudson*, 522 U.S. at 104–05 (holding that the involuntary commitment of a child sex offender was not retributive because prior conviction was used as evidence of future dangerousness, not to assign culpability). We similarly were unpersuaded that the residency restrictions at issue in *Vasquez* furthered traditional punitive aims in lieu of the Illinois SORA's "obvious aim" to "protect children." *Vasquez*, 895 F.3d at 522. The Sixth Circuit has also "accordingly give[n] this factor little weight," recognizing that civil statutes often pursue these aims, too. *Does #1-5*, 834 F.3d at 704. Because the plaintiffs have failed to show why the analyses in these cases do not apply with equal force to the same arguments that they raise here, this factor favors Indiana.

4. Rational connection to a nonpunitive purpose

Whether the law has a "rational connection to a nonpunitive purpose" is "a most significant factor in our determination that the statute's effects" are not punitive. *Smith*, 538 U.S. at 102 (internal quotation and citation omitted). We begin by identifying a nonpunitive purpose and then turn to whether the law's requirements are rationally connected to that goal.

AMERICAN OVERSIGHT

One aim of SORA is to advance public safety, particularly for vulnerable minors. *See Smith*, 538 U.S. at 93 ("[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded." (internal quotation and citation omitted)). No one disputes this nonpunitive purpose. The disagreement centers instead on whether SORA's requirements are rationally related to that aim. We are satisfied that they are.

Laws that result in consequences for offenders' prior conduct are not automatically punitive if they are connected to a regulatory purpose that falls within the power of the state, such as public safety. *Flemming*, 363 U.S. at 616. Deportation, for example, is "an exercise of the plenary [power] of Congress to fix the conditions under which aliens are permitted to enter and remain in this country." *Id.* While it presents a consequence for people who have unlawfully entered the United States, that does not convert a lawful exercise of congressional power into a *punishment*. Similarly, the Supreme Court has held that excluding former felons from practicing a profession "is an incident of the State's power to protect the health and safety of its citizens"—"not a purpose to add to the punishment of ex-felons." *Id.* So, too, here. SORA's registration requirements rationally relate to Indiana's power to protect the safety of its citizens, despite its burden on sex offenders. *See Shaw*, 823 F.3d at 572 (explaining that Oklahoma's "reporting requirements are also consistent with a non-punitive intent—promoting public safety—by facilitating law enforcement's identification of sex offenders and notification to the public of potential dangers"). This critical factor supports Indiana.

AMERICAN OVERSIGHT

5. Excessive with respect to that purpose

The touchpoint for the excessiveness factor is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective," not whether "the legislature has made the best choice possible to address the problem it seeks to remedy." *Smith*, 538 U.S. at 105. The burden is on the plaintiff to establish that the law's "nonpunitive purpose is a sham or mere pretext." *Id.* at 103 (internal quotation and citation omitted).

While the plaintiffs proffer several arguments on this factor, they fall short of meeting their burden. First, they contend that SORA does not further its goal, making its requirements excessive. The plaintiffs cite a study showing that sex offenders do not recidivate at higher rates than other felons. The implication is that SORA's registration requirements will not bolster public safety because sex offenders do not present an outsized threat. This conclusion is flawed. The plaintiffs' study does not establish that sex offenders pose little risk to the public, just that their risk of reoffending is similar to that of other ex-felons. *See Vasquez*, 895 F.3d at 522 ("[S]imilar recidivism rates across different categories of crime would not establish that the nonpunitive aim of this statute—protecting children—is a sham.").

The plaintiffs also take issue with SORA's application to all offenders "without regard to their future dangerousness." But the Supreme Court "has upheld against ex post facto challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Smith*, 538 U.S. at 104; *see, e.g.*, *De Veau v. Braisted*, 363 U.S. 144, 159–60 (1960) (plurality opinion) (upholding a law that prohibited former felons from working as union officers).

AMERICAN OVERSIGHT

Although *Smith* recognized that the "magnitude of the restraint" could require individual assessments in some cases, such cases are the exception. *Smith*, 538 U.S. at 104 (discussing the involuntary and potentially indefinite confinement at issue in *Hendricks* as one example). Indiana is not required to make individualized judgments before imposing its registration requirements. This factor favors Indiana.

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At best, the plaintiffs have shown that SORA partially resembles one historical punishment and may place some affirmative restraints or disabilities on them. The remaining factors, including the law's rational relation to a nonpunitive purpose, all support Indiana. The plaintiffs have not carried their heavy burden of proving that SORA is so punitive in effect as to override the Indiana legislature's intent to enact a civil law. As the plaintiffs acknowledge, "the Alaska statute at issue in [*Smith*] shares several core provisions with Indiana's SORA." While SORA goes farther than the Alaska law in some respects, it is not so far afield as to warrant a different outcome than in *Smith*.

V.

We hold that Indiana's SORA neither violates plaintiffs' right to travel nor constitutes an impermissible ex post facto law. Accordingly, we reverse the district court's entry of summary judgment and remand for further analysis of the equal protection claim consistent with this opinion.

REVERSED AND REMANDED

AMERICAN OVERSIGHT

SCUDDER, *Circuit Judge*, concurring. I join the majority opinion and write separately to address one aspect of the opinion—the retroactivity inquiry of the *Ex Post Facto* Clause.

Our case law on the retroactivity prong needs a course correction. See *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018); *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011). The pertinent retroactivity inquiry is whether the law "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Carmell v. Texas*, 529 U.S. 513, 540 (2000) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1867) (internal quotation marks omitted)).

But in *Leach* we suggested otherwise, determining that the federal SORNA was not impermissibly retroactive because it "merely creates new, prospective legal obligations based on the person's prior history." 639 F.3d at 773; see also *Vasquez*, 895 F.3d at 520 (applying *Leach*'s retroactivity holding to Illinois's SORA). Though this observation about how SORNA functions is descriptively correct, it misses the mark on the retroactivity inquiry. What *Leach* and *Vasquez* failed to account for is that the registration obligations did not apply at the time the sex offenders committed the offenses triggering registration—meaning that the sex offender registration laws imposed obligations beyond those prescribed at the time of the offense.

The majority opinion acknowledges this tension in our case law but stops short of fixing it. See Maj. Op. 23. I would take the next step and use today's decision to align our law with Supreme Court precedent. The issue is sure to surface in future cases and our sitting *en banc* provides the perfect opportunity for the full court to issue the course correction.

AMERICAN OVERSIGHT

There is no question that the obligations imposed by Indiana's SORA on the six plaintiffs in this case apply retroactively, and we should use today's decision to say so.

AMERICAN OVERSIGHT

ROVNER, *Circuit Judge*, with whom WOOD and HAMILTON, *Circuit Judges*, join, concurring in part and dissenting in part. I join all but Part II of the court's opinion today. I remain convinced that Indiana's other jurisdiction provision[1] deprives the plaintiffs of state citizenship on equal terms with other Indiana residents and in so doing violates their right to travel. I therefore dissent from that part of the court's decision.

1.

Encompassed within the right to travel is the right to relocate from one state to another and, upon establishing bona fide residence in a new state, to enjoy the same privileges and immunities as any other citizen of that state. *Saenz v. Roe*, 526 U.S. 489, 502, 119 S. Ct. 1518, 1526 (1999). Each of the six plaintiffs in this case has been denied the benefit of Indiana's *ex post facto* provision[2] that a similarly-situated, but lifelong Indiana resident would receive. Because each of the plaintiffs committed a sex offense before Indiana attached a registration obligation to that crime, the Indiana Supreme Court's decision in *Wallace* precludes the State from relying on their convictions as the basis for requiring them to register. *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009). What Indiana has done instead is to rely on the fact that each of the plaintiffs previously was required to register in another state as the basis for imposing its own registration obligation on them. Had any of the

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[1] *See* Ind. Code § 11-8-8-4.5(b)(1) (defining "sex offender" who must register in Indiana to include "a person who is required to register as a sex offender in any jurisdiction"); § 11-8-8-5(b)(1) (similarly defining "sex or violent offender" who must register).

[2] Ind. Const., art. 1, § 24 ("No *ex post facto* law … shall ever be passed.").

AMERICAN OVERSIGHT

plaintiffs been a resident of Indiana at the time of his offense and never traveled anywhere that burdened him with a duty to register, Indiana itself would not have imposed such a burden on him. It is thus *only* their travel—in this case, relocation from another state to Indiana—that renders them subject to a registration obligation in Indiana. This sets up the very sort of tiered classes of state citizenship that the Supreme Court's travel jurisprudence forbids.[3] The fact that a lifelong Indiana resident may also incur an obligation to register in Indiana by working or studying in another state that imposes such a duty on him does not obviate the problem; it simply makes clear that Indiana is relying on the fortuity of a person's travel to burden its citizen with an obligation that it would not otherwise impose.

At bottom, what Indiana is doing is assigning differential obligations to its citizens based not on what they have done but where they have been. It is relying on another state's handling of a particular criminal history to determine how that

[3] The number of individuals who can assert the particular right-to-travel claim the plaintiffs are asserting in this case is necessarily limited and dwindling. Anyone convicted of a sex offense since the mid-1990s or later (*i.e.*, after registration requirements were first adopted in Indiana and elsewhere) will likely be subject to registration in Indiana based on their criminal histories. *Wallace* only poses an obstacle to imposing registration obligations on someone convicted before Indiana made his crime (or its out-of-state equivalent) a registrable offense. So, with respect to the vast majority of offenders, Indiana will not have to rely on the other jurisdiction requirement as it must with respect to the six plaintiffs in this case, all of whom were convicted in 1994 or earlier and are now in their fifties or sixties.

AMERICAN OVERSIGHT

individual will be treated in Indiana. So a sex offender whose crime would not otherwise trigger a registration obligation as a matter of Indiana law will nonetheless be required to register because *another* state, as a matter of its own law, required him to register so long as he lived, worked, or studied in that state. Indiana thus is relying on another state's legal rules to circumscribe his rights as an Indiana citizen. This is incompatible with the holdings and the logic of the Supreme Court's right-to-travel cases.

2.

One point should be made clear at the outset: In taking notice that another state has imposed a registration obligation on one of its citizens, Indiana is not purporting to enforce another state's judgment or to implement the registration obligation that state has imposed. This would be a very different case if that were the aim and effect of Indiana's other jurisdiction provision. But it is not. Indiana instead is relying on the historical fact that another state required an offender to register there (whenever and for however long) as the basis for imposing its *own* registration obligation on one of its citizens. *See State v. Zerbe*, 50 N.E.3d 368, 370 (Ind. 2016) ("it is not Zerbe's *crime* that triggers his obligation to register as a sex offender in Indiana; rather it is his *Michigan registry requirement* that does so") (emphasis in original). This new obligation is not in any way tethered to the life of the registration obligation imposed by the other state. It is not as if, for example, an offender who was required by California to register for a period of 10 years and seven years into that obligation moves to Indiana will now have to register for an additional three years in Indiana in order to complete the 10-year term that California imposed. It does not matter to Indiana's other jurisdiction

AMERICAN OVERSIGHT

provision for how long an offender was required to register in another state or when that obligation expires. It only matters to Indiana's registration scheme that there was a prior obligation, period. And how lengthy the new registration obligation will be in Indiana is a matter answered by Indiana law. Thus, whereas the other state may only have required an offender to register for a period of years, Indiana may require him to register for the remainder of his life. Take plaintiff Patrick Rice, for example. Based on his 1989 conviction for aggravated sexual assault, Rice was required by Illinois to register for a period of 10 years upon his release from prison in 2017, but when he subsequently relocated to Indiana to live with his sister, Indiana imposed a lifetime registration obligation on him, because his Illinois offense makes him a "sexually violent predator" under Indiana law. *Cf. Jensen v. State*, 905 N.E.2d 384, 394 (Ind. 2009) (statutory revisions to registration scheme which have effect of lengthening Indiana offender's existing registration obligation from 10 years to life do not amount to *ex post facto* violation).

So in no sense is this case one about the enforceability of another state's judgment or the comity that Indiana must afford to that judgment. Indiana is simply relying on an offender's registration history in another state as the basis for implementing its own, independent duty to register in Indiana. And it is doing so in circumstances where the offender's criminal history itself would not trigger a registration obligation as a matter of Indiana law.

Over the course of this litigation, Indiana has cited two related reasons for relying on a prior registration obligation imposed elsewhere as the basis for imposing a duty to register in Indiana. First, Indiana is concerned that it not become a

AMERICAN OVERSIGHT

haven for sex offenders who, like the plaintiffs here, committed sex offenses before those offenses became subject to registration in Indiana and whom the state, under *Wallace*, cannot require to register based on that criminal history. Second, Indiana is using the other jurisdiction requirement as a secondary, catchall criterion for requiring registration of individuals whose particular crimes happen not to fall within any of the categories of offenses that the Indiana legislature has thus far identified as crimes requiring registration.

It goes without saying that Indiana has a legitimate interest in implementing registration obligations as a means of protecting its citizenry from individuals who might repeat their prior sex offenses. I can also appreciate the state's wish not to allow an offender to escape a duty to register in Indiana simply because his specific sex offense is not one that the legislature thought to identify in the drafting process as one warranting registration. *But see Edwards v. California*, 314 U.S. 160, 173, 62 S. Ct. 164, 167 (1941) ("no boundar[y] to the permissible area of State legislative activity … is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders"); *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322, 1329 (1969) ("the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible"), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 1359–60 (1974).

But Indiana is among a minority of jurisdictions that regards sex offender registration as punitive and thus subject to

AMERICAN OVERSIGHT

the *ex post facto* clause of its constitution.[4] Thus, as a matter of its own law, Indiana cannot require the six plaintiffs in this case to register based solely on their criminal histories, as the plaintiffs committed their crimes before the state legislature first made them registrable offenses. *Wallace* precludes the state from effectively increasing their punishment after the fact.

By looking instead to a registration obligation imposed by another state as the basis for imposing its own obligation on the plaintiffs, Indiana nominally avoids the *ex post facto* problem.[5] But in doing so, it has created another, federal

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[4] Some eight state supreme courts have held that the retroactive application of sex offender registration and notification laws violate their respective state constitutions. *See* U.S. Dep't of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking, *Sex Offender Registration and Notification in the United States, Current Case Law and Issues—March 2019: Retroactive Application & Ex Post Facto Considerations*, at 1–2 & n.9, available at https://smart.ojp.gov/sorna/current-law/case-law-updates.

[5] I say nominally because the rationale of the Indiana cases is that Indiana is premising its registration obligation solely upon the obligation imposed by the offender's former domicile and not on his underlying criminal offense, *e.g.*, *Zerbe*, 50 N.E.3d at 370, with the result that his obligation to register is effectively continued across state lines, *Tyson v. State*, 51 N.E.3d 88, 96 (Ind. 2016). (Of course, there would have been no duty to register in the first instance but for the particular offense he committed, and that offense would not trigger a duty to register under Indiana law.) I am not confident this rationale holds up in all applications of Indiana's other jurisdiction requirement, however. Two of the plaintiffs, Gary Snider and Adam Bash, relocated to Indiana three and six years, respectively, before the Indiana legislature adopted the other jurisdiction provision in 2006. Although they had been required to register in their former domiciles, those registration obligations would have effectively come to an end once they moved to Indiana, at least absent an assertion of

AMERICAN OVERSIGHT

constitutional problem. Relying on an obligation that another state has imposed as a matter of its own law as the determinant for how a new Indiana citizen will be treated in Indiana interferes with his right to travel. It is only because each plaintiff lived somewhere else previously that he can now be required to register as a matter of Indiana law. And upon their relocation to Indiana each finds his rights vis-à-vis registration defined by his former domicile: only because he once lived somewhere that authorized registration for his offense may he be required to register in Indiana, whose own law would not have permitted a registration obligation based on the very same criminal history. *See Saenz*, 526 U.S. at 505, 119 S. Ct. at 1527 ("the right to travel embraces the citizen's right to be treated equally in her new state of residence"); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623, 105 S. Ct. 2862, 2868 (1985) ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their [date of] arrival in the State … ."); *Shapiro*, 394 U.S. at 633, 89 S. Ct. at 1330 ("We recognize that a State has a valid interest in preserving the fiscal integrity of its

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extraterritorial authority by their former home states. So in their cases, it would be difficult for Indiana to claim that application of the other jurisdiction provision simply maintained their prior registration obligations across state lines. (Of course, we also know that Indiana initially required Snider and Bash to register based on their criminal histories; but the 2009 decision in *Wallace* made plain in hindsight that the State lacked the authority to require Snider and Bash to register on that basis.)

AMERICAN OVERSIGHT

programs. … But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.").

3.

My colleagues in the majority characterize the effect of the other jurisdiction provision on the plaintiffs as merely one of disparate impact rather than one of disparate treatment. It is true enough that the statute does not draw express distinctions based on a person's residency. But the statute on its face does take notice of an individual's treatment in another jurisdiction and uses his treatment elsewhere as the template for how he will now be treated as an Indiana citizen, under Indiana law. In doing so, the statute necessarily implicates his travel history. More to the point, it creates distinct classes of Indiana citizenship that turn upon what rights and obligations an individual has been assigned by another state. In some instances, the effect is benign; in others, the individual loses important freedoms he would have enjoyed as an Indiana citizen had he never relocated from or traveled to another state. In *all* applications of the statutory provision at issue here, it is the person's travel history, and his treatment in another jurisdiction, that define his rights as an Indiana citizen going forward. The burdens that the plaintiffs in this case, and other Indiana offenders like them, must shoulder as a result of the other jurisdiction provision are not the unintended consequence of a statute that is otherwise neutral vis-à-vis the right to travel. The very purpose of the statute is to use the fact of one's prior presence in another jurisdiction to circumscribe his rights as an Indiana citizen. This is not disparate impact. It is, overtly and unmistakably, disparate treatment. Although the Supreme Court has not yet confronted the particular fact pattern presented here, its teachings show us why

AMERICAN OVERSIGHT

Indiana's registration scheme unconstitutionally burdens the plaintiffs' right to travel.

4.

The majority relies on two features of Indiana's other jurisdiction provision to distinguish it from the sorts of durational residency schemes that the Supreme Court has deemed to violate the right to travel. First, if a sex offender relocates to Indiana from another state that did not require him to register, Indiana's other jurisdiction provision will not by its terms compel him to register in Indiana. Second, relocating to Indiana is not the only way of triggering the other jurisdiction provision: The provision also comes into play when an Indiana resident—however longstanding—travels to another state for work or study (while remaining an Indiana resident) and is required to register in that state so long as he is present for those purposes. To the majority's way of thinking, these provisions show that Indiana is not discriminating based on the length of one's residency in Indiana, as has typically been the case in the Supreme Court's jurisprudence.

Certainly the timing and duration of one's residency in Indiana is not the sole determinant of whether its other jurisdiction provision will compel him to register as a sex offender in Indiana. If anything, however, the way in which Indiana's other jurisdiction provision operates makes plain that Indiana is relying exclusively on how one was treated in another state to determine how he will be treated in Indiana. This cannot be reconciled with what I understand to be the animating rationale of the Supreme Court's right-to-travel cases. I will take each feature of the Indiana provision, including its application to relocating persons like the plaintiffs, in turn to explain my view.

AMERICAN OVERSIGHT

5.

Start with the benign application of the other jurisdiction provision: If an offender relocates to Indiana from a state that did not require him to register, then he will not be made to register in Indiana. I agree with the majority that this is one aspect of the provision showing that Indiana is not invariably discriminating against residents who relocate from other states.

Of course, as the majority recognizes, this was true in *Saenz* as well. For the recipients of public benefits who were relocating to California from other states, California capped the amount of such benefits such individuals could receive during their first year of residence in California at the levels they received in their prior states of residence for a period of one year. But not every state had public benefit levels that were lower than California's relatively generous payments; a handful gave their residents equal or greater benefits. Individuals relocating from those states thus suffered no disadvantage as a result of their relocation; they received the same benefit amounts upon relocation that a long-standing Californian would. 526 U.S. at 497 & n.8, 119 S. Ct. at 1523 & n.8. That did not move the Supreme Court. It still found the scheme as a whole one that impermissibly discriminated against new residents based on their recent arrival in California. *Id.* at 505–07, 119 S. Ct. at 1527–28.

So the fact that not *every* sex offender who relocates to Indiana from another state or travels from Indiana to another state will incur a registration obligation as a result does not rule out the possibility that Indiana is interfering with the right to travel—indeed, it confirms that what Indiana is doing is using another state's treatment of a sex offender as a proxy

AMERICAN OVERSIGHT

for how he should be treated in Indiana. If an offender is fortunate enough to travel to or relocate from a state that does not impose a registration obligation on him, Indiana will not do so; but if the other state does require him to register, then Indiana will as well. Either way, Indiana is relying on another state's treatment of the offender as dispositive of how he will be treated in Indiana.

6.

This is unquestionably the case with the six plaintiffs before us. All six committed a sex offense in or before 1994, when Indiana adopted the original version of its Sex Offense Registration Act (SORA). Because the plaintiffs' crimes were committed before they became registrable offenses under Indiana law, *Wallace* precludes the state from imposing a registration obligation based on their criminal histories. *Wallace* treats registration as a punishment, and thus one that Indiana's *ex post facto* provision rules out for offenses taking place before registration became proscribed for an individual's offense. Had the plaintiffs been living in Indiana at the time of their offenses and remained there afterward, they would be free today of any obligation to register under *Wallace*.

For the plaintiffs, it is the fact that they relocated to Indiana at a later date, and from other states that required them to register, that deprives them of the benefit of Indiana's *ex post facto* provision. Although their crimes were such that, if committed in Indiana, they would not be registrable offenses under *Wallace*, because each of the plaintiffs lived previously in a jurisdiction that treated the offenses as registrable—and saw no *ex post facto* problem with doing so—Indiana seizes on the prior registration obligation itself to demand registration

AMERICAN OVERSIGHT

in Indiana. It is thus one's relocation from such a state that is the trigger for the registration obligation in Indiana.

Plaintiff Brian Hope's history makes plain the problem. Hope in fact committed his sex offense in Indiana. He committed the offense in 1993 and pleaded guilty in 1996. In 2000, he completed his probation. In 2004, he moved to California and later to Texas, where he was required to register under Texas law based on his Indiana conviction.[6] When he returned to Indiana in 2013 to help care for an ailing family member, Indiana invoked the other jurisdiction provision to require him to register in Indiana. Given the date of his offense, Indiana law does not treat his criminal history as one requiring registration: Again, *Wallace* holds that the state's *ex post facto* provision forbids it. But because Hope previously lived in Texas, which *did* treat his offense as one requiring registration, Indiana relies on the prior registration obligation itself to demand that he register in Indiana. But for his travel to and from Texas, Hope would have no such obligation as a matter of Indiana law. *See also Ammons v. State*, 50 N.E.3d 143, 144–45 (Ind. 2016) (per curiam) (no *ex post facto* violation where Indiana resident committed sex offense pre-SORA, later moved to Iowa, which required him to register based on his Indiana conviction, and upon subsequent return to Indiana was required to register based on the Iowa registration obligation).

The same, of course, is true with respect to the other five plaintiffs. Like Hope, they committed sex offenses (albeit not

[6] Hope himself does not concede that Texas required him to register based on his Indiana conviction. For present purposes, I am accepting Indiana's representation that he was required to register on this basis.

AMERICAN OVERSIGHT

in Indiana) that were not registrable in Indiana when the crimes took place. So under *Wallace*, Indiana's *ex post facto* provision would bar the state from imposing a registration requirement based on their criminal histories. Instead, the state looks to the obligations imposed on the plaintiffs by their former states of residence as the trigger for registration in Indiana.

As a consequence of this scheme, the plaintiffs arrived in Indiana with a lesser set of rights than otherwise similarly-situated Indiana offenders. Rather than treat the offender's criminal history as the dispositive factor in deciding whether registration is required—and permitted by Indiana's *ex post facto* provision—Indiana has looked instead to what civil burdens an offender's former state of residence imposed on him and adopts those burdens as its own.

In effect, the state is treating an offender who moved to Indiana from, say, New York, where he was required to register, as if he remains a citizen of New York for registration purposes, and he cannot claim the benefit of Indiana's *ex post facto* clause in the same way that a lifelong Indiana resident with the identical criminal history can. Even Hope, who was an Indiana resident when he committed his sex offense, has lost the benefit of Indiana's *ex post facto* decision because he left Indiana and for a time resided in another state which burdened him with a registration obligation that *Wallace* foreclosed Indiana from imposing. Because he was formerly a citizen of Texas, Indiana requires Hope to carry the same burden as a Hoosier that he carried as a Texan.

AMERICAN OVERSIGHT

7.

This unique feature of Indiana's registration scheme—requiring registration based not on one's criminal history and on how Indiana law treats that history, but rather on how another state treated that history as a matter of its own law (even if it is an Indiana criminal history)—implicates the core concerns that have animated the Supreme Court's right-to-travel decisions. Indiana is classifying the six plaintiffs based on their prior domiciles and assigning them a lesser set of rights (no *ex post facto* protection vis-à-vis registration obligations) and a greater set of burdens (the duty to register as a sex offender, in some cases for life) as compared with similar offenders who lived in Indiana before its SORA was adopted and have remained there since. As more recently arrived residents of Indiana, the plaintiffs do not enjoy all of the same rights and privileges as other Indiana residents. *See Saenz*, 526 U.S. at 505–07, 119 S. Ct. at 1527–28 (invalidating California scheme temporarily capping amount of public aid new residents could receive to amounts they received in their former domiciles); *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 911–12, 106 S. Ct. 2317, 2325–26 (1986) (invalidating civil service employment preference limited to veterans who resided in state at time they entered military service); *Hooper*, 472 U.S. at 622–23, 105 S. Ct. at 2868–69 (invalidating property tax exemption limited to veterans who resided in state prior to specified date); *Zobel v. Williams*, 457 U.S. 55, 64–65, 102 S. Ct. 2309, 2314–15 (1982) (invalidating distribution of public oil dividends to state residents based on the length of their residency in state); *Mem. Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 269, 94 S. Ct. 1076, 1088 (1974) (invalidating requirement that citizen must reside in state for period of one year before becoming eligible for non-emergency medical care at public expense);

AMERICAN OVERSIGHT

Shapiro, 394 U.S. at 633, 89 S. Ct. at 1330 (invalidating various provisions requiring one year's residence in state to be eligible for public aid).

To be sure, there are factual differences between the offender-registration scheme at issue here and the public benefit schemes the Court has addressed previously. Indiana is not imposing a durational residency requirement as California did in *Saenz*: it is not requiring any and all offenders who were required to register in their former states to register in Indiana for a period of one year after their relocation, for example, after which the state will re-evaluate whether they must continue to register in Indiana based on their criminal histories. Indiana's scheme is more like a fixed-point residency scheme, in the sense that had the plaintiffs all established residency in Indiana by 1994 and remained there continuously thereafter, they would have no obligation to register; but having instead relocated to Indiana at later dates, they do have to shoulder the burdens of registration. *Cf. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317 (veteran must have resided in state at the time he entered military service in order to qualify for veterans' civil service preference); *Hooper*, 472 U.S. 612, 105 S. Ct. 2862 (veteran must have been a state resident by specified date in order to qualify for tax exemption). Even that analogy is imperfect because, as the majority reminds us, any Indiana resident can become subject to a registration obligation by commuting to another state that requires him to register there. (More on that aspect of Indiana's scheme in a moment.)

But what Indiana's registration scheme has in common with *Saenz* in particular is that Indiana is looking to an individual's treatment by his former state of residence as the determinant for how he will be treated by Indiana, and limiting

AMERICAN OVERSIGHT

his rights as an Indiana citizen based on the rules of his former domicile. Had Hope never left Indiana, he would by virtue of the *Wallace* decision be free of any obligation to register today. But because he left Indiana and for a time resided in Texas, whose own *ex post facto* clause did not preclude the imposition of a registration obligation upon him, he now occupies a distinct tier of Indiana citizenship which requires him to register for life. In one respect, his case is like that of a veteran who did not yet live in New Mexico as of the qualifying eligibility date the state established for a special tax break for veterans. *Hooper*. In another, he is like a public aid recipient relocating to California, who is assigned a lesser set of benefits upon arrival from another state, *Saenz*, except that here the benefit in question is not public aid but one's ability to invoke Indiana's *ex post facto* protections, and instead of being temporary, the lesser benefit is permanent. *Cf. Soto-Lopez*, 476 U.S. at 909, 106 S. Ct. at 2324 (plurality) ("a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their right to migrate").

Certainly it is true that the Supreme Court has not addressed the right to travel in this particular context. But what it has already said about a state's obligation to treat newcomers on equal terms with longer-term residents applies with equal force here. With respect to the state's *ex post facto* guarantee, Indiana is treating each of the plaintiffs as a stranger rather than one of its own, relegating them to the more burdensome status they held in their prior domiciles as offenders subject to punitive registration requirements. *Cf. Mem. Hosp.*, 415 U.S. at 261–62, 94 S. Ct. at 1084 ("Not unlike the admonition of the Bible that, 'Ye shall have one manner of law, as well for the stranger, as for your own country,' Leviticus 24:22

AMERICAN OVERSIGHT

(King James version), the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.").

8.

But what of the fact that any citizen of Indiana, however long he has resided in the state, can incur a registration obligation simply by commuting to another state that requires him to register so long as he is present there? *See, e.g.*, 730 Ill. Comp. Stat. 150/3(a-5) ("An out-of-state student or out-of-state employee shall, within 3 days after beginning school or employment in this State, register in person and provide accurate information as required by the Department of State Police."). Certainly this is another point of distinction between this case and the Supreme Court's precedents, and as the majority points out, this application of Indiana's scheme shows that residency per se is not always the triggering factor for the obligation to register (although it is for the plaintiffs). But one's travel certainly is the trigger, and as in the case of relocation to Indiana from another state, one's travel for work or study to another state that requires registration while there again results in the permanent loss of rights vis-à-vis other Indiana citizens. Although the commuter scenario is not presented in this case, it implicates the Supreme Court's right-to-travel jurisprudence just as surely as the plaintiffs' relocation scenario does.

Consider what happens when a lifelong Indiana resident who was convicted of a sex offense pre-SORA commutes to another state—neighboring Illinois, for example—for work or study and must register there as a matter of Illinois law. Now he has been required to register in another jurisdiction, and

AMERICAN OVERSIGHT

Indiana can cite that Illinois registration requirement as the basis for requiring him to register in Indiana. As a result of his travel, this individual has now effectively lost the benefit of Indiana's *ex post facto* clause and the *Wallace* decision. His criminal history is precisely the same as it was before. He has not violated the terms of supervision or a protective order, or taken some other action that suggests he poses an increased risk of recidivism or danger to others. Nothing about his background has changed except for the fact that he traveled to another jurisdiction that required him to register as a matter of its own law (including its own *ex post facto* jurisprudence), so long as he was present in that other state. Without ever surrendering his Indiana citizenship, he leaves Indiana with one set of rights and obligations and returns with another, simply because he traveled to another state with a different set of rules.

From the earliest days of this country, the right to travel freely among the states has been recognized as an essential right of national citizenship. *See* Articles of Confederation, art. IV, § 1 (1778) (recognizing a right of "free ingress and regress to and from any other State" and affording to the free inhabitants of each state "all privileges and immunities of free citizens in the several states"); U.S. Const., art. IV, § 2, cl. 1 ("[t]he citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States"); *id.*, amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States[.]"); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (Cir. Ct. E.D. Pa. 1823) (Bushrod Washington, Circuit Justice) ("The right of a citizen of one

AMERICAN OVERSIGHT

state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise ... may be mentioned as [one] of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental … ."); *Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."); *Edwards*, 314 U.S. at 178, 62 S. Ct. at 169 (Douglas, J., concurring) ("The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."); *id.* at 183, 62 S. Ct. at 171 (Jackson, J., concurring) ("This Court should … hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing."); *Shapiro*, 394 U.S. at 629, 89 S. Ct. at 1329 ("This Court long ago recognized that the nature of our Federal Union and our constitutional precepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden this movement.").

Traveling from one state to another at the cost of surrendering the rights one otherwise enjoys as the bona fide resident of one's home state is not free travel. Indiana cannot, I submit, tell one of its citizens, "You have all the rights of a Hoosier today, but if you travel to another state that accords

AMERICAN OVERSIGHT

you lesser rights, you return with only so many rights as that state gave you." To do so may implicate the first as well as the third aspect of the right to travel, *see ante* at 11 (outlining the three aspects), but it certainly violates the central teaching of the Supreme Court's right-to-travel precedents, which is that a state cannot invidiously classify its residents, and afford them differential rights, based on when and whence they have come to the state.

9.

States can and do reach different conclusions about what crimes should require registration. They also can and do reach different conclusions about whether registration obligations are punitive, such that they implicate their own *ex post facto* provisions. What they cannot do, having settled these questions in a particular way, is to apply a different set of rules to a citizen who has relocated from a jurisdiction that answered the questions differently. In terms of his rights as a state citizen, an Indiana citizen newly relocated from Texas is not a former Texan, he is a Hoosier, period, and he must be treated as such.

Indiana decided to require registration for the particular offenses that the plaintiffs committed, but only after the plaintiffs committed those crimes. And because Indiana's Supreme Court has decided that the state's registration obligations are punitive, Indiana's *ex post facto* provision bars the state from requiring registration of all six plaintiffs based on their criminal histories. The state cannot pick and choose which of its residents can claim the benefit of that provision, but that is in effect what Indiana is doing. By placing its reliance on the fact that an offender relocated from another state that imposed a registration obligation as a matter of its own laws (including

AMERICAN OVERSIGHT

its *ex post facto* jurisprudence) as the basis for requiring the offender to register in Indiana, it is precluding the offender from claiming the benefit of the Indiana *ex post facto* clause that another citizen of Indiana would be entitled to claim. It is saying to plaintiff Hope, "Yes, you had a right to be free from registration when you previously lived in Indiana and committed your offense, but you lost that right when you moved to Texas, which interpreted its own legal provisions so as to require you to register."

None of the six plaintiffs in this case has done a single thing to distinguish himself from a similarly-situated Indiana offender who, by virtue of the timing of his residency in Indiana, cannot be required to register under *Wallace*—*except* relocate (i.e., travel) from another state that had different registration rules. The right to travel, as conceived and applied by the Supreme Court, forbids such inconsistent and discriminatory treatment of Indiana's citizens. The express logic, if not the fact-specific holdings, of the Supreme Court's right-to-travel precedents, call upon us to affirm the district court's decision to grant the plaintiffs declaratory and injunctive relief on this point.

For the foregoing reasons, and the additional reasons set forth in the panel's now-vacated majority opinion, 984 F.3d 532, I respectfully dissent as to this aspect of the court's decision.

AMERICAN OVERSIGHT

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

[Docket No. ATF 2021R–05; AG Order No. 5051–2021]

RIN 1140–AA54

Definition of "Frame or Receiver" and Identification of Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Department of Justice ("Department") proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") regulations to provide new regulatory definitions of "firearm frame or receiver" and "frame or receiver" because the current regulations fail to capture the full meaning of those terms. The Department also proposes amending ATF's definitions of "firearm" and "gunsmith" to clarify the meaning of those terms, and to provide definitions of terms such as "complete weapon," "complete muffler or silencer device," "privately made firearm," and "readily" for purposes of clarity given advancements in firearms technology. Further, the Department proposes amendments to ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before August 19, 2021. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number ATF 2021R–05, by any of the following methods—

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; *ATTN: ATF 2021R–05.*
- *Fax:* (202) 648–9741.

Instructions: All submissions received must include the agency name and docket number (ATF 2021R–05) for this notice of proposed rulemaking ("NPRM" or "proposed rule"). All properly completed comments received will be posted without change to the Federal eRulemaking portal, *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the Gun Control Act of 1968 ("GCA"), as amended, and the National Firearms Act of 1934 ("NFA"), as amended.[1] This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing the GCA and NFA. *See* 27 CFR parts 478, 479.

Prior to passage of the GCA, the Federal Firearms Act of 1938 ("FFA") regulated all firearm parts. The FFA and implementing regulations defined the term "firearm" to mean "any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such weapon.*" Public Law 75–785, 52 Stat. 1250 (1938); 26 CFR 177.10 (repealed) (emphasis added). The Omnibus Crime Control and Safe Streets Act of 1968 repealed the FFA, replacing it with the GCA. Public Law 90–351, section 907, 82 Stat. 197 (1968). During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that "[t]he present definition of this term includes 'any part or parts' of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.'" *See* 111 Cong. Rec. 5527 (March 22, 1965).[2]

A "firearm" is defined by 18 U.S.C. 921(a)(3) to include not only a weapon that will, is designed to, or may readily be converted to expel a projectile, but also the "frame or receiver" of any such weapon. Because "frames" or "receivers" are included in the definition of "firearm," any person who engages in the business of manufacturing, importing, or dealing in frames or receivers must obtain a license from ATF. 18 U.S.C. 922(a)(1)(A); *id.* at 923(a). Each licensed manufacturer or importer must "identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer."[3] 18 U.S.C. 923(i); *see* 27 CFR 478.92, 479.102. Licensed manufacturers and importers must also maintain permanent records of production or importation, as well as their receipt, sale, or other disposition of firearms, including frames or receivers. 18 U.S.C. 923(g)(1)(A); 27 CFR 478.122, 478.123.

A "frame or receiver" is the primary structural component of a firearm to which fire control components are attached.[4] While the GCA does not

[1] NFA provisions still refer to the "Secretary of the Treasury." 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002), transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this notice of proposed rulemaking refers to the Attorney General throughout.

[2] *See also* H.R. Rep. 90–1577, at 4416 (June 21, 1968) ("Under former definitions of 'firearm,' any part or parts of such a weapon were included. It was found impractical to have controls over each small part of a firearm. Thus, this definition includes only the major parts of the firearm, that is, the frame or receiver."); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same).

[3] Additionally, a firearm frame or receiver that is not a component part of a complete weapon at the time it is sold, shipped, or disposed of must be identified in the manner prescribed with a serial number and all of the other required markings. 27 CFR 478.92(a)(2); *id.* at 479.102(e); ATF Ruling 2012–1.

[4] *See* Webster's Third New International Dictionary, pp. 902, 1894 (1971) (a "frame" is "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm"; "receiver" means "the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached"); *Olson's Encyclopedia of Small Arms,* p.72 (1985) (the term

AMERICAN OVERSIGHT

define the term ''frame or receiver,'' to implement the statute, the terms ''firearm frame or receiver'' and ''frame or receiver'' were defined in regulations several decades ago as that part of a firearm that provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel. 27 CFR 478.11 (implementing GCA, Title I); 27 CFR 479.11 [5] (implementing GCA, Title II). The intent in promulgating these definitions was to provide guidance as to which portion of a firearm was the frame or receiver for purposes of licensing, serialization, and recordkeeping, thereby ensuring that a necessary component of the weapon could be traced if later involved in a crime.

At the time these definitions were published around 50 years ago, single-framed firearms such as revolvers and break-open shotguns were far more prevalent for civilian use than split/multi-piece receiver weapons, such as semiautomatic rifles and pistols with detachable magazines. Single-framed firearms incorporate the hammer, bolt or breechblock, and firing mechanism within the same housing. Years after these definitions were published, split/multi-piece receiver firearms, such as the AR–15 semiautomatic rifle (upper receiver and lower receiver), Glock semiautomatic pistols (upper slide assembly and lower grip module), and Sig Sauer P320 (M17/18 as adopted by the U.S. military) (upper slide assembly, chassis, and lower grip module), became popular.[6] Additionally, more firearm manufacturers began incorporating a striker-fired mechanism rather than a ''hammer'' in the firing design. With the rise in popularity of striker-fired Glock semiautomatic pistols in the mid-1980s, other manufacturers began incorporating a striker-fired mechanism, rather than a hammer, in semiautomatic handguns.[7]

A. ATF's Application of the Definitions To Split Frames or Receivers

Although ATF's regulatory definitions of ''frame or receiver'' do not expressly capture these types of firearms (*i.e.,* split/multi-piece receivers) that now constitute the majority of firearms in the United States,[8] ATF's position has long been that the weapon ''should be examined with a view toward determining if [either] the upper or lower half of the receiver more nearly fits the legal definition of 'receiver,' '' and more specifically, for machineguns, whether the upper or lower portion has the ability to accept machinegun parts.[9] [10]

Since it began issuing firearm classifications under the GCA and NFA in private letter rulings and for criminal investigations, ATF has considered a variety of factors when examining firearms, including: (a) Which component the manufacturer intended to be the frame or receiver; (b) which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms; (c) how the component fits within the overall design of the firearm when assembled; (d) the design and function of the fire control components to be housed, such as the hammer, bolt or breechblock, and firing mechanism; (e) whether the component could permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed, in accordance with regulations; (f) whether classifying the particular component is consistent with the legislative intent of the GCA and implementing regulations; and (g) whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

Even though neither the upper nor the lower portion of a split/multi-piece receiver firearm alone falls within the precise wording of the regulatory definition, ATF has for many years interpreted the regulatory definition using these factors as a guide in determining which portion of a weapon model is a firearm frame or receiver. Indeed, the current definitions were never intended to be, or understood to be, exhaustive; at the time the current definitions were adopted there were numerous models of firearms that did not contain a part that fully met the regulatory definition of ''frame or receiver,'' such as the Colt 1911, FN–FAL, and the AR–15/M–16, all of which were originally manufactured almost exclusively for military use, and ATF has long applied these factors in determining which component of those weapons qualifies as the frame or receiver.[11]

Existing law recognizes that the definition of ''frame or receiver'' need not be limited to a strict application of the regulation. The prefatory paragraph to the definitional section of 27 CFR 478.11 (Meaning of Terms) states: ''[w]hen used in this part and in forms

''frame'' means ''the basic structure and principal component of a firearm''); *Steindler's New Firearms Dictionary* p. 209 (1985) (''receiver'' means ''that part of a rifle or shotgun (excepting hinged frame guns) that houses the bolt, firing pin, mainspring, trigger group, and magazine or ammunition feed system. The barrel is threaded into the somewhat enlarged forward part of the receiver, called the receiver ring. At the rear of the receiver, the butt or stock is fastened. In semiautomatic pistols, the frame or housing is sometimes referred to as the receiver.'').

[5] The definition of ''frame or receiver'' in § 479.11 differs slightly from the definition in § 478.11 in that it omits an Oxford comma between ''bolt or breechblock'' and ''firing mechanism.''

[6] *See Once Banned, Now Loved and Loathed: How the AR–15 Became 'America's Rifle'*, New York Times (Mar. 3, 2018), *https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html* (Once the patent expired in 1977, ''it opened the way for dozens of weapons manufacturers to produce their own models, using the same technology. The term AR–15 has become a catchall that includes a variety of weapons that look and operate similarly''); Paul M. Barrett, *Glock: The Rise of America's Gun* 21–23 (2013) (''Today the Glock is on the hip of more American police officers than any other handgun.''); *A Star Is Born—U.S. Army Chooses Sig Sauer P320 For Its New Service Pistol, Forbes.com* (Jan. 20, 2017) *https://www.forbes.com/sites/frankmininter/2017/01/20/a-star-is-born-u-s-army-chooses-sig-sauer-p320-for-its-new-service-pistol/*. While millions of AR–15s/M–16s existed at the time ATF promulgated the definitions, they were manufactured almost exclusively for military use. *See* Internal Colt Memorandum from B. Northrop, Feb. 2, 1973, p.2 (noting that there were 2,752,812 military versus 25,774 civilian (''Sporters'') serialization of AR–15/M–16 rifles then manufactured).

[7] *A Matter of Purpose: Striker Fire vs. Hammer Fire*, Small Arms Defense Journal (June 8, 2018), *http://www.sadefensejournal.com/wp/a-matter-of-purpose-striker-fire-vs-hammer-fire/* (''Even though Glock wasn't the first to use striker fire on pistols, Glock can be credited for making the striker fire popular in the 1980s when they started using striker fire in their entire line of pistols. As Glock became popular, other manufacturers started using striker fire as well, proliferating it across the firearms manufacturing community on a grand scale.'').

[8] *United States* v. *Rowold*, 429 F. Supp. 3d 469 (N.D. Ohio 2019), Testimony of ATF Firearms Enforcement Officer Daniel Hoffman at Doc. No. 60, Hrg. Tr., Page ID 557 (approximately 10% of currently manufactured firearms in the United States include the three components in the frame or receiver definition); and Defense Expert Daniel O'Kelly at Doc. No. 60, Hrg. Tr. Page ID 482 (''90 some percent of [semiautomatic pistols] do not have a part which has more than one of these four elements in it and, therefore, don't qualify, according to the definition in the CFR.'').

[9] ATF Internal Revenue Service Memoranda #21208 (Mar. 1, 1971) (lower portion of the M–16 is the frame or receiver because it comes closest to meeting the definition of frame or receiver in 26 CFR 178.11 (now 27 CFR 478.11), and is the receiver of a machinegun as defined in the NFA); ATF Memorandum #22334 (Jan. 24, 1977) (upper half of the FN FAL rifle is the frame or receiver because it was designed to accept the components that allow fully automatic fire). The ability to accept machinegun parts is considered because both the GCA and the NFA regulate machinegun receivers as ''machineguns.'' *See* 18 U.S.C. 921(a)(23); 26 U.S.C. 5845(b) (''The term ['machinegun''] shall also include the frame or receiver of any such weapon [which shoots is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger].'').

[10] Regulations implementing the relevant statutes spell the term ''machine gun'' rather than ''machinegun.'' *E.g.,* 27 CFR 478.11, 479.11. For convenience, this notice of proposed rulemaking uses ''machinegun'' except when quoting a source to the contrary.

[11] *See* footnote 9 *supra.*

AMERICAN OVERSIGHT

prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section." [12] The intent of Congress, as indicated by the plain language and the statutory scheme of the GCA, is to regulate—as a firearm—the frame or receiver of a firearm. *See* 111 Cong. Rec. 5527 (March 22, 1965). As stated above, Congress replaced the term "part or parts" in the FFA definition of "firearm" with "frame or receiver," the major parts of a weapon regulated under the GCA. This includes marking these parts with serial numbers for tracing purposes, recording these parts as "firearms" in required records, and running a National Instant Criminal Background Check System ("NICS") background check when individuals purchase or acquire them.

In the past few years, however, some courts have treated the regulatory definition as exhaustive when applied to the lower portion of the AR–15-type rifle, which is the semiautomatic version of the M–16-type machinegun originally designed for the U.S. military. While ATF for decades has classified the lower receiver of the AR–15 rifle as a "frame or receiver," courts recently have read the regulatory definition to mean that the lower portion of the AR–15 is not a "frame or receiver" because it only provides housing for the hammer and firing mechanism, but not the bolt or breechblock. *See United States* v. *Rowold,* 429 F. Supp. 3d 469, 475–77 (N.D. Ohio 2019) ("The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism."); *United States* v. *Jimenez,* 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) ("[A] receiver must have the housing for three elements: hammer, bolt or breechblock, and firing mechanism."); *United States* v. *Joseph Roh,* SACR 14–167–JV, Minute Order p. 6 (C.D. Cal. July 27, 2020) (granting defendant's post-trial motion for acquittal for manufacturing AR–15 lower receivers without a license because "[n]o reasonable person would understand that a part constitutes a receiver where it lacks the components specified in regulation").

These courts' interpretation of ATF's regulations, if broadly followed, could mean that as many as 90 percent of all firearms now in the United States would not have any frame or receiver subject to regulation.[13] Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320 [14] pistols, that do not utilize a hammer—a named component—in the firing sequence. Such a narrow interpretation of what constitutes a frame or receiver would allow persons to avoid: (a) Obtaining a license to engage in the business of manufacturing or importing upper or lower frames or receivers; (b) identifying upper or lower frames or receivers with a serial number and other traceable markings; (c) maintaining records of upper or lower frames or receivers produced or imported through which they can be traced; and (d) running NICS checks on potential transferees to determine if they are legally prohibited from receiving or possessing firearms when they acquire upper or lower frames or receivers. In turn, this would allow prohibited persons to acquire upper and lower receivers that can quickly be assembled into semiautomatic weapons more easily and without a background check.[15] If no portion of split/multi-piece frames or receivers were subject to any existing regulations, such as marking, recordkeeping, or background checks, law enforcement's ability to trace semiautomatic firearms later used in crime would be severely impeded. This result would thereby undermine the intent of Congress in requiring the frame or receiver of every firearm to be identified, *see* 18 U.S.C. 923(i), and regulated as a firearm, *see* 18 U.S.C. 921(a)(3)(B).[16]

B. Privately Made Firearms or "Ghost Guns"

Technological advances have also made it easier for unlicensed persons to make firearms at home from standalone parts or weapon parts kits, or by using 3D printers or personally owned or leased equipment, without any records or a background check. Commonly referred to as "ghost guns," these privately made firearms ("PMFs"), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver, making it difficult for law enforcement to determine where, by whom, or when they were manufactured, and to whom they were sold or otherwise disposed.

In recent years, the number of PMFs recovered from crime scenes throughout the country has increased.[17] From January 1, 2016, through December 31, 2020, there were approximately 23,906 suspected PMFs reported to ATF as having been recovered by law enforcement from potential crime scenes, including 325 homicides or attempted homicides, and that were attempted to be traced by ATF, broken down by year as follows: [18]

[12] ATF's predecessor agency, the Alcohol, Tobacco and Firearms Division within the Internal Revenue Service, derived this limitation on the application of definitions from the Internal Revenue Code ("IRC"), 26 U.S.C. 7701(a). Courts interpreting definitions in the IRC have not strictly applied those definitions where they would be manifestly incompatible with the intent of the applicable statute. *See, e.g., Pierre* v. *Commissioner,* 133 T.C. 24, 35 (2009) (even though a Limited Liability Company was not among any of the named entities defined in section 7701, it would be manifestly incompatible with the Federal estate and gift tax statutes to exclude them); *Bunnel* v. *Commissioner,* 50 T.C. 837, 841 (1968) (literal application of the definition of "taxpayer" in section 7701(a)(14) was avoided where it was manifestly incompatible with the intent of other sections of the IRC); *Davis* v. *Commissioner,* 30 T.C. 462, 466–67 (1958) (strict geographical application of the term "United States" in 26 U.S.C. 3797(a)(9) (now 7701(a)(9)) to the territory of American Samoa, rather than in a political sense, would be manifestly incompatible with the intent and purpose of the income tax exemption for persons earning income outside the United States).

[13] *See* footnote 8, *supra.*

[14] The United States military services have adopted variants of the Sig Sauer P320 as their official side arm, and are in the process of purchasing up to 500,000 of these striker-fired pistols. *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol, Military.com* (Jan. 19, 2017), *https://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html; Every U.S. military branch is about to get its hands on the Army's new sidearm of choice, Taskandpurpose.com* (Nov. 18, 2020), *https://taskandpurpose.com/military-tech/modular-handgun-system-fielding/* (Sig Sauer delivered its 200,000th P320 variant pistol to the military despite the obstacles posed by the novel coronavirus).

[15] *See Design of AR–15 could derail charges tied to popular* rifle, *APnews.com* (Jan. 13, 2020), *https://apnews.com/article/396bbedbf4963a28bda99e7793ee6366.*

[16] *See* footnote 2, *supra.*

[17] *See Baltimore police report a 400% increase in untraceable 'ghost guns',* The Baltimore Sun (Feb. 18, 2021), *http://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-ghost-gun-ban-20210218-ae2dortu6ngn5llmfmq6yxtx6m-story.html; Syracuse joins lawsuit against feds amid rise in ghost guns,* WRVO Syracuse (Aug. 27, 2020), *https://www.wrvo.org/post/syracuse-joins-lawsuit-against-feds-amid-rise-ghost-guns#stream/0; Ghost Guns: The build-it-yourself firearms that skirt most federal gun laws and are virtually untraceable,* CBS News (May 10, 2020), *https://www.cbsnews.com/news/ghost-guns-untraceable-weapons-criminal-cases-60-minutes-2020-05-10/; Untraceable ghost guns proliferate as Philadelphia grapples with violence,* The Morning Call (Mar. 18, 2020), *https://www.mcall.com/news/pennsylvania/mc-nws-pa-philadelphia-ghost-guns-20200318-jzyt4thyvvgntproexbleyleay-story.html; Ghost Guns Are Everywhere in California,* The Trace (May 17, 2019), *https://www.thetrace.org/2019/05/ghost-gun-california-crime/; The Rise of Untraceable Ghost Guns,* Wall Street Journal (Jan. 4, 2018), *https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800; How D.C. Is Addressing An Ongoing Spike In Gun Violence,* NPR Washington (Mar. 2, 2020), *https://www.npr.org/local/305/2020/03/02/811194978/how-d-c-is-addressing-an-ongoing-spike-in-gun-violence; Untraceable 'Ghost Guns' sold across Central Florida,* WKMG–TV Orlando (Nov. 15, 2016), *https://www.clickorlando.com/getting-results/2016/11/15/untraceable-ghost-guns-sold-across-central-florida/.*

[18] Source: ATF Office of Strategic Intelligence and Information. These numbers (as of March 4, 2021)

AMERICAN OVERSIGHT

2016: 1,750
2017: 2,507
2018: 3,776
2019: 7,161
2020: 8,712

It is, therefore, not unexpected that numerous Federal criminal cases have been brought by the Department to counter illegal trafficking in unserialized home-completed and assembled weapons, and possession of such weapons by prohibited persons.[19]

The problem of untraceable firearms being acquired and used by violent criminals and terrorists is international in scope. On May 28, 2019, citing intelligence reports by the Department of Homeland Security ("DHS"), the Federal Bureau of Investigation ("FBI"), and the National Counterterrorism Center ("NCTC"), the House Committee on Homeland Security issued a report concluding that "[g]host guns not only pose a challenge on the front end, enabling prohibited buyers to purchase deadly weapons with just a few clicks online, but also on the back end, hamstringing law enforcement's ability to investigate crimes committed with untraceable weapons" and that the "wide availability of ghost guns and the emergence of functional 3D-printed guns are a homeland security threat. Terrorists and other bad actors may seek to exploit the availability of these weapons for dangerous ends." H.R. Rep. No. 116–88, at 2 (May 28, 2019).[20] Criminal investigations and studies highlight this concern.[21]

The GCA "insists that the dealer keep certain records, to enable federal authorities both to enforce the law's verification measures and to trace firearms used in crimes." *Abramski* v. *United States,* 573 U.S. 169, 173 (2014) (citing H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)). "That information helps to fight serious crime." *Id.* at 182; *see also* Identification Markings Placed on Firearms, 66 FR 40597 (Aug. 3, 2001) ("Firearms tracing is an integral part of

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are likely far lower than the actual number of PMFs recovered from crime scenes because some law enforcement departments incorrectly trace some PMFs as commercially manufactured firearms, or may not see a need to use their resources to attempt to trace firearms with no serial number or other identifiable markings. The term "suspected PMF" is used because of the difficulty of getting law enforcement officials to uniformly enter PMF trace information into ATF's electronic tracing system ("eTrace"), resulting in reporting inconsistencies of PMFs involved in crime. For example, often PMFs resemble commercially manufactured firearms, or incorporate parts from commercially manufactured firearms bearing that manufacturer's name, so some firearms suspected of being PMFs were entered into eTrace using a commercial manufacturer's name rather than as one privately made by an individual. The term "potential crime scenes" is used because ATF does not know if the firearm being traced by the law enforcement agency was found at a crime scene as opposed to one recovered by them that was stolen or otherwise not from at the scene of a crime. This is because the recovery location or correlated crime is not always communicated by the agency to ATF in the tracing process.

[19] *See, e.g., Kissimmee Man Sentenced To Five Years In Prison For Manufacturing Over 200 "Ghost Guns" Without A License,* D.O.J Office of Public Affairs (June 12, 2018), *https://www.justice.gov/usao-mdfl/pr/kissimmee-man-sentenced-five-years-prison-manufacturing-over-200-ghost-guns-without; Grass Valley Man Sentenced to 5 Years in Prison for Unlawfully Manufacturing Ghost Guns and Selling Them on Dark Web,* DOJ Office of Public Affairs (Sept. 21, 2018), *https://www.justice.gov/usao-edca/pr/grass-valley-man-sentenced-5-years-prison-unlawfully-manufacturing-ghost-guns-and; Rhode Island Man Charged with Building, Selling "Ghost" Machine Gun,* DOJ Office of Public Affairs (Dec. 12, 2018), *https://www.justice.gov/usao-ri/pr/rhode-island-man-charged-building-selling-ghost-machine-gun; Conroe Man Ordered to Prison for Making "Ghost Guns",* DOJ Office of Public Affairs (Feb. 21, 2019) *https://www.justice.gov/usao-sdtx/pr/conroe-man-ordered-prison-making-ghost-guns; Seven Felons Indicted, Dozens of Firearms Seized as Part of Investigation Targeting Criminal Gun Sales in Orange County,* DOJ Office of Public Affairs (Oct. 10, 2019), *https://www.justice.gov/usao-cdca/pr/seven-felons-indicted-dozens-firearms-seized-part-investigation-targeting-criminal-gun; Man Sentenced to 15 Years for Trafficking "Ghost Guns" and Drugs,* DOJ Office of Public Affairs (Feb. 14, 2020), *https://www.justice.gov/usao-edva/pr/man-sentenced-15-years-trafficking-ghost-guns-and-drugs; Tampa Man Sentenced To Over Five Years For Manufacturing Counterfeit Credit Cards, Fake IDs, And Illegal Firearms,* DOJ Office of Public Affairs (June 26, 2020), *https://www.justice.gov/usao-mdfl/pr/tampa-man-sentenced-over-five-years-manufacturing-counterfeit-credit-cards-fake-ids-and; Alleged Dealer of Ghost Guns and Machinegun Conversion Devices Arraigned,* DOJ Office of Public Affairs (July 15, 2020), *https://www.justice.gov/usao-edva/pr/alleged-dealer-ghost-guns-and-machinegun-conversion-devices-arraigned; Connecticut Man Charged with Firearm Trafficking,* DOJ Office of Public Affairs (Aug. 12, 2020), *https://www.justice.gov/usao-ma/pr/connecticut-man-charged-firearm-trafficking; Operation 'Black Phoenix' Leads to Federal Charges Against 25 Who Allegedly Engaged in Illegal Narcotics and Firearms Sales,* DOJ Office of Public Affairs (Sept. 15, 2020), *https://www.justice.gov/usao-cdca/pr/operation-black-phoenix-leads-federal-charges-against-25-who-allegedly-engaged-illegal; D.C. Felon Pleads Guilty in Federal Court in Maryland to Illegal Possession of a "Ghost Gun" Firearm and Ammunition,* DOJ Office of Public Affairs (Sept. 22, 2020), *https://www.justice.gov/usao-md/pr/dc-felon-pleads-gui&lty-federal-court-maryland-illegal-possession-ghost-gun-firearm-and; Ghost Gun and Machine Gun Conversion Device Dealer Pleads Guilty,* DOJ Office of Public Affairs (Sept. 29, 2020), *https://www.justice.gov/usao-edva/pr/ghost-gun-and-machine-gun-conversion-device-dealer-pleads-guilty; Felon sentenced to more than five years in prison for arsenal of 'ghost guns' and smuggled silencers,* DOJ Office of Public Affairs (Oct. 9, 2020), *https://www.justice.gov/usao-wdwa/pr/felon-sentenced-more-five-years-prison-arsenal-ghost-guns-and-smuggled-silencers; Montgomery County Man Admits to Unlawfully Selling "Ghost Guns",* DOJ Office of Public Affairs (Nov. 5, 2020), *https://www.justice.gov/usao-ndny/pr/montgomery-county-man-admits-unlawfully-selling-ghost-guns; Drug Dealer Who Sold "Ghost Guns," Silencers, and a Machinegun Sentenced to Thirty Years in Federal Prison,* DOJ Office of Public Affairs (Nov. 6, 2020), *https://www.justice.gov/usao-ndia/pr/drug-dealer-who-sold-ghost-guns-silencers-and-machinegun-sentenced-thirty-years-federal; Baltimore Man Sentenced to 21 Years in Federal Prison for Five Bank Robberies, Five Armed Robberies of Liquor Stores, and Related Firearms Charges,* DOJ Office of Public Affairs (Nov. 12, 2020), *https://www.justice.gov/usao-md/pr/baltimore-man-sentenced-21-years-federal-prison-five-bank-robberies-five-armed-robberies; Philadelphia Man Sentenced to 12½ Years for Trafficking Methamphetamine and Weapons, Including 'Ghost Guns,' Near Schools,* DOJ Office of Public Affairs (Dec. 30, 2020), *https://www.justice.gov/usao-edpa/pr/philadelphia-man-sentenced-12-12-years-trafficking-methamphetamine-and-weapons; Vineland Boys Gang Member Pleads Guilty to Racketeering Offenses, Including Attempted Murder and Narcotics Trafficking,* DOJ Office of Public Affairs (Jan. 22, 2021), *https://www.justice.gov/usao-cdca/pr/vineland-boys-gang-member-pleads-guilty-racketeering-offenses-including-attempted; Burbank Man Arrested on Federal Complaint Alleging He Sold 'Ghost Guns' Out of His Hookah Lounge,* DOJ Office of Public Affairs (Jan. 29, 2021), *https://www.justice.gov/usao-cdca/pr/burbank-man-arrested-federal-complaint-alleging-he-sold-ghost-guns-out-his-hookah; Saratoga County Man Admits to Unlawfully Selling "Ghost Guns" and Methamphetamine Distribution,* DOJ Office of Public Affairs (Feb. 3, 2021), *https://www.justice.gov/usao-ndny/pr/saratoga-county-man-admits-unlawfully-selling-ghost-guns-and-methamphetamine; Orange County Man Sentenced to 10 Years in Federal Prison for Brokering Illegal Sales of 'Ghost Guns,' Other Firearms,* DOJ Office of Public Affairs (Feb. 8, 2021), *https://www.justice.gov/usao-cdca/pr/orange-county-man-sentenced-10-years-federal-prison-brokering-illegal-sales-ghost-guns.*

[20] Specifically, the House Report cited a January 11, 2019, Joint Intelligence Bulletin issued by DHS, FBI, and NCTC concluding that "these rapidly evolving technologies pose an ongoing, metastasizing challenge to law enforcement in understanding, tracking, and tracing ghost guns," and an April 19, 2019, DHS intelligence assessment that "repeated the warning that ghost guns pose an urgent and evolving threat to the homeland, particularly in the hands of ideologically motivated lone wolf actors." H.R. Rep. No. 116–88, at 2.

[21] *CBP: 3–D-printed full-auto rifle seized at Lukeville crossing, tucsonsentinel.com* (Feb. 8, 2016), *http://www.tucsonsentinel.com/local/report/020816_3d_printed_gun/cbp-3-d-printed-full-auto-rifle-seized-lukeville-crossing/; Firearms using 3D-printed components seized in Sweden,* Armament Research Services (May 19, 2017), *https://armamentresearch.com/3d-printed-firearms-seized-in-sweden/; The TSA Has Found 3D-Printed Guns at Airport Checkpoints 4 Times Since 2016,* Time (Aug. 2, 2018), *https://time.com/5356179/3d-printed-guns-tsa/; Indiana Residents Indicted on Terrorism and Firearms Charges,* DOJ Office of Public Affairs (July 11, 2019), *https://www.justice.gov/opa/pr/indiana-residents-indicted-terrorism-and-firearms-charges; Use of 3D printed guns in German synagogue shooting must act as warning to security services, experts say, independent.co.uk* (Oct. 11, 2019), *https://www.independent.co.uk/news/world/europe/3d-gun-print-germany-synagogue-shooting-stephan-balliet-neo-nazi-a9152746.html; TSA Confiscated 3D-Printed Guns at Raleigh-Durham International Airport, nextgov.com* (Mar. 4, 2020), *https://www.nextgov.com/emerging-tech/2020/03/tsa-confiscated-3d-printed-guns-raleigh-durham-international-airport/163533/; Man Sentenced for Attempting to Board International Flight with a Loaded Firearm,* DOJ Office of Public Affairs (Mar. 12, 2021), *https://www.justice.gov/usao-sdca/pr/man-sentenced-attempting-board-international-flight-loaded-firearm; Glock ghost guns up for grabs on the dark web,* Australian National University (Mar. 23, 2021), *https://www.anu.edu.au/news/all-news/glock-ghost-guns-up-for-grabs-on-the-dark-web; Spain dismantles workshop making 3D-printed weapons,* BBC, (Apr. 19, 2021), *https://www.bbc.com/news/world-europe-56798743.*

AMERICAN OVERSIGHT

any investigation involving the criminal use of firearms.''); *Blaustein & Reich, Inc.* v. *Buckles,* 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (ATF has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).[22] An accurate firearm description is necessary to trace a firearm and is required to be recorded by a person licensed to engage in the business of manufacturing, importing, or dealing in firearms, or by a licensed collector of curio or relic firearms, regardless of whether it is a business or personal firearm.[23]

ATF traces firearms found by law enforcement at a crime scene by first contacting the licensed manufacturer or importer marked on the frame or receiver who maintains permanent records of their manufacture or importation and disposition. Using the information obtained from those required records, ATF then contacts each licensed dealer or other licensee who recorded their receipt and disposition to locate the first unlicensed purchaser to help find the perpetrator or otherwise solve the crime.[24] However, because PMFs do not bear a serial number or other markings of a licensed manufacturer or importer, ATF has found it extremely difficult to complete such traces on behalf of law enforcement to individual unlicensed purchasers. From January 1, 2016, through March 4, 2021, ATF could only complete traces of suspected PMFs recovered by law enforcement to an individual purchaser in approximately 151 out of 23,946 attempts, generally by tracing a serial number engraved on a handgun slide, barrel, or other firearm part not currently defined as a frame or receiver, but recorded by licensees in the absence of other markings.[25]

With the proliferation of PMFs, ATF has also received numerous requests from licensees seeking clarity on how they may be accepted and recorded so that they can track their inventories, process warranty claims, reconcile any missing inventory, respond to trace requests, and report lost or stolen PMFs to police and insurance companies. Federal law and regulations require licensees, before conducting business, to inventory the firearms possessed for such business and record it in a Firearms Acquisition and Disposition Record (''A&D Record'').[26] After commencing business, licensees must record all firearms received and disposed of by the business in the A&D Record to include the following information separated into columns: Manufacturer and/or importer, model, serial no., type, and caliber or gauge.[27] When a firearm is disposed to an unlicensed person, licensees are required to complete a Firearms Transaction Record, ATF Form 4473 (''Form 4473'').[28] Like the A&D Record, this form requires licensees to record the manufacturer and importer, model (if designated), serial number, type, and caliber or gauge of the firearm. Licensees are also required by law to report the theft or loss of firearms on a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, which includes a description of the manufacturer, importer, model, serial number, type, and caliber/gauge of each firearm stolen or lost.[29] And when licensees sell or otherwise dispose of multiple pistols or revolvers within five consecutive business days to the same person, they must report to ATF the type, serial number, manufacturer, model, importer, and caliber on a Report of Multiple Sale or Other Disposition of Pistols and Revolvers, ATF Form 3310.4.[30]

However, because PMFs do not have markings identifying the name of a licensed manufacturer or importer, model, serial number, or caliber/gauge, licensees might only record a ''type'' of firearm (*e.g.,* pistol, revolver, rifle, or shotgun) in their A&D Records and on ATF Forms 4473. Over time, as more PMFs are accepted into inventory, it will become increasingly difficult, if not impossible, for licensees and ATF (during inspections) to distinguish between those PMFs physically in the firearms inventory and those recorded in required A&D Records, as well as determine which PMFs recorded as disposed on ATF Form 4473, were those recorded as disposed in the A&D Record.[31] Likewise, it will be difficult for licensees and ATF to accurately determine which PMFs were stolen or lost from inventory, and for police to locate stolen PMFs in the business inventories of pawnbrokers,[32] or to return any recovered stolen or lost PMFs to their rightful owners.

Not only does the inability to distinguish between unmarked firearms

[22] *See also* ATF Ruling 2009–5, p.2 (''The unique marks of identification of firearms serve several purposes. First, the marks are used by Federal firearms licensees to effectively track their firearms inventories and maintain all required records. Second, the marks enable law enforcement officers to trace specific firearms used in crimes from the manufacturer or importer to individual purchasers, and to identify particular firearms that have been lost or stolen. Further, marks help prove in certain criminal prosecutions that firearms used in a crime have travelled in interstate or foreign commerce.'').

[23] *See* 18 U.S.C. 923(g)(1)(D); 27 CFR 478.125(f) (disposition records of a Federal firearms licensee's personal collection firearms must contain a complete description of the firearm); House Consideration and Passage of S.2414, 99th Cong., 2d Sess., 132 Cong. Rec. 15229 (June 24, 1986) (Statement of Rep. Hughes) (''In order for the law enforcement Firearm Tracing Program to operate, some minimal level of recordkeeping is required [for sales from dealers' personal collections]. Otherwise, we will not have tracing capability. This provision simply requires that a bound volume be maintained by the dealer of the sales of firearms which would include a complete description of the firearm, including its manufacturer, model number, and its serial number and the verified name, address, and date of birth of the purchaser. There is only a minimal inconvenience for the dealer, yet obtaining and recording this information is critical to avoid serious damage to the Firearm Tracing Program.'').

[24] Licensees must respond to ATF trace requests within 24 hours. 18 U.S.C. 923(g)(7); *see also J&G Sales Ltd.* v. *Truscott,* 473 F.3d 1043, 1045–46 (9th Cir. 2007) (describing the tracing process).

[25] Source: ATF Office of Strategic Intelligence and Information. These figures were extracted on May 5, 2021, and include traces for both U.S. and international law enforcement agencies.

[26] 27 CFR 478.125(e).

[27] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.125(e), (f).

[28] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.124.

[29] 18 U.S.C. 923(g)(6); 27 CFR 478.39a(b).

[30] 18 U.S.C. 923(g)(3)(A); 27 CFR 478.126a. Pursuant to 18 U.S.C. 923(g)(5)(A), licensed dealers along the Southwest border are also required by demand letter to report to ATF multiple sales of certain rifles during five consecutive business days to the same person on ATF Form 3310.12, including the rifle's serial number, manufacturer, importer, model, and caliber. Also under that statute, licensed dealers with 15 or more trace requests with a ''time-to-crime'' of three years or less must report to ATF the acquisition date, model, caliber or gauge, and the serial number of a secondhand firearm transferred by the dealer.

[31] In *United States* v. *Biswell,* 406 U.S. 311, 315–16 (1972), the Supreme Court explained that ''close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.'' (citation omitted).

[32] Most states require pawnbrokers to record or report any serial number and other identifying markings on pawned merchandise so that police can determine their origin. *See* Ala. Code section 5–19A–3(1); Alaska Stat. section 08.76.180(a)(4); Ariz. Rev. Stat. section 44–1625(C)(5); Colo. Rev. Stat. section 29–11.9–103(1); Conn. Gen. Stat. section 21–41(c); Del. Code tit. 24, section 2302(a)(1)(b); DC Code section 47–2884.11(d); Fla. Stat. section 538.04(1)(b)(3),(9); Ga. Code section 44–12–132(4); Haw. Rev. Stat. section 445–134.11(c)(10); 205 Ill. Comp. Stat. section 510/5(a); Ind. Code section 28–7–5–19(a)(4); Ky. Rev. Stat. Ann. section 226.040(1)(d)(7); La. Stat. Ann. section 37:1782(16)(a); Mass. Gen. Laws ch. 140 section 79; Mich. Comp. Laws section 446.205(5)(1),(4); Minn. Stat. section 325J.04(Sub.1)(1); Miss. Code Ann. section 75–67–305(1)(a)(iii),(ix); Mo. Rev. Stat. section 367.040(6)(b); Neb. Rev. Stat. section 69–204(3); N.M. Stat. section 56–12–9(A)(3); N.C. Gen. Stat. section 66–391(b)(1); Ohio Rev. Code section 4727.07; Okla. Stat. tit. 59 section 1509(D)(h); S.C. Code Ann. section 40–39–80(B)(1)(l)(iii),(ix); Tenn. Code Ann. section 45–6–209(b)(1)(C),(H); Tex. Fin. Code section 371.157(4); Utah Code section 13–32a–104(1)(h)(i)(A); Va. Code Ann. section 54.1–4009(A)(1); Wash. Rev. Code section 19.60.020(1)(e); W. Va. Code section 47–26–2(b)(1); Wis. Stat. section 134.71(8)(c)(2).

AMERICAN OVERSIGHT

make it extremely difficult for law enforcement to trace PMFs involved in crime, it also makes it more difficult for Federal, State, and local law enforcement to identify and prosecute illegal firearms traffickers who are often tied to violent criminals and armed narcotics traffickers.[33] The ATF Form 4473 is the primary evidence used to prosecute straw purchasers who buy firearms from a Federal firearms licensee on behalf of prohibited persons, such as felons, and other persons who could use them to commit a violent crime. The form is typically the key evidence that the straw purchaser who bought the firearm (and who can pass a background check) made a false statement to the Federal firearms licensee concerning the identity of the actual purchaser when acquiring that firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(1)(A), or State law.[34] But as unmarked and difficult-to-trace PMFs proliferate throughout the marketplace, it is likely to become increasingly difficult to prove that firearms acquired under false pretenses on a Form 4473 were the ones found in the hands of the true purchaser—and thus more difficult to prosecute straw purchasers for making false statements.[35] This assumes, of course, that the PMF involved in the crime could even be traced to the Federal firearms licensee, or that the correct Form 4473 could be located. Likewise, the absence of identifying firearm information on multiple sales forms and theft/loss reports makes it more difficult for ATF to identify firearms traffickers and thieves.[36]

Although clarifying the definition of ''frame or receiver'' in this rule would help the firearms industry and the public understand which part of a complete weapon is the regulated ''frame or receiver,'' and more commercially manufactured frames or receivers are likely to be marked by licensed manufacturers as a result, PMFs are increasingly being made or 3D printed at home without any identifying marks, recordkeeping, or background checks. In turn, these firearms are progressively finding their way to licensees who may wish to acquire them so they can advertise and market them broadly, or who may repair, customize, or accept them as security in pawn for a loan. Rulemaking is therefore necessary to ensure that PMFs are not unlawfully manufactured for sale to licensees who may wish to acquire them for resale, or accept them as security in pawn for a loan, as this would undermine the important public safety goals of the GCA to reduce violent crime, which includes assisting State and local law enforcement in their efforts to control the traffic of firearms within their borders.[37] Indeed, several States and municipalities have banned or severely restricted unserialized or 3D printed firearms.[38]

II. Proposed Rule

Due to judicial developments as well as continued technological advancements in firearms manufacturing, maintaining the current definitions negatively affects both public safety and the regulated firearms industry. For these reasons, the Department proposes amending ATF's regulations to clarify the definition of ''firearm'' and to provide a more comprehensive definition of ''frame or receiver'' so that those definitions more accurately reflect firearm configurations not explicitly captured under the existing definitions in 27 CFR 478.11 and 479.11. Further, this NPRM proposes new terms and definitions to take into account technological developments and modern terminology in the firearms industry, as well as amendments to the marking and recordkeeping requirements that would be necessary to implement these definitions. However, nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law. Also, while licensed manufacturers who sell or distribute firearms to law enforcement agencies would be subject to this rule, law enforcement agencies (not engaged in the business of manufacturing firearms for sale or distribution) would be excluded from this rule, including associated amendments to the marking and recordkeeping requirements necessary to implement its definitions.

[33] *See United States* v. *Marzzarella*, 614 F.3d 85, 100 (3rd Cir. 2010) (''The direct tracing of the chain of custody of firearms involved in crimes is one useful means by which serial numbers assist law enforcement. But serial number tracing also provides agencies with vital criminology statistics—including a detailed picture of the geographical source areas for firearms trafficking and ''time-to-crime'' statistics which measure the time between a firearm's initial retail sale and its recovery in a crime—as well as allowing for the identification of individual dealers involved in the trafficking of firearms and the matching of ballistics data with recovered firearms.''); *Following the Gun, Enforcing Federal Laws Against Firearms Traffickers*, ATF Publication, pp.1, 26 (June 2000) (serial number obliteration is a clear indicator of firearms trafficking to, among other criminals, armed narcotics traffickers).

[34] *See, e.g., Abramski* v. *United States*, 573 U.S. 169 (2014); *Marshall* v. *Commonwealth*, 822 S.E.2d 389 (Va. App. 2019); *Commonwealth* v. *Baxter*, 956 A.2d 465 (Pa. Super 2008).

[35] *See, e.g., United States* v. *Powell*, 467 F. Supp. 3d 360, 368, 374 (E.D. Va. 2020) (indictment charging false statements on ATF Form 4473 in connection with the purchase of specific handguns listed by date of purchase, make, caliber, model, serial number, and name of FFL); *United States* v. *McCurdy*, 634 F. Supp. 2d 118 (D. Me 2009) (denial of a motion for a new trial discussing whether the firearm sold as documented on the ATF Form 4473 and the firearm introduced at trial were the same).

[36] The lack of firearm description information in theft/loss reports makes it difficult for ATF to match recovered firearms with those reported as lost or stolen, thereby hindering ATF's efforts to enforce the numerous provisions of the GCA that prohibit thefts. *See* 18 U.S.C. 922(i) (transporting or shipping stolen firearms in interstate or foreign commerce); *id.* at 922(j) (receiving, possessing, concealing, storing, bartering, selling, disposing, or pledging or accepting as security for a loan any stolen firearm which has moved in interstate or foreign commerce); *id.* at 922(u) (stealing a firearm that has been shipped or transported in interstate or foreign commerce from the person or premises of an FFL); *id.* at 924(l) (stealing a firearm which is moving in or has moved in interstate commerce); and *id.* at 924(m) (stealing a firearm from a licensee).

[37] *See* Public Law 90–351, sec. 901(a), 82 Stat. 212, 225–26 (1968); 18 U.S.C. 922(b)(2) (prohibiting licensees from selling or delivering any firearm to any person in a State where the purchase or possession by such person of such firearm would be in violation of any State law or published ordinance applicable at the place of sale, delivery, or other disposition); *id.* at 922(t)(2),(4) (NICS background check denied if receipt of firearm by transferee would violate State law); *id.* at 923(d)(1)(F) (requiring license applicants to certify compliance with the requirements of State and local law applicable to the conduct of business).

[38] *See* Cal. Pen. Code. section 29180 (prohibiting ownership of firearms that do not bear a serial number or other mark of identification provided by the State); Conn. Gen. Stat. section 29–36a(a) (prohibiting manufacture of firearms without permanently affixing serial numbers issued by the State); DC Code section 7–2504.08(a) (prohibiting licensees from selling firearms without serial numbers); Haw. Rev. Stat. section 134–10.2 (prohibiting unlicensed persons from producing 3D printed or parts kit firearms without a serial number); Mass. Gen. Laws 269 section 11E (prohibiting manufacture or delivery of unserialized firearms to licensed dealer); N.J. Stat. Ann. section 2C:39–3(n) (prohibiting possession of firearms manufactured or assembled without serial number); N.Y. Penal Law sections 265.50, 265.55 (prohibiting manufacture/possession of undetectable firearms); R.I. Gen. Laws section 11–47–8(e) (prohibiting possession of ''a ghost gun or an undetectable firearm or any firearm produced by a 3D printing process''); Va. Code. Ann. section 18.2–308.5 (prohibiting possession of undetectable firearms); Wash. Rev. Code section 9.41.190 (prohibiting the manufacture with intent to sell of undetectable and untraceable firearms); *see also Philadelphia Becomes First City To Ban 3D-Printed Gun Manufacturing, Reason.com* (Nov. 22, 2013), *https://reason.com/2013/11/22/philadelphia-becomes-first-city-to-ban-3/; County Council Unanimously Approves Ghost Gun Bill, Mocoshow.com (April 6, 2021), https://mocoshow.com/blog/county-council-unanimously-approves-ghost-gun-bill/?fbclid=IwAR1KCyFal3AId31WKCTLanR-uEUj_-dW_T32lND5gfKmle_-nvIbZyT052.*

AMERICAN OVERSIGHT

A. Definition of "Firearm"

Under the GCA and implementing regulations, the term "firearm" includes:

"(A) any weapon (including a starter gun) which *will or is designed to* or *may readily be converted* to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3); 27 CFR 478.11 (emphasis added). Although weapon parts kits in their unassembled, incomplete, and/or unfinished state or configuration generally will not expel a projectile by the action of an explosive at the time of sale or distribution, weapon parts kits that are "designed to" [39] or "may readily be converted" [40] to expel a projectile by the action of an explosive are "firearms" under the GCA.[41]

In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called "80% receivers," [42] either directly from manufacturers of the kits or retailers, without background checks or recordkeeping. Some of these parts kits contain most or all of the components (finished or unfinished) necessary to complete a functional weapon within a short period of time. Some of them include jigs, templates, instructions, drill bits, and tools that allow the purchaser to complete the weapon to a functional state with minimal effort, expertise, or equipment. Weapon parts kits such as these are "firearms" under the GCA because they are *designed to* or *may readily be converted* to expel a projectile by the action of an explosive.[43] Manufacturers of such parts kits must be licensed, abide by the marking and recordkeeping requirements, and pay Federal Firearms Excise Tax on their sales price.[44] Any Federal firearms licensee that sells such kits to unlicensed individuals would need to complete ATF Forms 4473, conduct NICS background checks, and abide by the recordkeeping requirements applicable to fully completed and assembled firearms.[45] Therefore, to reflect existing case law, this proposed rule would add a sentence at the end of the definition of "firearm" in 27 CFR 478.11 providing that "[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive."

Nonetheless, this amendment is not intended to affect the classification of a weapon, including a weapon parts kit, in which each frame or receiver (as defined in this proposed rule) of such weapon is properly destroyed in accordance with ATF standards. Because such weapons have been completely destroyed or permanently redesigned not to expel a projectile by the action of an explosive, and cannot readily be converted to do so, ATF would not consider them as either "designed to" or "readily assembled, completed, converted, or restored to expel a projectile by the action of an explosive." To make this clear, this proposed rule would add another sentence to the end of the definition of "firearm" in 27 CFR 478.11 to provide that "[t]he term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed." (see Section II.B.5 of the preamble)

B. Definition of "Frame or Receiver"

The proposed new regulatory definition of "frame or receiver" would be a multi-part definition added to 27

[39] *See* H.R. Rep. 90–1577, at 4416 (June 21, 1968) ("This provision makes it clear that so-called unserviceable firearms come within the definition."); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same). Numerous courts have held that weapons *designed to* expel a projectile by the action of an explosive are "firearms" under 18 U.S.C. 921(a)(3)(A) even if they cannot expel a projectile in their present form or configuration. *See, e.g., United States* v. *Hardin,* 889 F.3d 945, 946 (8th Cir. 2017) (pistol with broken trigger and numerous missing internal parts was a weapon designed to expel a projectile by the action of an explosive); *United States* v. *Dotson,* 712 F.3d 369 (7th Cir. 2013) (damaged pistol with corroded, missing and broken components); *United States* v. *Rivera,* 415 F.3d 284, 285–87 (2nd Cir. 2005) (pistol with a broken firing pin and flattened firing-pin channel); *United States.* v. *Brown,* 117 F.3d 353 (7th Cir. 1997) (no firing pin); *United States* v. *Reed,* 114 F.3d 1053 (10th Cir. 1997) (shotgun with broken breech bolt); *United States* v. *Hunter,* 101 F.3d 82 (9th Cir. 1996) (pistol with broken firing pin); *United States* v. *Yannott,* 42 F.3d 999, 1005 (6th Cir. 1994) (shotgun with broken firing pin); *United States* v. *Ruiz,* 986 F.2d 905, 910 (5th Cir. 1993) (revolver with hammer filed down); *United States.* v. *York,* 830 F.2d 885, 891 (8th Cir. 1987) (revolver with no firing pin and cylinder did not line up with barrel). *But see United States* v. *Wada,* 323 F. Supp. 2d 1079 (D. Or. 2004) (firearms redesigned as ornaments that "would take a great deal of time, expertise, equipment, and materials to attempt to reactivate" were no longer designed to expel a projectile by the action of an explosive and could not readily be converted to do so).

[40] *See, e.g., United States* v. *Wick,* 697 F. App'x 507, 508 (9th Cir. 2017) (complete UZI parts kits "could 'readily be converted to expel a projectile by the action of an explosive,' meeting the statute's definition of firearm under section 921(a)(3)(A)" because the "kits contained all of the necessary components to assemble a fully functioning firearm with relative ease"); *United States* v. *Stewart,* 451 F.3d 1071, 1073 n.2 (9th Cir. 2006) (upholding district court's finding that .50 caliber rifle kits with incomplete receivers were "firearms" under 921(a)(3)(A) because they could easily be converted to expel a projectile); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within short period of time could readily be converted to expel a projectile).

[41] The plain language of the definition of "firearm" in 18 U.S.C. 921(a)(3)(A) states that a weapon need not function so long as it is designed to, or may readily be converted to, expel a projectile. Even though they generally cannot function to expel a projectile when sold, weapon parts kits are still "weapons"—real combat instruments, such as pistols, revolvers, rifles, or shotguns—in an unassembled, unfinished, and/or incomplete state or configuration. There is no minimum utility or lethality requirement in the GCA or NFA for an item to be considered a "weapon." *Cf. United States* v. *Thompson/Center Arms,* 504 U.S. 505, 513, n.6 (1992) (a rifle was "made" under the NFA when a pistol was packaged together with a disassembled rifle parts kit); *United States* v. *Hunter,* 843 F. Supp. 235, 256 (E.D. Mich. 1994) ("If Defendants believe that machinegun conversion kits are not in and of themselves 'weapons' under § 921(a)(3), they forget that that section clearly envisions machineguns as weapons."); *United States* v. *Drasen,* 845 F.2d 731, 736–37 (7th Cir. 1988) (rejecting argument that a collection of rifle parts cannot be a "weapon").

[42] The term "80% receiver" is a term used by some industry members, the public, and the media to describe a frame or receiver that has not yet reached a stage in manufacture to be classified as a "frame or receiver" under Federal law. However, that term is neither found in Federal law nor accepted by ATF.

[43] *See* footnotes 39 and 40, *supra.*

[44] The Internal Revenue Code of 1954, 26 U.S.C. 4181, imposes on the manufacturer, producer, or importer an excise tax of 10% (pistols and revolver) or 11% (other firearms) on the sales price of firearms manufactured, produced, or imported, including complete, but unfinished, weapon parts kits. *See* Rev. Rul. 62–169 (IRS RRU), 1962–2 C.B. 245 (kits which contain all of the necessary component parts for the assembly of shotguns are complete firearms in knockdown condition even though, in assembling the shotguns the purchaser must 'final-shape,' sand, and finish the fore-arm and the stock); *cf.* Rev. Rul. 61–189 (IRS RRU), 1961–2 C.B. 185 (kits containing unassembled components and tools to complete artificial flies for fisherman were sporting goods subject to excise tax); *Hine* v. *United States,* 113 F. Supp. 340, 343 (Ct. Cl. 1953) ("True enough, [these fishing rod kits] might be called 'blanks' by those engaged in the trade, but what could they be called or to what practical use could they be put other than 'fishing rods?' Plaintiff says that it would be extremely difficult if not impossible to case with a 'blank' rod and this is true, but we can conceive of no other practical use for them except as fishing rods. . . . Having reached the stage of manufacture or development where they became recognizable as one of the sporting goods described in Section 3406(a)(1) the rods upon being sold were subject to tax even though there remained one or more finishing operations to be performed.") (citations omitted).

[45] Additionally, persons who engage in the business of selling or distributing such weapon parts kits cannot avoid licensing, marking, recordkeeping, or excise taxation by selling or shipping the parts in more than one box or shipment to the same person, or by conspiring with another person to do so. *See, e.g., United States* v. *Evans,* 928 F.2d 858 (9th Cir. 1991) (conspiracy to cause and aid and abet the possession of unregistered machineguns where one defendant sold parts kits containing all component parts of Sten machineguns except receiver tubes, and the other sold customers blank receiver tubes along with detailed instructions on how to complete them); Internal Revenue Service Technical Advice Memorandum 8709002, 1986 WL 372494, at 4 (Nov. 13, 1986) (for purposes of imposing Firearms Excise Tax it is irrelevant whether the components of a revolver in an unassembled knockdown condition are sold separately to the same purchaser in various related transactions, rather than sold as a complete kit in a single transaction).

AMERICAN OVERSIGHT

CFR 478.11 and 479.11 (referencing section 478.11). First, there would be a general definition of ''frame or receiver'' with non-exclusive examples that illustrate the definition. This would be followed by supplements that further explain the meaning of the term ''frame or receiver'' for certain firearm designs and configurations, as follows: (a) Firearm muffler or silencer frame or receiver; (b) split or modular frame or receiver, also followed by examples of the frames or receivers for common firearm designs that are distinguishable because of differences in firing cycle, method of operation, or physical design characteristics; (c) partially complete, disassembled, or inoperable frame or receiver; and (d) destroyed frame or receiver. Although the new definition would more broadly define the term ''frame or receiver'' than the current definition, it is not intended to alter any prior determinations by ATF of what it considers the frame or receiver of a particular split/modular weapon. ATF would also continue to consider the same factors when classifying firearms (see Section I.A of the preamble).

1. General Definition of ''Frame or Receiver''

ATF proposes to replace the respective regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' in 27 CFR 478.11 and 479.11 because they too narrowly limit the definition of receiver with respect to most current firearms and have led to erroneous district court decisions. Indeed, most firearms currently in circulation in the United States do not have a specific part that expressly falls within the current ''frame or receiver'' regulatory definitions. Most concerning is that the interpretation of these definitions by some courts, relying on the current regulations, would make it easier to obtain the majority of existing firearms, including some of the most advanced semiautomatic weapons, without complying with the requirements of the GCA, and make it far more difficult to trace those firearms after a crime. Should the current definition remain in place and courts continue to interpret it such that no part or parts of most firearms are defined as the frame or receiver, these unserialized parts, easily purchased and assembled to create functioning firearms, would be untraceable, thereby putting the public at risk. While a ''frame or receiver'' is clearly within the statutory definition of what constitutes a ''firearm'' under the GCA, 18 U.S.C. 921(a)(3)(B), clarifying that this term includes how most modern-day firearms operate would help ensure that the regulatory definition of ''frame or receiver'' will not be misinterpreted by the courts, the firearms industry, or the public at large to mean that most firearms in circulation have no part identifiable as a frame or receiver.

As a threshold matter, the new definition makes clear that a ''frame or receiver'' must be visible to the exterior when the complete weapon is assembled so that licensees can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see the identifying markings for tracing purposes. Nonetheless, as explained in Section II.B.3 of the preamble, an internal frame or chassis at least partially exposed to the exterior to allow identification may be determined by ATF to be the frame or receiver of a split or modular frame or receiver.

Next, the new definition more broadly describes a ''frame or receiver'' as one that provides housing or a structure designed to hold or integrate any fire control component. Unlike the prior definitions of ''frame or receiver'' that were rigidly tied to three specific fire control components (*i.e.,* those necessary for the firearm to initiate or complete the firing sequence), the new regulatory definition is intended to be general enough to encompass changes in technology and parts terminology. With respect to the fire control components housed by the frame or receiver, the definition would include, at a minimum, any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. However, the definition is not limited to those particular fire control components.[46] There may be future changes in firearms technology or terminology resulting in housings or holding structures for new or different components that initiate, complete, or continue the firing sequence of weapons that expel a projectile by the action of an explosive. For further clarity, the definition would then give four nonexclusive examples with illustrations of common single-framed firearms: (1) Hinged or single frame revolver (structure to hold the trigger, hammer, and cylinder); (2) bolt-action rifle (structure to hold the bolt and firing pin, and attach the trigger mechanism); (3) break action, lever action, or pump action rifle or shotgun (housing for the bolt and firing pin, or a structure designed to integrate the breechblock); and (4) semiautomatic firearm or machinegun with a single receiver housing all fire control components (housing for the hammer, bolt, trigger mechanism, and firing pin, *e.g.,* AK-type firearms).

Finally, the definition would make clear to persons who may acquire or possess a part now defined as a ''frame or receiver'' that is identified with a serial number that they must presume, absent an official determination by ATF or other reliable evidence to the contrary, that the part is a firearm ''frame or receiver'' without further guidance.

2. Firearm Muffler or Silencer Frame or Receiver

Under the GCA, licensed manufacturers and importers must identify the frame or receiver of each firearm, including a firearm muffler or silencer, with a serial number in accordance with regulations. 18 U.S.C. 921(a)(3)(C), 923(i). The NFA requires firearm manufacturers, importers, and makers to identify each firearm, including a firearm muffler or silencer, with a serial number and such other identification as may be prescribed by regulations. 26 U.S.C. 5842(a); *id.* at 5845(a)(7). Because under the NFA each individual part of a firearm muffler or silencer is a ''firearm'' [47] that must be registered in the National Firearms Registration and Transfer Record (''NFRTR''), the regulations currently assume that every part defined as a silencer must be marked in order to be registered, and expressly require that they be marked whenever sold, shipped, or otherwise disposed even though they may be installed by a qualified licensee within a complete muffler or silencer device.[48]

However, this result has caused confusion and concern among many silencer manufacturers because some silencer parts defined as ''silencers,'' such as baffles, are difficult to mark, and make little sense to mark for tracing purposes when the outer tube or

[46] The prefatory paragraph to the definitional sections in the GCA and NFA regulations explain that ''[t]he terms 'includes' and 'including' do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.'' 27 CFR 478.11, 479.11.

[47] A firearm ''muffler or silencer'' is defined to include ''any combination of parts'' designed and intended for the use in assembling or fabricating a firearm silencer or muffler and ''any part intended only for use in such assembly or fabrication.'' 18 U.S.C. 921(a)(24); 26 U.S.C. 5845(a)(7); 27 CFR 478.11; *id.* at 479.11. This rule defines the term ''complete muffler or silencer device'' not to say that individual silencer parts are not considered a firearm ''muffler or silencer'' subject to the requirements of the NFA, but to advise industry members when those individual silencer parts must be marked and registered in the NFRTR when they are used in assembling or fabricating a muffler or silencer device.

[48] *See* 27 CFR 479.101(b); 478.92(a)(4)(iii); 479.102(f)(1).

AMERICAN OVERSIGHT

housing of the complete device is marked and registered. Not only is it difficult for manufacturers to apply identifying markings, there is also the administrative difficulty in timely filing and processing numerous ATF Forms 2, Notice of Firearms Manufactured or Imported upon manufacture of each part, and ATF Forms 3, Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer upon sale or other disposition of each part to another qualified licensee.

For these reasons, ATF is proposing a number of amendments to clarify how and when firearm muffler or silencer parts must be marked and registered in the NFRTR. Among other changes (see Section II.H.9 of the preamble, below), this rule defines the term ''frame or receiver'' as it applies to a ''firearm muffler or silencer frame or receiver'' and adds the term ''complete muffler or silencer device'' (see Section II.D of the preamble). Under the NPRM, the term ''frame or receiver'' means, ''in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: baffles, baffling material, or expansion chamber.'' These new definitions would clarify for manufacturers and makers of complete muffler or silencer devices that they need only mark each part (or specific part(s) previously determined by the Director) of the device defined as a ''frame or receiver'' under this rule. However, individual muffler or silencer parts must be marked if they are disposed of separately from a complete device unless transferred by qualified manufacturers to other qualified licensees for the manufacture or repair of complete devices (see Section II.H.9 of the preamble).[49]

ATF anticipates that, under this supplemental definition, the outer tube of a complete muffler or silencer device would be considered the frame or receiver with respect to most commercial silencer designs currently on the market. This is because the outer tube would be the only housing for essential internal components (*e.g.,* baffles or baffling material) of the complete device. Marking the outer tube, as distinguished from a smaller non-housing component like an end cap that can be damaged upon expulsion of projectiles, best preserves the ability of law enforcement to trace the silencer device if used in crime, and is consistent with recommendations ATF has received from the firearms industry.[50]

Nonetheless, like the definition of ''frame or receiver'' for projectile weapons, this sub-definition would be flexible enough to encompass changes in technology and parts terminology. This is because any housing or structure designed to hold or integrate an essential internal component of the muffler or silencer device would meet the definition. While the proposed definition gives examples of internal components that manufacturers must consider as essential, *e.g.,* baffles, baffling material, or expansion chamber, it is not limited to those particular components.[51]

3. Split or Modular Frame or Receiver

This second supplement explains that ATF may determine ''in the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential components'' whether one or more specific part(s) of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. It then sets forth the factors ATF considers in making this determination: ''(a) Which component the manufacturer intended to be the frame or receiver; (b) which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms; (c) how the component fits within the overall design of the firearm when assembled; (d) the design and function of the fire control components to be housed or integrated; (e) whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed; (f) whether classifying the particular component is consistent with the legislative intent of the Act and this part; and (g) whether classifying the component as the frame or receiver is consistent with the Director's prior classifications.'' No single factor is controlling. It would further make clear that ''[f]rames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.''

This supplement to the general definition addresses one of the core problems of the current definition of ''firearm frame or receiver;'' namely, that a majority of firearms now use a split or modular design in which more than one part houses a different fire control component and/or incorporates a striker instead of a hammer. It would make clear that even though a firearm, including a silencer, may have more than one part that falls within the definition of ''frame or receiver,'' ATF may classify a specific part or parts to be the ''frame or receiver'' of a particular weapon. For this reason, manufacturers may wish to submit samples to ATF for classification of one or more particular components as the frame or receiver so that they need only mark a specific part or parts of a weapon, rather than all qualifying parts (see Section II.H.10 of the preamble) or obtain a marking variance (see Section II.H.6 of the preamble). However, this supplemental definition would also make clear that ATF would not classify an internal frame or chassis as a ''frame or receiver'' unless it is at least partially exposed to the exterior to allow identification so that licensees accepting them into inventory can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see the identifying markings for tracing purposes.[52]

One important goal of this rule is to ensure that it does not affect existing ATF classifications of firearms that specify a single component as the frame or receiver. Application of the rule, as proposed, would not alter these prior

[49] This rule is consistent with ATF enforcement policy. *See* footnote 72 *infra.*

[50] In 2016, ATF issued an Advance Notice of Proposed Rulemaking in response to a petition for rulemaking from a firearms industry trade association recommending that regulations be amended to require that a silencer be marked on the outer tube (as opposed to other locations), unless a variance is granted by the Director on a case-by-case basis for good cause. *See* 81 FR 26764 (May 4, 2016).

[51] *See* footnote 46, *supra.*

[52] Markings must also be clearly visible from the exterior because they may be needed to prove that a criminal defendant had knowledge that the serial number was obliterated or altered. *See, e.g., Lewis* v. *United States,* No. 3:12–0522, 2012 WL 5198090, at *4 (M.D. Tenn. Oct. 19, 2012) (serial number obliterated on the ''visible exterior'' of a revolver); *State* v. *Shirley,* No. 107449, 2019 WL 2156402 (Ct. App. Ohio May 16, 2019) (same); *cf. United States* v. *Sands,* 948 F.3d 709, 719 (6th Cir. 2020) (serial number is not altered or obliterated so long as it is ''visible to the naked eye''); *United States* v. *St. Hilaire,* 960 F.3d 61, 66 (2d Cir. 2020) (''This 'naked eye test' best comports with the ordinary meaning of 'altered'; it is readily applied in the field and in the courtroom; it facilitates identification of a particular weapon; it makes more efficient the larger project of removing stolen guns from circulation; it operates against mutilation that impedes identification as well as mutilation that frustrates it; and it discourages the use of untraceable weapons without penalizing accidental damage or half-hearted efforts.'').

AMERICAN OVERSIGHT

ATF classifications. To provide more clarity, this supplement to the definition would include a nonexclusive list of common weapons with a split/multi-piece frame or receiver configuration for which ATF has previously determined a specific part to be the frame or receiver. If a manufacturer produces or an importer imports a firearm falling within one of these designs as they exist as of the date of publication of a final rule, it can refer to this list to know which part is the frame or receiver. The manufacturer or importer can then mark without needing to ask ATF for a classification. The nonexclusive list identifies the frame or receiver for the following firearms: (i) Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols; (ii) Glock-type striker fired semiautomatic pistols; (iii) Sig Sauer P320-type semiautomatic pistols; (iv) certain locking block rail system semiautomatic pistols; (v) AR–15-type and Beretta AR–70-type firearms; (vi) Steyr AUG-type firearms; (vii) Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP 38, MP 40, and SIG 550 type firearms, and HK-type machineguns and semiautomatic variants; (viii) Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof; and (ix) Sten, Sterling, and Kel-tec Sub-2000-type firearms. However, if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of ''frame or receiver'' would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF, as described above.

4. Partially Complete, Disassembled, or Inoperable Frame or Receiver

This third supplement would define ''frame or receiver'' to include ''in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state.'' To determine this status, ''the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials.'' For clarification, ''partially complete'' for purposes of this definition ''means a forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.''

This supplement addresses another core challenge of the existing, definition of firearm ''frame or receiver;'' namely, that it does not address the question when an object becomes a frame or receiver. While the GCA and implementing regulations define a ''firearm'' to include the ''frame or receiver,'' neither delineates when a frame or receiver is created. The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law. ATF has long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture. This is the point at which a substantial step has been taken, or a critical line crossed, so that the item in question may be so classified under the law. This ''critical stage of manufacture'' is when the article becomes sufficiently complete to function as a frame or receiver, or may readily be completed, assembled, converted, or restored to accept the parts it is intended to house or hold.[53]

Clarifying this issue is needed to deter the increased sale or distribution of unlicensed and unregulated partially complete or unassembled frames or receivers often sold within parts kits that can readily be completed or assembled to a functional state.[54] Many kits that include unfinished frame or receivers have been sold by nonlicensees who were not required to run a background check or maintain transaction records. Accordingly, prohibited persons have easily obtained them.[55] Moreover, without any markings, they are nearly impossible to trace. Although this addition is intended to capture when an item becomes a frame or receiver that is regulated irrespective of the type of technology used to complete the assembly, frame or receiver molds that can accept metal or polymer, unformed blocks of metal, and other articles only in a primordial state would not—without more—be considered a ''partially complete'' frame or receiver. However, when a frame or receiver is broken or has been disassembled into pieces that can readily be made into a frame or receiver, or is a partially complete frame or receiver forging, casting, or additive printing[56] that has reached a stage in manufacture where it can readily be made into a functional frame or receiver, that article would be a ''frame or receiver'' under the GCA.

5. Destroyed Frame or Receiver

This fourth supplement would exclude from the definition of ''frame or receiver'' any frame or receiver that is destroyed. The supplement describes what it means to be a ''destroyed'' frame or receiver: One permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and that may not readily be assembled, completed, converted, or restored to a functional state. This new definition then would set forth nonexclusive acceptable methods of destruction, which have been provided by ATF in past guidance.[57]

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[53] ATF Letter to Private Counsel #907010 (Mar. 20, 2015).

[54] The Polymer 80 assembly, for example, may be completed in under thirty minutes. *See, e.g., Silverback Reviews, Polymer 80 Lower Completion/Parts Kit Install*, YouTube (Aug. 19, 2019), *https://www.youtube.com/watch?v=ThzFOIYZgIg* (21-minute video of completion of a Polymer 80 lower parts kit with no slide). Indeed, the internet is replete with people with no experience completing these firearms. *See* HandleBandle, *DIY: How to Build a Gun at Home (That Shoots) Part 1*, YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=nO-8Pns9aq4;* HandleBandle, *Polymer 80 with No Experience Tips (Build Part 2)*, YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=a0JM5v45vsg;*HandleBandle, Legally Building a Gun in My Living Room (5D Tactical Glock Kit), YouTube (Oct. 18, 2018), *https://www.youtube.com/watch?v=5SaNLrhnnuA.*

[55] *See Bridgeport Felon Sentenced to More Than 5 Years in Federal Prison for Possessing Firearms*, Justice.gov (Jan. 7, 2021), *https://www.justice.gov/usao-ct/pr/bridgeport-felon-sentenced-more-5-years-federal-prison-possessing-firearms; Winthrop man had homemade 'ghost' guns and 3,000 rounds of ammunition, prosecutors say, Boston.com* (Aug. 5, 2020), *https://www.boston.com/news/crime/2020/08/05/winthrop-man-had-homemade-ghost-guns-prosecutors-say; 'Ghost Gun' used in shooting that killed two outside Snyder County restaurant*, Penn Live (Jul. 14, 2020), *https://www.pennlive.com/crime/2020/07/ghost-gun-used-in-shooting-that-killed-two-outside-snyder-county-restaurant.html; The gunman in the Saugus High School shooting used a 'ghost gun,'* sheriff says, CNN (Nov. 21, 2019), *https://www.cnn.com/2019/11/21/us/saugus-shooting-ghost-gun/index.html; How the felon killed at Walmart got his handgun, DA says, LehighValleyLive.com* (March 28, 2018), *https://www.lehighvalleylive.com/news/2018/05/how_the_felon_killed_at_walmar.html; 'Ghost guns': Loophole allows felons to legally buy gun parts* online, *KIRO7.com, https://www.kiro7.com/news/local/ghost-guns-federal-loophole-allows-felons-to-legally-buy-gun-parts-online-build-assault-weapons/703695149/.*

[56] ATF does not believe the production of 3D printed frames or receivers is substantial at this time when compared with commercially produced firearms. For the most part, individuals currently make PMFs from parts kits produced commercially, not by using 3D printers. However, the cost, capabilities, and availability of 3D printers are quickly improving.

[57] *See How to Properly Destroy Firearms, ATF.gov, https://www.atf.gov/firearms/how-properly-destroy-firearms;* ATF Rul. 2003–1 (destruction of Browning M1919 type receivers); ATF Rul.2003–2 (FN FAL type receivers); ATF Rul. 2003–3 (H&K G3 type receivers); ATF Rul. 2003–4 (Sten type receivers).

AMERICAN OVERSIGHT

C. Definition of "Readily"

To provide guidance on how the term "readily" is used to classify firearms, including frame or receiver parts kits or weapon parts kits sold with incomplete or unassembled frames or receivers, the NPRM adds this term to 27 CFR 478.11 and 479.11 and defined as "a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process." It would further list factors relevant in making this determining to include: (a) Time, *i.e.,* how long it takes to finish the process; (b) ease, *i.e.,* how difficult it is to do so; (c) expertise, *i.e.,* what knowledge and skills are required; (d) equipment, *i.e.,* what tools are required; (e) availability, *i.e.,* whether additional parts are required, and how easily they can be obtained; (f) expense, *i.e.,* how much it costs; (g) scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and (h) feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction. This definition and factors considered in determining whether a weapon, including a weapon parts kit, or unfinished or damaged frame or receiver may readily be assembled, completed, converted, or restored to function are based on case law interpreting the terms "may readily be converted to expel a projectile" in 18 U.S.C. 921(a)(3)(A) and "can be readily restored to shoot" in 26 U.S.C. 5845(b).[58] Thus, defining the term "readily" is necessary to provide further clarity in determining when incomplete weapons or configurations of parts become a "firearm" regulated under the GCA and NFA.

D. Definitions of "Complete Weapon" and "Complete Muffler or Silencer Device"

This proposed rule would add definitions for "complete weapon" and "complete muffler or silencer device" to 27 CFR 478.11 and 479.11. A "complete weapon" would be defined as "a firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable." Likewise, a "complete muffler or silencer device" would be defined as "a firearm muffler or firearm silencer that contains all of the component parts necessary to function as designed whether or not assembled or operable." These definitions are needed to explain when a frame or receiver of a firearm, including a firearm muffler or silencer, as the case may be, must be marked.

E. Definition of "Privately Made Firearm"

The NPRM proposes adding a definition of "privately made firearm" to 27 CFR 478.11 to mean "[a] firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings placed by a licensed manufacturer at the time the firearm was produced." The term would not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). This proposed definition explains that PMFs are those firearms that were made by nonlicensees without the markings required by this part, and excludes those already marked and registered in the NFRTR, and any firearm made before enactment of the GCA which, unlike the repealed law it replaced, required all firearms to be marked under federal law.[59] The term "made" is incorporated within the term "privately made firearm" rather than "manufacture" to distinguish between firearms manufactured (or "made") by private individuals without a license and those manufactured by persons licensed to engage in the business of manufacturing firearms.[60]

F. Definition of "Importer's or Manufacturer's Serial Number"

The proposed rule would define the term "importer's or manufacturer's serial number" in 27 CFR 478.11 as: "[t]he identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number." Because "privately made firearms" are manufactured by someone other than a licensed manufacturer, the serial number that incorporates the abbreviated Federal firearms license ("FFL") number placed by a licensee on a PMF under this rule is the "importer's or manufacturer's serial number." This definition would help ensure that the serial numbers and other markings necessary to ensure tracing, including those placed by a licensee on a "privately made firearm" or marked with an ATF-issued serial number,[61] to include imported firearms, are considered the "importer's or manufacturer's serial number" protected by 18 U.S.C. 922(k), which prohibits their removal, obliteration, or alteration.[62]

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[58] *See United States* v. *Dodson,* 519 F. App'x 344, 352–53 (6th Cir. 2013) (gun that was restored with 90 minutes of work, using widely available parts and equipment and common welding techniques, fit comfortably within the readily restorable standard); *United States* v. *TRW Rifle 7.62x51mm Caliber,* 447 F.3d 686, 692 (9th Cir. 2006) (a two-hour restoration process using ordinary tools, including a stick weld, is within the ordinary meaning of "readily restored"); *United States* v. *Mullins,* 446 F.3d 750, 756 (8th Cir. 2006) (a starter gun that can be modified in less than one hour by a person without any specialized knowledge to fire may be considered "readily convertible" under the GCA); *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 422–24 (6th Cir. 2006) ("[T]he Defendant weapon here had all of the necessary parts for restoration and would take no more than six hours to restore."); *United States* v. *Woods,* 560 F.2d 660, 664 (5th Cir. 1977) (holding that a weapon was a shotgun within the meaning of 26 U.S.C. 5845(d) and stating "[t]he fact that the weapon was in two pieces when found is immaterial considering that only a minimum of effort was required to make it operable."); *United States* v. *Smith,* 477 F.2d 399, 400–01 (8th Cir. 1973) (machinegun that would take around an eight-hour working day in a properly equipped machine shop was readily restored to shoot); *United States* v. *16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns,* 443 F.2d 463 (2d Cir. 1971) (starter guns converted in no more than 12 minutes to fire live ammunition were readily convertible under the GCA); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within a short period of time could readily be converted to expel a projectile); *United States* v. *Catanzaro,* 368 F. Supp. 450, 453 (D. Conn. 1973) (a sawed-off shotgun was "readily restorable to fire" where it could be reassembled in one hour and the necessary missing parts could be obtained at a Smith & Wesson plant); *compare with United States* v. *Seven Miscellaneous Firearms,* 503 F. Supp. 565, 574–75 (D.D.C. 1980) (weapons could not be "readily restored to fire" when restoration required master gunsmith in a gun shop and $65,000 worth of equipment and tools).

[59] The Federal Firearms Act of 1938 (repealed), the predecessor to the GCA, made it unlawful for a person to receive a firearm that had the manufacturer's serial number removed, obliterated or altered. 15 U.S.C. 902(i). Regulations promulgated to implement this law required each firearm manufactured after July 1, 1958, to be identified with the name of the manufacturer or importer, a serial number, caliber, and model. However, there was an exception from the serial number and model requirements for any shotgun or .22 caliber rifle unless that firearm was also subject to the NFA. 26 CFR 177.50 (rescinded).

[60] Both the GCA and NFA define the term "manufacturer" as any person "engaged in the business of manufacturing firearms," and the GCA further defines the term "licensed manufacturer" as "any such person licensed under the provisions of this chapter." 18 U.S.C. 921(a)(10); 26 U.S.C. 5845(m). The NFA further defines the term "make," and the various derivatives of that word, to include "manufacturing (other than by one qualified to engage in the business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. 5845(i).

[61] ATF occasionally issues serial numbers for placement on firearms in which the serial numbers were not originally placed, *see* 26 U.S.C. 5842(b), or were accidentally removed, damaged, or worn due to routine use or other innocent reason.

[62] In addition to Federal law, 18 U.S.C. 922(k) and 26 U.S.C. 5861(g), (h), (i), almost every state prohibits the removal, alteration, or obliteration of a firearm's serial number or possession of a firearm with a serial number that has been removed,

AMERICAN OVERSIGHT

G. Definition of "Gunsmith" [63]

To provide greater access to professional marking, this proposed rule would clarify that the meaning of the term "gunsmith" includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services. Specifically, this proposed rule would amend the definition of "engaged in the business" as it applies to a "gunsmith" in 27 CFR 478.11 to clarify the meaning of that term as someone "who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms."

This amendment would make clear that businesses that routinely repair or customize existing firearms, make or fit special barrels, stocks, or trigger mechanisms, or mark firearms as a service performed on firearms not for sale or distribution by a licensee, may be licensed as dealer-gunsmiths rather than as manufacturers.[64] Under this rule, PMFs would first need to be recorded by the dealer-gunsmith as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight), and once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. This would ensure that the PMF, if ever found by police at a crime scene, can be traced. However, no ATF Form 4473 or NICS background check would be required upon return of the marked firearm to the person from whom it was received, pursuant to 27 CFR 478.124(a).

H. Marking Requirements for Firearms

1. Information Required To Be Marked on the Frame(s) or Receiver(s)

To properly implement the new definitions, this proposed rule would amend 27 CFR 478.92(a) and 479.102 to explain how and when markings must be applied on each part defined as a frame or receiver, particularly since there could be more than one part of a complete weapon, or complete muffler or silencer device, that is the frame or receiver (*i.e.,* when ATF has not identified specific part(s) as the frame or receiver). After publication of a final rule, each frame or receiver of a new firearm design or configuration manufactured or imported after the date of publication of the final rule would need to be marked with a serial number, and *either:* (a) The manufacturer's or importer's name (or recognized abbreviation), and city and State (or recognized abbreviation) where the manufacturer or importer maintains their place of business, or in the case of a maker of an NFA firearm, where the firearm was made; or (b) the manufacturer's or importer's name (or recognized abbreviation), and the serial number beginning with the licensee's abbreviated FFL number as a prefix, which is the first three and last five digits followed by a hyphen, and then followed by a number (which may incorporate letters and a hyphen) as a suffix, *e.g.,* "12345678–[number]." The serial number (with or without the FFL prefix) identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm.

The additional information required to be marked on each frame or receiver (*i.e.,* name, city and state, or name and abbreviated serial number) would only apply to new designs or configurations of firearms manufactured or imported after publication of the rule. Licensed manufacturers and importers may continue to identify the additional information on firearms (other than PMFs) of the same design and configuration as they existed before [effective date of the rule] under the prior content rules, and any rules necessary to ensure such identification will remain effective for that purpose. This provision is intended to reduce production costs incurred by licensees.

Requiring Federal firearms licensees to mark in this manner on each part defined as a frame or receiver would make it possible for ATF to trace the firearm if the manufacturer's or importer's name, city, or state is marked on the slide or barrel, and the original components are later separated. At the same time, it would give an option for manufacturers and importers to avoid marking their city and state as currently required at §§ 478.92(a)(1)(ii)(D), (E) and 479.102(a)(1)(iv) and (v), or obtain a marking variance from this requirement, by allowing them to mark their abbreviated license number as a prefix to the serial number as an alternative because this information can be obtained by looking up the licensee's information. Except for silencer parts transferred by manufacturers to other qualified manufacturers and dealers for completion or repair of devices (see Section II.H.9 of the preamble), there would be no change to the existing requirement that each part defined as a machinegun or silencer that is disposed of separately and not part of a complete weapon or device be marked with all required information because individual machinegun conversion and silencer parts are "firearms" under the NFA that must be registered in the NFRTR. 26 U.S.C. 5841(a)(1); *id.* at 5845(a), (b). However, for frames or receivers, and individual machinegun conversion or silencer parts defined as "firearms" that are disposed of separately, the model designation and caliber or gauge may be omitted if it is unknown at the time the part is identified.

altered, or obliterated. *See* Ala. Code section 13A–11–64; Alaska Stat. section 11.61.200; Ariz. Rev. Stat. section 13–3102; Ark. Code section 5–73–107; Cal. Penal Code section 23900; Colo. Rev. Stat. section 18–12–103; Conn. Gen. Stat. section 29–36; Del. Code tit. 11 section 1459; Fla. Stat. Ann. section 790.27; Ga. Code. Ann. section 16–9–70; Haw. Rev. Stat. section 134–10; Idaho Code Ann. section 18–2410; 720 Ill. Comp. Stat. section 5/24–5; Ind. Code section 35–47–2–18; Kan. Stat. Ann. section 21–6306; Ky. Rev. Stat. section 527.050; La. Stat. Ann. section 40:1788; Me. Stat. tit. 17–A section 705(E); Md. Code Pub. Safety section 5–142; Mass. Gen. Laws 269 section 11C; Mich. Comp. Laws section 750.230; Minnesota Stat. section 609.667; Mo. Rev. Stat. section 571.050; Mont. Code Ann. section 45–6–326; Neb. Rev. Stat. sections 28–1207, 28–1208; Nev. Rev. Stat. section 202.277; N.H. Rev. Stat. Ann. section 637:7–a; N.J. Stat. Ann. section 2C:39–3(d); N.Y. Penal Law section 265.02(3); N.C. Gen. Stat. section 14–160.2; N.D. Cent. Code section 62.1–03–05; Ohio Rev. Code section 2923.201; Okla. Stat. tit. 21 section 1550(B); Or. Rev. Stat. section 166.450; 18 Pa. Cons. Stat. sections 6110.2, 6117; R.I. Gen. Laws section 11–47–24; S.C. Code. Ann. section 16–23–30(C) (handguns); S.D. Codified Laws 22–14–5; Tenn. Code Ann. section 39–14–134; Tex. Penal Code section 31.11; Utah Code section 76–10–521 (handguns); Va. Code Ann. section 18.2–311.1; Wash. Rev. Code section 9.41.140; W. Va. Code section 18.2–311.1; Wis. Stat. section 943.37(3).

[63] The term "gunsmith" is not used in the GCA; however, the Firearm Owners' Protection Act, Public Law 99–308, amended the GCA to define "engaged in the business" as applied to dealers to clarify when gunsmiths must have a license. *See* 18 U.S.C. 921(a)(11)(B); *id.* at (a)(21)(D); 132 Cong. Rec. 9603–04 (May 6, 1986) (statement of Sen. McClure).

[64] By clarifying the definition of gunsmith to mean a service routinely performed on existing firearms that are not for sale or distribution by a licensee, this rule would supersede ATF Ruling 2010–10, which allows gunsmiths under specified conditions to engage in certain manufacturing activities for licensed manufacturers. This would eliminate a significant source of confusion among regulated industry members and the public as to who needs a license to manufacture firearms. *See Broughman* v. *Carver,* 624 F.3d 670 (4th Cir. 2010) (distinguishing dealer-gunsmiths from manufacturers).

AMERICAN OVERSIGHT

2. Size and Depth of Markings

This proposed rule would not change the existing requirements for size and depth of markings in 27 CFR 478.92(a)(1) and 479.102(a), but for sake of clarity, consolidates them into a standalone paragraph along with the existing method of measuring the size and depth of markings set forth in 27 CFR 478.92(a)(5) and 479.102(b).

3. Period of Time To Identify Firearms

Neither the GCA nor the NFA explain at what point in the manufacturing process the required markings must be placed. In this regard, the proposed rule would make a distinction between the manufacture or making of a complete weapon or complete muffler or silencer device, and each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed. Complete weapons or complete muffler or silencer devices, as defined in this rule, would be allowed to be marked up to seven days from completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except for silencer parts produced by qualified manufacturers for transfer to other licensees to complete or repair silencer devices (see Section II.H.9 of the preamble), parts defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that are not component parts of a complete weapon or device when disposed of would be allowed to be marked up to seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. Adding this language would codify ATF Ruling 2012–1, and this ruling would become obsolete upon publication of the rule. As explained in that ruling, whether the end product is to become a complete weapon or device, or a frame or receiver to be disposed of separately, firearms that are actively awaiting materials, parts, or equipment repair to be completed are still considered to be actively in the manufacturing process.

4. Marking of Privately Made Firearms

Because privately made firearms do not have the identifying markings required of commercially manufactured firearms, this rule proposes to amend 27 CFR 478.92 to require FFLs to mark, or supervise the marking of, the same serial number on each frame or receiver (as defined in this rule) of a weapon that begins with the FFL's abbreviated license number (first three and last five digits) as a prefix followed by a hyphen on any "privately made firearm" (as defined) that the licensee acquired (*e.g.,* "12345678–[number]"). Unless previously identified by another licensee, PMFs acquired by licensees on or after the effective date of the rule would need to be marked in this manner within seven days of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner.[65] For PMFs acquired by licensees before the effective date of the rule, licensees would be required to mark or cause them to be marked by another licensee either within 60 days from that date, or before the date of final disposition (including to a personal collection), whichever is sooner. With respect to polymer firearms, including those that are produced using additive manufacturing (also known as "3D printing"), the method of marking would typically require the licensee to embed (or use pre-existing) metal serial number plates within the plastic to ensure they cannot be worn away during normal use.[66] Incorporation of this metal plate along with other metal components would also help ensure that the polymer firearm does not violate the Undetectable Firearms Act, 18 U.S.C. 922(p), which prohibits the manufacture and possession of firearms that are not as detectable as the "Security Exemplar" that contains 3.7 ounces of material type 17–4 PH stainless steel.[67]

PMFs currently in inventory that a licensee chooses not to mark may also be destroyed or voluntarily turned in to law enforcement within the 60-day period. Also, this proposed rule would not require Federal firearms licensees to accept any PMFs, or to mark them themselves. Licensees would be able to refuse to accept PMFs, or arrange for private individuals to have them marked by another licensee before accepting them, provided they are properly marked in accordance with this proposed rule. To provide greater access to professional marking, as stated previously, this rule would clarify that the meaning of the term "gunsmith" includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services.

Consistent with the language and purpose of the GCA, this proposed provision is necessary to allow ATF to trace all firearms acquired and disposed of by licensees, prevent illicit firearms trafficking, and provide guidance to FFLs and the public with respect to PMF transactions with the licensed community. This provision is crucial in light of advances in technology that allow unlicensed persons easily to produce firearms at home from parts ordered online, or by using 3D printers or personally owned or leased equipment. Such privately made firearms have and will continue to make their way to the primary market in firearms throughout the licensed community.[68] At the same time, consistent with the intent of the GCA,[69] nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law.[70] Persons should consult the laws and officials in their own States and localities to determine the lawfulness of PMFs.

[65] Under this rule, licensed collectors would only need to mark PMFs they receive or otherwise acquire that are defined as "curios or relics." *See* 27 CFR 478.11 (definitions of "firearm" and "curios or relics").

[66] When the size and depth of markings regulations were first promulgated, ATF recognized that "all markings can be removed by someone who wishes to make a deliberate effort to remove the markings. Realistically, we need to be concerned about markings that could be worn away during normal use or markings that could survive normal refinishing processes, *e.g.,* blueing, plating, etc. . . . As such, ATF has required manufacturers and importers who use polymer plastic frames to mark serial numbers in a steel plate embedded within the plastic." 66 FR 40599 (Aug. 3, 2001).

[67] Handguns that are 3D printed are also subject to the registration and taxation requirements of the NFA if they have a smooth bore and are capable of being concealed on the person, thereby falling within the definition of "any other weapon." *See* 26 U.S.C. 5845(e).

[68] Under Federal law, for example, certain firearm transactions must be conducted through Federal firearms licensees. *See* 18 U.S.C. 922(a)(5) (prohibiting any person other than a licensee, subject to certain limited exceptions, from selling or delivering a firearm to an unlicensed out of state resident).

[69] *See* Public Law 90–351, sec. 901(b), 82 Stat. 227.

[70] This rule is also consistent with the Second Amendment. As the Supreme Court stated in *District of Columbia* v. *Heller,* 554 U.S. 570, 626–27 & n.26 (2008), "presumptively lawful regulatory measures" include those "imposing conditions and qualifications on the commercial sale of arms." *See also United States* v. *Marzzarella,* 614 F.3d 85, 99 (3d Cir. 2010) (concluding that even if strict scrutiny were to apply, 18 U.S.C. 922(k) (prohibiting possession of firearms with obliterated serial numbers) would be upheld under the Second Amendment because "serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms. Because it assists law enforcement in this manner, we find its preservation is not only a substantial but a compelling interest.").

AMERICAN OVERSIGHT

5. Meaning of Marking Terms

An additional amendment to 27 CFR 478.92 and 478.102 would clarify the meaning of the terms ''legible'' and ''legibly'' to ensure that ''the identification markings use exclusively Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen,'' and that the terms ''conspicuous'' and ''conspicuously'' are understood to mean that ''the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.'' This would codify the meaning of those terms as explained in ATF Ruling 2002–6 (''legible''), and ATF's final rule at 66 FR 40599 (Aug. 3, 2001) (referencing U.S. Customs Service regulations on the definition of ''conspicuous'').

6. Alternate Means or Period of Identification

This proposed rule would not alter the Director's ability to authorize other means of identification, or a ''marking variance,'' for any part defined as a firearm (including a machinegun or silencer) upon receipt of a letter application or an Application for Alternate Means of Identification of Firearms (Marking Variance), ATF Form 3311.4, showing that such other identification is reasonable and does not hinder the effective administration of the regulations. The amendment would also allow ATF to grant a variance from the period in which to mark firearms.

7. Destructive Device Period of Identification

Similar to other firearms, because the proposed rule would now specify the seven-day grace period in which to mark all completed firearms, including destructive devices, this rule would also allow ATF to grant a variance from this period. The marking requirements for destructive devices are otherwise unchanged.

8. Adoption of Identifying Markings

This rule proposes to authorize licensed manufacturers and importers to adopt an existing serial number, caliber/gauge, model, or other markings already identified on a firearm provided they legibly and conspicuously place, or cause to be placed, on each part (or part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, which is the first three and last five digits followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number],'' to ensure the traceability of the firearm. This language would supersede ATF Ruling 2013–3 as it applies to licensed manufacturers and importers, but the ruling would remain effective for makers of NFA firearms. This change would help avoid multiple markings on firearms that could be confusing to law enforcement and alleviate concerns of some manufacturers and importers regarding serial number duplication when firearms are remanufactured or reimported.

9. Firearm Muffler or Silencer Parts Transferred Between Qualified Licensees

Licensed and qualified firearm muffler or silencer manufacturers routinely transfer small internal muffler or silencer components to each other to produce complete devices, and between qualified licensees when repairing existing devices. Because of the difficulties and expense of marking and registering small individual components used to commercially manufacture a complete muffler or silencer device with little law enforcement benefit, this proposed rule would allow qualified manufacturers to transfer parts defined as a firearm muffler or silencer to other qualified manufacturers without immediately identifying or registering them. Once the new device is complete with the part, the manufacturer would be required to identify and register the device in the manner and within the period specified in this rule for a complete device. Likewise, the proposed rule would allow qualified manufacturers to transfer muffler or silencer replacement parts to qualified manufacturers and dealers to repair existing devices already identified and registered in the NFRTR. Further, this rule would amend the definition of ''transfer'' to clarify that the temporary conveyance of a lawfully possessed NFA firearm, including a silencer, to a qualified manufacturer or dealer for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor is not a ''transfer'' requiring additional identification or registration in the NFRTR. This change would be consistent with the definition of ''transfer'' in 26 U.S.C. 5845(j) because a temporary conveyance for these purposes is not a sale or other disposition.[71] These proposed rules are intended to reduce the practical and administrative problems of marking and registering silencer parts by the regulated industry, and avoid a potential resource burden on ATF to process numerous tax-exempt registration applications with little public safety benefit.[72]

10. Voluntary Classification of Firearms and Armor Piercing Ammunition

For many years, ATF has acted on voluntarily requests from persons, particularly manufacturers who are developing new products, by issuing determinations or ''classifications'' whether an item is a ''firearm'' or ''armor piercing ammunition'' as defined in the GCA or NFA. This helps regulated industry members and the public determine what laws and regulations may be applicable to the product, and any steps that they may need to take to be compliant with those laws and regulations. To clarify this process, this proposed rule would set forth the procedure and conditions by which persons may voluntarily submit such requests to ATF. Each request would be submitted in writing or on an ATF form executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. Upon completion of the examination, ATF may return the sample to the person who made the request unless a determination is made that return of the

[71] The definition of ''transfer'' in the NFA only includes ''selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of'' a firearm. *See United States* v. *Smith,* 642 F.2d 1179, 1182 (9th Cir. 1981) (''We cannot agree that Congress intended to impose a transfer tax and require registration whenever mere physical possession of a firearm is surrendered for a brief period.'').

[72] These changes are consistent with ATF enforcement policy. *See NFA Handbook,* ATF E-Publication 5320.8 (April 2009), pp. 46, 60 sections 7.4.6; 9.5.1. With regard to silencer repairs, in order to avoid any appearance that an unlawful ''transfer'' has taken place, ATF recommends that an Application for Tax Exempt Transfer and Registration of Firearm, ATF Form 5, be submitted for approval prior to conveying the firearm for repair or identifying the firearm. The conveyance may also be accomplished by submission of a letter from the registrant to the qualified FFL advising the FFL that the registrant is shipping or delivering the firearm for repair/identification and describing the repair or identification. Return of the registered silencer to the registrant may likewise be accomplished by submission of an ATF Form 5 or by a letter from the FFL to the registrant that accompanies the silencer.

AMERICAN OVERSIGHT

sample would be or place the person in violation of law.

ATF's decision whether to classify an item voluntarily submitted is entirely discretionary. The proposed procedure would assist ATF more efficiently to determine the design and intent of the manufacturer of the item through its written statements, and by examining the objective design features of an actual sample along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item (though ATF is not limited to examining the items submitted to make its determination). The proposed rule would further codify ATF's policy not to evaluate a firearm accessory or attachment "unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used," and would further explain that "[a] determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration."

I. Recordkeeping

1. Acquisition and Disposition Records

This proposed rule would make minor amendments to 27 CFR 478.122, 478.123, 478.125, and 478.125a, pertaining to the acquisition and disposition records maintained by importers, manufacturers, and dealers. Due to the possibility that a firearm may have more than one frame or receiver as defined in this rule, and the changes to marking regulations, this rule would make technical amendments to these recordkeeping regulations to make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) in the regulations and for the formatting of their records as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that Federal firearms licensees record more than one manufacturer, importer, or serial number, if appropriate, when acquiring or disposing of firearms with multiple components marked as the frame or receiver, or that have been remanufactured or reimported by another licensee. This is consistent with prior ATF guidance to the firearms industry.[73] However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* "closed out") or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

Over the years, licensed importers and manufacturers have asked ATF to allow them to consolidate their records of importation or manufacture and acquisition and disposition of firearms, rather than maintaining separate records as required by 27 CFR 478.122(d) and 478.123(d). Because separate records are also difficult for ATF to inspect, this rule would amend §§ 478.122 and 478.123 to require licensed importers and manufacturers to consolidate their records of importation, manufacture, or other acquisition, and their sale or other disposition in a format containing the applicable columns specified in a table included in § 478.122(b). The columns may be in a different order than the specified format provided they contain all required information. These changes would supersede ATF Rulings 2011–1 and 2016–3, and those rulings would become obsolete upon publication of a final rule.

This rule would also make minor clarifying edits to the format of the Firearms Acquisition and Disposition Record in § 478.125(e). The column titled "Name and address or name and license No." would be retitled as "Name and address of nonlicensee; or if licensee, name and License No." In addition, the column titled "Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically" would be retitled "Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically." This change would make clear that both the name and license number (not the address) of a licensee from whom firearms are received and to whom they are disposed are recorded in the A&D Record. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* "closed out") or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

The proposed changes to § 478.125 would also include a minor amendment to paragraph (f) to make it clear that in the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee must record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. This change is needed to ensure that acquisition records are closed out when firearms are no longer in inventory.[74] This would resolve a significant problem that ATF Industry Operations Investigators have when trying to reconcile the inventory of a Federal firearms licensee, and that Federal firearms licensees have when timely responding to trace requests, particularly when old A&D Records are "closed out" and stored, which, under this proposed rule, could be in a separate warehouse depending on their age (see Section II.J of the preamble).

2. Firearms Transaction Records

Some technical amendments would be needed at 27 CFR 478.124 pertaining to information recorded on the ATF Form 4473. Like changes to the recordkeeping regulations, these amendments would make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) to ensure that the Federal firearms licensee is recording more than one manufacturer, importer, and serial number, if appropriate, on Forms 4473. In addition, the proposed changes to § 478.124 would include a minor technical amendment to paragraph (f) by removing a phrase that indicates that a Federal firearms licensee must fill out the firearm description information only after filling out the information about the transferee. Making this deletion would codify ATF Procedure 2020–1, which sets forth an alternative method of complying with § 478.124(f) for non-over-the-counter firearm transactions. ATF recently issued that procedure in light of changes to ATF Form 4473 (May 2020), which now requires completion of the form in an order different from that provided in § 478.124(f).

3. Recordkeeping for Privately Made Firearms

Minor changes to the above regulations regarding recordkeeping by licensees would also be needed to account for any voluntary receipts or other acquisitions (including from a personal collection) of privately made firearms, and corresponding dispositions (including to a personal collection). Since PMFs are not

[73] *See* FFL Newsletter, May 2012, p.5 ("If a firearm is marked with two manufacturer's names, or multiple manufacturer and importer names, FFLs should record each manufacturers' and importers' name in the A&D record.").

[74] This is consistent with prior ATF guidance to the firearms industry. *See* FFL Newsletter, Sept. 2011, p.5.

AMERICAN OVERSIGHT

commercially manufactured, if a PMF were received or otherwise acquired by a licensee or disposed of, or imported, the abbreviation ''PMF'' would be recorded as the manufacturer in the appropriate column on a licensee's acquisition and disposition record, ATF Form 4473, or import application, as well as the PMF serial number beginning with the abbreviated FFL number in the serial number column. For PMFs received prior to the effective date of a final rule that are to be identified by the licensee in accordance with § 478.92, or by another licensee at the licensee's request, the licensee would be required to first record the firearm as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight). Once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce a title format change to the A&D Record to add ''and/or PMF'' in the manufacturer column until an existing paper record book is completed (*i.e.,* ''closed out'') or electronic record version updated in the normal course of business, provided each PMF received is accurately recorded as a ''PMF'' in the manufacturer column.

4. NFA Forms Update

Minor technical amendments would also be needed in 27 CFR 479.62, 479.84, 479.88, 479.90, and 479.141, pertaining to NFA Form 1 (Application to Make), NFA Form 4 (Application to Transfer), NFA Form 3 (Tax Exempt Transfers—SOTs), NFA Form 5 (Tax Exempt Transfers—Governmental Entities), and the Stolen or Lost Firearms report, respectively. Due to the new definitions and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), importer(s), serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, importer, or serial number, if appropriate, is recorded when completing the NFA forms.

5. Importation Forms Update

Minor technical amendments would also be needed in 27 CFR 447.42, 447.45, 478.112, 478.113, 478.114, and 479.112, pertaining to the importation of firearms. Again, due to the new definition and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), country or countries of manufacture, and serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, country, importer, or serial number, if appropriate, is recorded when completing importation forms.

J. Record Retention

This rule also proposes to amend 27 CFR 478.129 to remove language stating that FFL dealers and collectors need only keep A&D Records and ATF Forms 4473 for up to 20 years following the date of sale or disposition of the firearm. The proposed changes would require Federal firearms licensees to retain all records until business or licensed activity is discontinued, either on paper or in an electronic format approved by the Director,[75] at the business or collection premises readily accessible for inspection. There would also be an amendment to 27 CFR 478.50(a) to allow all licensees, including manufacturers and importers, to store paper records and forms with no open disposition entries and with no dispositions recorded within 20 years at a separate warehouse, which would be considered part of the business premises for this purpose and subject to inspection.

In view of advancements in electronic scanning and storage technology, and ATF's acceptance of electronic recordkeeping, these amendments would reverse a 1985 rulemaking allowing non-manufacturer/importer Federal firearms licensees to destroy their records after 20 years.[76] The durability and longevity of firearms means that they are often in circulation for more than 20 years, while the cost of storing firearm transaction records has decreased dramatically through electronic recordkeeping. The proposed amendments would enhance public safety by ensuring that records of active licensees will be available for tracing purposes. ATF has encountered some firearms retailers who have destroyed large numbers of records more than 20 years old so that they would no longer need to be stored physically. This resulted in some traces of firearms involved in crimes to be returned incomplete for lack of records. This provision is also essential if PMFs involved in crime are marked and traced directly to licensed dealers who, unlike licensed manufacturers and importers, are not presently required to maintain permanent records.

III. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic benefits, environmental benefits, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has determined that while this proposed rule is not economically significant, it is a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because this proposed rule raises novel legal or policy issues arising out of legal mandates. Accordingly, the rule has been reviewed by OMB.

This proposed rule would update the new definition of ''frame or receiver,'' among other items. Table 1 provides a summary of the provisions of this proposed rule, along with the estimated affected population, costs, and benefits.

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS

Category	NPRM
Applicability	• New Definition of Receiver.

[75] ATF previously approved electronic storage of certain records under the conditions set forth in ATF Rulings 2016–1 (Acquisition and Disposition Records) and 2016–2 (ATF Forms 4473).

[76] *See* 50 FR 26702 (June 28, 1985).

AMERICAN OVERSIGHT

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS—Continued

Category	NPRM
Affected Population	• Update Marking Requirements. • New Gunsmithing Definition. • Update Record Retention. • Other Technical Amendments. • 113,204 FFLs (Record Retention). • Unknown number of FFLs manufacturers and importers (Definition of Receiver). • 35 Non-FFL manufacturers (Definition of Receiver). • 6,044 FFL retailers (PMFs). • 36 Non-FFL retailers (PMFs). • Unknown number of Individual Owners.
Total Costs to Industry, Public, and Government (7% Discount Rate)	$1.1 million; $149,995 7% annualized.
Benefits (7% Discount Rate)	N/A.
Benefits (Qualitative)	• Provides clarity to courts on what constitutes a firearm frame or receiver. • Applies to new technology. • Makes consistent marking requirements. • Eases certain marking requirements. • Increases tracing of crime scene firearms to prosecute criminals.

1. New Definition of Firearm Frame or Receiver

The proposed definition of this term would maintain current classifications and current marking requirements of firearm frames or receivers, except that the licensed manufacturer or importer must mark on new designs or configurations either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, on each part defined as a frame or receiver, along with the serial number. To ensure traceability if the parts are separated, there would no longer be an option *only* to mark the FFL's name, city, and state on the slide or barrel. More specifically—

- The proposed definitions would take into account the fact that modern firearms do not house all the components as defined in the current definition. These definitions account for firearms such as split frames or multi-piece firearms;
- The proposed definition would recognize the current classifications of a firearm "frame or receiver." It is intended to encompass the majority, if not all, of existing regulated firearms, and no new marking requirements would be required for these existing designs and configurations;
- After this proposed rule is finalized, markings on new designs or configurations of firearms manufactured or imported may be accomplished by marking each frame or receiver with the licensee's name, city, and state, and serial number, or with the licensee's name and abbreviated license number prefix and number (serial number) in the manner prescribed by existing marking requirements;
- Markings would need to be accomplished within 7 days of completion of the active manufacturing process for the complete weapon (or frame or receiver of such weapon if not being sold as a complete weapon); and
- The proposed rule would require acquisition and disposition record changes to accommodate recording multiple frames or receivers that have different serial numbers if the original frames or receivers (with the same serial number) become separated and are reassembled with frames or receivers bearing different serial numbers.

ATF believes that the majority of the industry currently complies with these requirements, so the cost would be minimal. While the new definitions would mostly affect new designs or configurations of firearms, manufacturers would still be able to receive a determination or a variance on the design from ATF; therefore, they may not experience an additional cost or burden. For more details, please refer to Chapter 2 of the Regulatory Impact Analysis.[77]

2. Partially Complete, Disassembled, or Inoperable Firearm Kits

This section addresses non-FFL manufacturers who manufacture partially complete, disassembled, or inoperable frame or receiver kits, to include both firearm parts kits that allow a person to make only a frame or receiver, and those kits that allow a person to make a complete weapon. When a partially complete frame or receiver parts kit reaches a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state, it would be considered a firearm "frame or receiver" that must be marked. Further, under the proposed rule, weapon parts kits with partially complete frames or receivers containing the necessary parts such that they may readily be completed, assembled, converted, or restored to expel a projectile by the action of an explosive would be "firearms" for which each frame or receiver of the weapon, as defined under this rule, would need to be marked.

For non-FFL manufacturers of firearm parts kits containing a part defined as a firearm frame or receiver, ATF anticipates there would be a significant impact on these individual companies, but notes that the overall industry impact would also be minimal. Based on current marketing related to the unregulated sale of certain firearm parts kits, ATF anticipates that these non-FFLs would either become FFLs to sell regulated frames or receivers or complete weapons (either as kits or fully assembled), or would take a loss in revenue to sell unregulated items or parts kits that do not contain a frame or receiver (*i.e.*, unregulated raw materials or molds, fire control components, barrels, accessories, tools, jigs, or instructions), but not both. For more details, please refer to Chapter 3 of the Regulatory Impact Analysis.

3. Gunsmithing

The proposed rule would result in a one-time cost for contract gunsmithing, estimated to be $180,849. For more details, please refer to Chapter 4 of the Regulatory Impact Analysis.

[77] The Regulatory Impact Analysis is available on *www.regulations.gov* in the same docket as this rule.

AMERICAN OVERSIGHT

4. Silencers

The proposed rule would require silencers to be marked on any housing or structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device. Currently, the regulations assume that each part defined as a muffler or silencer must be marked and registered.[78] While this proposed change would increase the number of certain parts—firearm muffler or silencer frames or receivers—that need to be marked for modular silencers, this proposed change is not intended to require marking of all silencer parts so long as they are incorporated into a complete device by the original manufacturer or maker that is marked and registered. More specifically, none of the internal nonstructural parts of a complete muffler or silencer device would need to be marked so long as each frame or receiver as defined in this rule is marked. However, as with current regulations, silencer parts sold, shipped, or otherwise disposed of separately would still be considered ''silencers'' that require all markings prior to disposition except when transferred between qualified manufacturers for the production of new devices, and to qualified manufacturers and dealers for the repair of existing devices (see Section II.H.9 of the preamble).

However, the proposed rule would now require some manufacturers of silencers to mark the outer tube rather than the endcap. ATF anticipates only minimal costs associated with moving the serial number and other identifying information from the end cap or adding the same information to the outer tube on certain silencers. Furthermore, there may be a savings for individual owners of silencers. This proposed rule would expressly allow for repairs on silencer devices without having to undergo the additional NFA transfer and registration process, so long as the device is returned to the sender. For more details, please refer to Chapter 5 of the Regulatory Impact Analysis.

5. Privately Made Firearms

A firearm, including a frame or receiver, assembled or otherwise produced by a non-licensee without any markings by a licensee at the time of production or importation is defined as a ''privately made firearm (PMF)'' in the proposed rule. This does not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). Under the proposed rule, FFLs would be required to mark PMFs within 7 days of the firearm being received by a licensee, or before disposition, whichever first occurs. Licensees would have 60 days to mark PMFs already in inventory after a final rule becomes effective. FFLs would have the option to mark their existing PMFs themselves. Both FFLs and non-FFLs would have the option to contract with an FFL, such as a gunsmith, for this purpose, dispose of them, or send them to ATF or another law enforcement agency for disposal. The industry cost for this section is $563,340. For more details, please refer to Chapter 6 of the Regulatory Impact Analysis.

6. Record Retention

Currently, licensees other than manufacturers and importers do not have to store their ATF Forms 4473 or A&D records beyond 20 years. This proposed rule would require licensed dealers and collectors to store their Forms 4473 or A&D records indefinitely. The industry cost for this section would be minimal because FFLs could drop off their overflow records to ATF or have ATF ship them directly. The government cost for this provision is $68,939 annually. For more details, please refer to Chapter 7 of the Regulatory Impact Analysis.

7. ATF Form Updates

This proposed rule would modify existing forms and records, such as ATF Forms 4473, NFA forms, importation forms, the Stolen or Lost Firearms Reports, and A&D Records, to help ensure that if more than one manufacturer or serial number is identified on any firearm, those names or serial numbers are recorded. As paper forms run out, FFLs would be able to order forms as part of their normal operations. In other words, FFLs using paper forms requested from ATF are not anticipated to incur any additional cost. For FFLs maintaining transaction records electronically, these FFLs would also only be required to update their software during their next regularly scheduled update. Because software updates occur regularly, and costs are already incorporated for those, ATF does not anticipate any additional costs would be incurred for these changes. There is no cost associated with this section. For more details, please refer to Chapter 8 of the Regulatory Impact Analysis.

8. Total Cost of the Proposed Rule

The total 10-year undiscounted cost of this proposed rule is estimated to be $1.3 million. The total 10-year discounted cost of the rule is $1.0 million and $1.2 million at 7 percent and 3 percent respectively. The annualized cost of this proposed rule would be $147,048 and $135,750, also at 7 percent and 3 percent, respectively.

9. Alternatives

ATF considered various alternatives when preparing this proposed rule. For a more detailed analysis, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

a. This Proposed Rule

ATF chose to propose promulgating new definitions of ''frame or receiver,'' ''privately made firearm,'' ''gunsmithing,'' and an update to records retention and new requirements for marking silencers, because they would maximize benefits.

b. Other Considered Alternatives

Alternative 1—No change. While this alternative minimizes cost, it does not meet any of the objectives outlined in this proposed rule.

Alternative 2—Everytown for Gun Safety petition. ATF received a petition for rulemaking from Everytown for Gun Safety, a non-profit organization, proposing to define ''firearm frame or receiver'' in 27 CFR 478.11. That proposed definition focused on housing the ''trigger group''; however, it did not define ''trigger group'' and even if it did, it would not address firearms that do not house trigger components within a single housing, or which have a remote trigger outside the weapon. In other words, this alternative would fall short of addressing all technologies or designs of firearms that are currently available, or may become available in the future. It also does not address potential changes in firearms terminology. Thus, while the alternative requested by that petition would reduce the cost by reducing the number of entities affected, it does not fully address the objectives of this proposed rule.

Alternative 3—Grandfather all existing firearms and receivers. This alternative would grandfather in all existing firearms that would not meet the serialization standard for partially complete and split frames or receivers. This was considered and incorporated into the proposed alternative, where feasible. However, in order to enforce the regulation, a complete grandfathering of existing firearms and silencers is problematic in that manufacturers could continue to

[78] *See* footnote 47, *supra.*

AMERICAN OVERSIGHT

produce non-compliant firearm frames or receivers and falsely market them as grandfathered firearms. This could potentially pose an enforcement issue that may not be resolved for years if not decades.

Alternative 4—Require serialization of all partially complete firearms or split receivers. This would require all firearms purchased by individuals to be retroactively serialized. However, the cost would increase considerably and the GCA only regulates the manufacture of firearms by Federal firearm licensees, not the making of firearms for personal use by private unlicensed individuals.

B. Executive Order 13132

This proposed rule will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. This rule is not intended to supersede State requirements unless there is a direct and positive conflict between them such that they cannot be reconciled or consistently stand together.[79] States can require markings on firearms for individuals. This rule does not require individuals to mark their personal firearms. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

D. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (''RFA''), ATF prepared an Initial Regulatory Flexibility Analysis (''IRFA'') that examines the impacts of the proposed rule on small entities (5 U.S.C. 601 *et seq.*). The IRFA is included here and as part of the RFA. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000 people. 5 U.S.C. 601(6).

Because this proposed rule affects different populations in different ways, the analysis for the IRFA has been broken up by provision. Certain provisions may have a significant impact on certain small entities, such as non-FFL manufactures of firearm parts kits with incomplete firearm frames or receivers. Based on the information from this analysis:

- ATF estimates that this proposed rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufacturers and retailers of firearm parts kits with incomplete firearm frames or receivers, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- Non-FFL manufacturers are anticipated to be small and would potentially have a significant impact on their individual revenue.
- The second largest impact would be $12,828 if a manufacturer had to retool their existing production equipment, but ATF anticipates this is unlikely because this proposed rule encompasses the majority of existing technology. This would not affect future production because this work would be part of their normal operations in creating new firearms.
- ATF estimates the majority of affected entities are small entities that would experience a range of costs; therefore, this rule may have a significant impact on small entities.

Under the RFA, we are required to consider what, if any, impact this rule would have on small entities. Agencies must perform a review to determine whether a rule will have such an impact. Because the agency has determined that it will, the agency has prepared an initial regulatory flexibility analysis as described in the RFA. Under Section 603(b) of the RFA, the regulatory flexibility analysis must provide or address:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and
- Descriptions of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

1. A Description of the Reasons Why Action by the Agency Is Being Considered

One of the reasons ATF is considering this proposed regulation is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the by-product of a transaction between two parties that is not accounted for in the transaction.

This proposed rule would update the existing definition of frame or receiver to account for the majority of technological advances in the industry and ensure that these firearms continue to remain under the regulatory regime as intended by the enactment of the GCA, including accounting for manufacturing of firearms using multiple manufacturers. In light of recent court cases, the majority of regulated firearms may not meet the existing definition of firearm frame or receiver. This may result in no part of a firearm being regulated as a ''frame or receiver'' contrary to the requirements in the GCA that ensure tracing to solve crime and help prevent prohibited persons from coming into possession of weapons. Furthermore, finding information in support of criminal cases may be hindered because records are destroyed after 20 years despite the fact that firearms may last longer than 20 years and be used in criminal activities.

This proposed rule would also account for advances in technology in performing transactions such as electronic storage. For more specific details regarding the need for regulation, please refer to the specific chapters pertaining to each provision of this proposed rule.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The Attorney General is responsible for enforcing the GCA, as amended, and the NFA, as amended. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A); *id.* at 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See*

[79] *See* 18 U.S.C. 927.

AMERICAN OVERSIGHT

28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing both the GCA and the NFA. *See* 27 CFR parts 478, 479.

The proposed rule provides new regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' because they are outdated. The proposed rule would also amend ATF's definitions of ''firearm'' and ''gunsmith'' to clarify the meaning of those terms, and to add new regulatory terms such as ''complete weapon,'' ''complete muffler or silencer device,'' ''privately made firearm,'' and ''readily'' for purposes of clarity given advancements in firearms technology. Further, the proposed rule would amend ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

- ATF estimates that this rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufactures and retailers of firearm kits, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- ATF anticipates the majority of affected entities are small entities and would experience any range of costs; therefore this rule would have a significant impact on a substantial number of small entities.

4. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

This proposed rule does not duplicate or conflict with other Federal rules.

5. Descriptions of any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

The significant alternatives considered are set forth in Section IV(A)(9) of this preamble. For more details, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804.

F. Unfunded Mandate Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

G. Paperwork Reduction Act of 1995

This proposed rule would call for collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–20). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Under the provisions of this proposed rule, there would be a one-time increase in paperwork burdens of identification markings placed on firearms as well as additional transaction records. This requirement would be added to an existing approved collection covered by OMB control number 1140–0050 and 1140–0067.

Title: Identification Markings Placed on Firearms.

OMB Control Number: OMB 1140–0050.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information in fighting crime by facilitating the tracing of firearms used in criminal activities. The systematic tracking of firearms from the manufacturer or U.S. importer to the retail purchaser also enables law enforcement agencies to identify suspects involved in criminal violations, determine if a firearm is stolen, and provide other information relevant to a criminal investigation.

Description and Number of Respondents: Currently there are 12,252 licensed manufacturers of firearms and 1,343 licensed importers. Of the potential number of licensed dealers and licensed pawnbrokers, ATF estimates that those directly affected would be a one-time surge of 5,298 licensed dealers, 710 licensed pawnbrokers, and 36 non-licensed dealers that would be affected. This proposed rule would affect a one-time surge of 6,044 respondents.

Frequency of Response: There will be a recurring response for all currently existing 13,595 licensed manufactures and licensed importers. This proposed rule would affect a one-time number of responses of 12,088 responses (6,044 respondents * 2 responses).

Burden of Response: This includes recurring time burden of 1 minute. ATF anticipates a one-time hourly burden of 0.25 hours per respondent.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 85,630 hours. The new burden, as a result of this proposed rulemaking, is a one-time hourly burden of 3,022 (6,044 respondents * 2 responses * 0.25 hourly burden per respondent).

Title: Licensed Firearms Manufactures Records of Production, Disposition, and Supporting Data.

OMB Control Number: OMB 1140–0067.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information for criminal investigation or regulatory compliance with the Gun Control Act of 1968. The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer, without such reasonable cause or warrant, and during the course of a criminal investigation of a person or persons other than the licensee in order to ensure compliance with the recordkeeping requirements of 18 U.S.C. 923(g)(1)(A) and (B). The Attorney General may also inspect or examine any records relating to firearms involved in a criminal investigation that is traced to the licensee, or firearms that may have been disposed of during the course of a bona fide criminal investigation.

Description and Number of Respondents: The current number of respondents is 9,056 firearm manufacturers, but this proposed rule would have a one-time surge for an unknown select few licensed manufacturers.

Frequency of Response: There will be a recurring response for all 9,056 licensed manufacturers, but only a one-time surge of 6,790 responses ((2,649 licensed dealer submissions + 710 license pawnbroker submissions + 36 non-licensed dealers) * 2 firearms or firearm kits) to licensed manufactures.

Burden of Response: This includes recurring time burden of 1.05 minutes. The burden resulting from this proposed

AMERICAN OVERSIGHT

rule is 0.25 hours per set of submittals by licensed dealers and licensed pawnbrokers to licensed manufacturers.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 201,205 hours. The new burden, as a result of this proposed rulemaking, is 1,698 hours (6,790 responses * 0.25 hours).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), a copy of this proposed rule will be submitted to OMB for its review of the collections of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information becomes effective, we will publish a notice in the **Federal Register** and request additional comments regarding the collection of information prior to OMB's decision to approve, modify, or disapprove the proposed collection.

IV. Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on the feasibility of implementing the new definition of firearm "frame or receiver" in 27 CFR 478.11 and 27 CFR 479.11, and related definitions and amendments that ensure the proper marking, recordkeeping, and traceability of all firearms manufactured, imported, acquired and disposed by Federal firearms licensees. ATF also requests comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits.

All comments must reference this document's docket number ATF 2021R–05, be legible, and include the commenter's complete first and last name and full mailing address. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity. ATF will retain all comments as part of this rulemakings administrative record. ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if ATF cannot read your comment due to technical difficulties and cannot contact you for clarification, ATF may not be able to consider your comment.

ATF will carefully consider all comments, as appropriate, received on or before the closing date, and will give comments after that date the same consideration if practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at ATF and on the internet through the Federal eRulemaking Portal, and subject to the Freedom of Information Act (5 U.S.C. 552). Commenters who do not want their name or other personal identifying information posted on the internet should submit comments by mail or facsimile, along with a separate cover sheet containing their personal identifying information. Both the cover sheet and comment must reference this docket number (2021R–05). For comments submitted by mail or facsimile, information contained on the cover sheet will not appear when posted on the internet but any personal identifying information that appears within a comment will not be redacted by ATF and it will appear on the internet.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter shall place any portion of a comment that is proprietary or confidential business information under law on pages separate from the balance of the comment with each page prominently marked "PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION" at the top of the page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it received, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal process.

C. Submitting Comments

Submit comments in any of three ways (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

- *Federal eRulemaking Portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at *www.regulations.gov* and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.
- *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's first and last name and full mailing address, be signed, and may be of any length.
- *Facsimile:* Submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

1. Be legible and appear in minimum 12 point font size (.17 inches);
2. Be 8½″ x 11″ paper;
3. Be signed and contain the commenter's complete first and last name and full mailing address; and
4. Be no more than five pages long.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for ATF 2021R–05), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects

27 CFR Part 447

Administrative practice and procedure, Arms control, Arms and

AMERICAN OVERSIGHT

munitions, Authority delegation, Chemicals, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements, Scientific equipment, Seizures and forfeitures.

27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

27 CFR Part 479

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, 27 CFR parts 447, 478, and 479 are proposed to be amended as follows:

PART 447—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

■ 1. The authority citation for 27 CFR part 447 continues to read as follows:

Authority: 22 U.S.C. 2778; Exec. Order 13637, 78 FR 16129 (Mar. 8, 2013).

§ 447.42 [Amended]

■ 2. Amend § 447.42 as follows:
■ a. In paragraph (a)(1)(ii), remove the word "country" and add in its place the term "country or countries";
■ b. In paragraph (a)(1)(iv)(A), remove "manufacturer" and add in its place "manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)"; and
■ c. In paragraph (a)(1)(iv)(G), remove "serial number" and add in its place "serial number(s)".

§ 447.45 [Amended]

■ 3. Amend § 447.45 as follows:
■ a. In paragraph (a)(2)(ii), remove "manufacturer of the defense article" and add in its place "manufacturer(s) of the defense article or privately made firearm (if privately made in the United States)";
■ b. In paragraph (a)(2)(iii), remove the word "country" and add in its place the term "country or countries"; and
■ c. In paragraph (a)(2)(vii), remove "serial number" and add in its place "serial number(s)".

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 4. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

■ 5. In § 478.11:
■ a. Add, in alphabetical order, definitions for "Complete muffler or silencer device" and "Complete weapon";
■ b. Revise the definition of "Engaged in the business" paragraph (d) "Gunsmith" and the definition of "Firearm";
■ c. Remove the definition of "Firearm frame or receiver"; and
■ d. Add, in alphabetical order, definitions for "Frame or receiver", "Importer or manufacturer's serial number", "Privately made firearm (PMF)", and "Readily".

The additions and revisions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Engaged in the business— * * *

(d) Gunsmith. A person who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms;

* * * * *

Firearm. Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. The term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed.

* * * * *

Frame or receiver. A part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure. Any such part identified with a serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be a frame or receiver. For purposes of this definition, the term "fire control component" means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. The following are nonexclusive examples that illustrate this definition:

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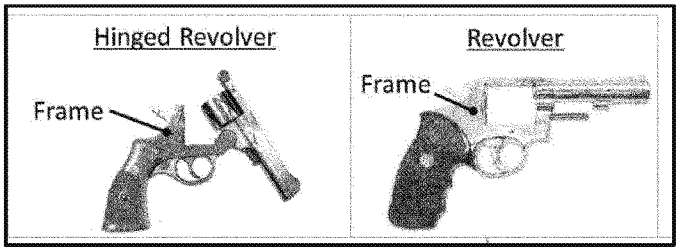
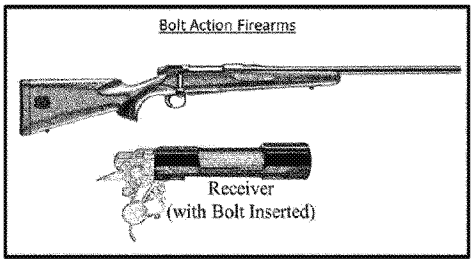
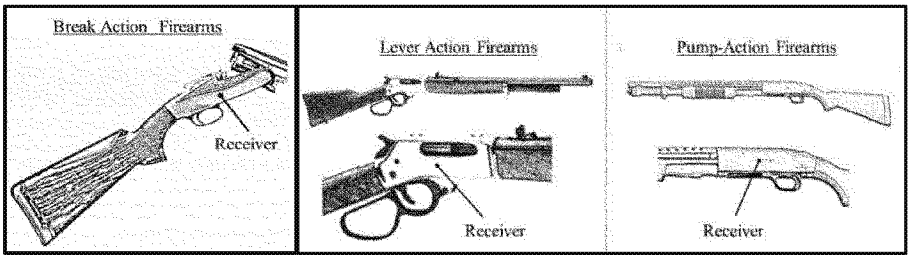
Example 1 – Hinged or single framed revolver: The frame or receiver is the part of the revolver that provides a structure designed to hold the trigger, hammer, and cylinder.



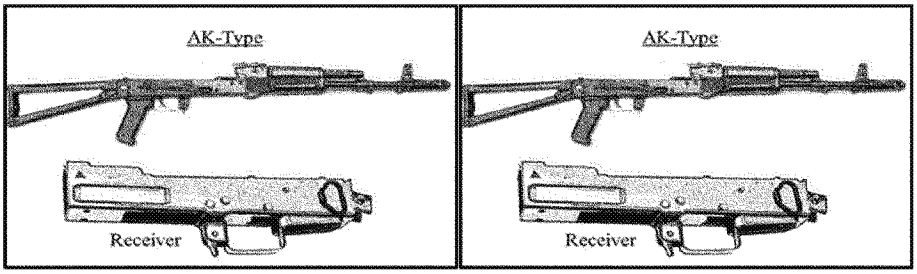
Example 2 – Bolt action rifle: The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



Example 3 – Break action, lever action, or pump action rifle or shotgun: The frame or receiver is the part of the rifle or shotgun that provides housing for the bolt and firing pin, or a structure designed to integrate the breechblock.



Example 4 - Semiautomatic firearm or machinegun with a single receiver housing all fire control components: The frame or receiver is the part of the firearm that provides housing for the hammer, bolt, trigger mechanism, and firing pin (*e.g.*, AK-type firearms).



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(a) *Firearm muffler or silencer frame or receiver.* The term ''frame or receiver'' shall mean, in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: Baffles, baffling material, or expansion chamber.

(b) *Split or modular frame or receiver.* (1) In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (*e.g.,* a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. In making this determination, the Director will consider the following factors, with no single factor being controlling:

(i) Which component the manufacturer intended to be the frame or receiver;

(ii) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;

(iii) How the component fits within the overall design of the firearm when assembled;

(iv) The design and function of the fire control components to be housed or integrated;

(v) Whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed;

(vi) Whether classifying the particular component is consistent with the legislative intent of the Act and this part; and

(vii) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

(2) Frames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.

(3) The Director has previously determined that a specific part is the frame or receiver with respect to certain weapons with split or modular frames or receivers. The following is a nonexclusive list of such weapons and the specific part identified as the frame or receiver as they existed on [date of publication of the final rule]:

(i) *Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols:* The lower portion of the pistol, or grip, that provides housing for the trigger mechanism and hammer, and a structure designed to integrate the slide rails.

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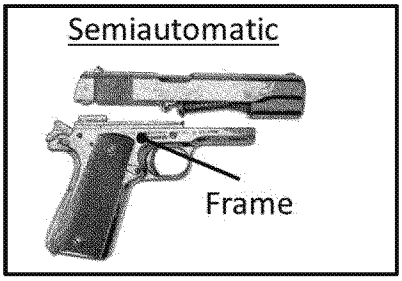
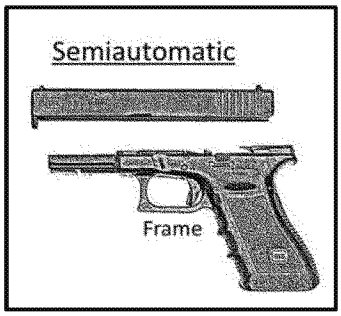
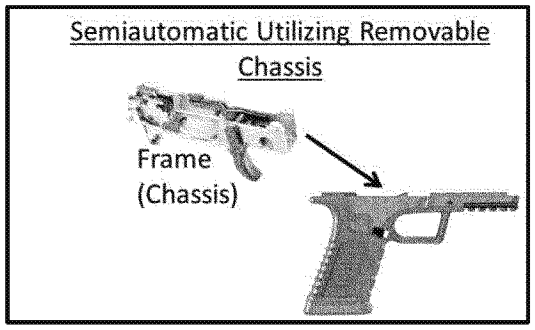


(ii) *Glock-type striker-fired semiautomatic pistols:* the lower portion of the pistol, or grip, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(iii) *Sig Sauer P320-type semiautomatic pistols:* the internal removable chassis of the pistol, partially exposed to the exterior to allow identification, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(iv) *Certain locking block rail system semiautomatic pistols:* the internal removable frame of the pistol that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails, provided a portion is partially exposed to the exterior to allow identification.

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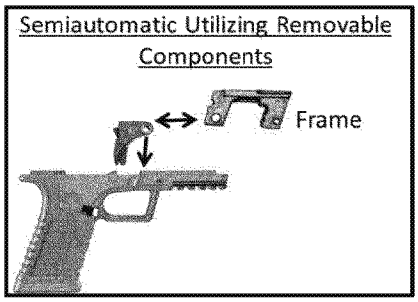
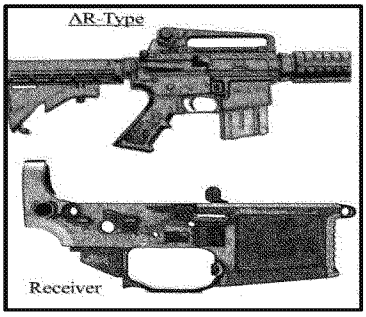
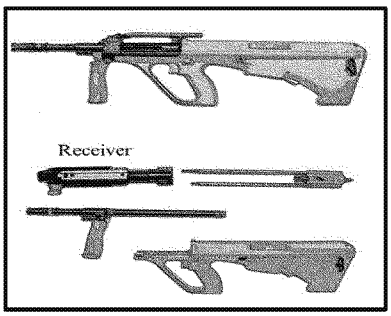


(v) *AR-15-type, and Beretta AR-70-type firearms:* the lower part of the weapon that provides housing for the trigger mechanism and hammer.



(vi) *Steyr AUG-type firearms:* the central part of the weapon that provides housing for the rods in the bolt carrier sub-assembly and a structure designed to attach the barrel.



(vii) *Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants:* the upper part of the weapon that provides housing for the bolt and firing pin.

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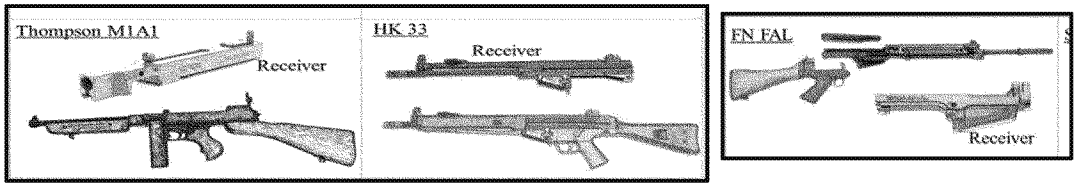
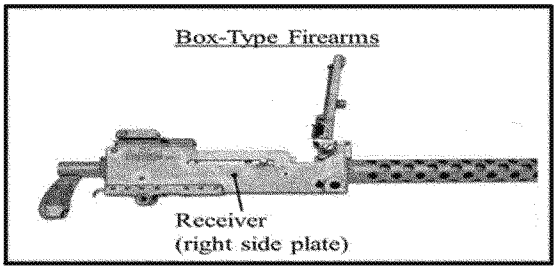
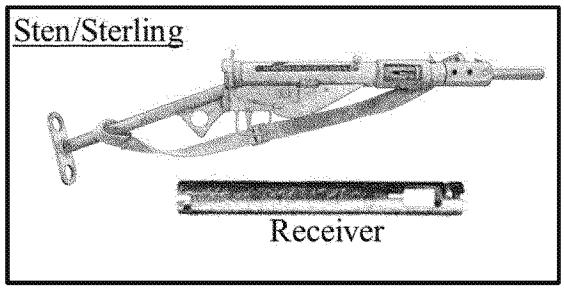


(viii) *Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof:* the side plate of the weapon that provides a structure designed to hold the charging handle.



(ix) *Sten, Sterling, and Kel-Tec SUB-2000-type firearms:* the central part of the weapon, or tube, that provides housing for the bolt and firing pin.



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(c) *Partially complete, disassembled, or inoperable frame or receiver.* The term ''frame or receiver'' shall include, in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state. In determining whether a partially complete, disassembled, or inoperable frame or receiver may readily be assembled, completed, converted, or restored to a functional state, the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials. For purposes of this definition, the term ''partially complete,'' as it modifies ''frame or receiver,'' means a forging, casting, printing, extrusion, machined body or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.

(d) *Destroyed frame or receiver.* The term ''frame or receiver'' shall not include a frame or receiver that is destroyed. For purposes of this definition, the term ''destroyed'' means that the frame or receiver has been permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and may not readily be assembled, completed, converted, or restored to a functional state. Acceptable methods of destruction include completely melting, crushing, or shredding the frame or receiver, or by completely severing at least three critical areas of the frame or receiver using a cutting torch having a tip of sufficient size to displace at least ¼ inch of material at each location.

* * * * *

Importer's or manufacturer's serial number. The identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number. When used in this part, the term ''serial number'' shall mean the ''importer's or manufacturer's serial number.''

* * * * *

Privately made firearm (PMF). A firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings

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placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date).

* * * * *

Readily. A process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process. Factors relevant in making this determination, with no single one controlling, include the following:

(a) Time, *i.e.,* how long it takes to finish the process;

(b) Ease, *i.e.,* how difficult it is to do so;

(c) Expertise, *i.e.,* what knowledge and skills are required;

(d) Equipment, *i.e.,* what tools are required;

(e) Availability, *i.e.,* whether additional parts are required, and how easily they can be obtained;

(f) Expense, *i.e.,* how much it costs;

(g) Scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and

(h) Feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction.

* * * * *

§ 478.50 [Amended]

■ 6. In § 478.50(a), add the phrase "or as otherwise provided in § 478.129" after "at the licensed premises served by such warehouse".

■ 7. Revise § 478.92 to read as follows:

§ 478.92 Identification of firearms and armor piercing ammunition.

(a)(1) *Firearms manufactured or imported by licensees.* Licensed manufacturers and licensed importers of firearms must legibly identify each firearm they manufacture or import as follows:

(i) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. Except as provided in paragraph (a)(4)(v) of this section, each frame or receiver thereof must also be marked with either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* "12345678–[number]"; and

(ii) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (a)(4)(v) of this section, the additional information shall include:

(A) The model, if such designation has been made;

(B) The caliber or gauge;

(C) When applicable, the name of the foreign manufacturer; and

(D) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(iii) *Frame or receiver, machinegun conversion part, or muffler or silencer part disposed of separately.* Except as provided in paragraph (a)(4)(iv) of this section, each part defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by the licensee must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(iv) *Size and depth of markings.* The engraving, casting, or stamping (impressing) of the serial number and additional information must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(v) *Period of time to identify firearms.* Licensed manufacturers must identify a complete weapon or complete muffler or silencer device no later than seven days following the date of completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except as provided in paragraph (a)(4)(iv) of this section, licensed manufacturers must identify each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

(2) *Privately made firearms.* Unless previously identified by another licensee in accordance with this section, and except as provided in paragraph (a)(4)(vi) of this section, licensees must legibly and conspicuously identify each privately made firearm within seven days following the date of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner. PMFs must be identified by placing on each part (or specific part(s) previously determined by the Director) of a weapon defined as a frame or receiver, the same serial number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. The serial number(s) must begin with the licensee's abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* "12345678–[number]". The serial number(s) must be placed in a manner otherwise in accordance with this section, including the requirements that the serial number(s) be at the minimum size and depth, and not susceptible of being readily obliterated, altered, or removed.

(3) *Meaning of marking terms.* For purposes of this section, the terms "legible" and "legibly" mean that the identification markings use exclusively

AMERICAN OVERSIGHT

Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(4) *Exceptions*—(i) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from the licensee showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(ii) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from the licensee. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested period is reasonable and will not hinder the effective administration of this part.

(iii) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number]''.

(iv) *Firearm muffler or silencer parts*—(A) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under part 479 may transfer a part defined as a firearm muffler or firearm silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(B) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under part 479 may transfer a replacement part defined as a firearm muffler or firearm silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

(v) *Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE].* Licensed manufacturers and licensed importers may continue to identify firearms (other than PMFs) of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1)(i) and (ii) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

(vi) *Privately made firearms acquired before [EFFECTIVE DATE OF THE FINAL RULE].* Licensees shall identify in the manner prescribed by this section, or cause another licensee to so identify, each privately made firearm received or otherwise acquired (including from a personal collection) by the licensee before [EFFECTIVE DATE OF THE FINAL RULE] within sixty (60) days from that date, or prior to the date of final disposition (including to a personal collection), whichever is sooner.

(b) *Armor piercing ammunition.* (1) Marking of ammunition. Each licensed manufacturer or licensed importer of armor piercing ammunition shall identify such ammunition by means of painting, staining or dying the exterior of the projectile with an opaque black coloring. This coloring must completely cover the point of the projectile and at least 50 percent of that portion of the projectile which is visible when the projectile is loaded into a cartridge case.

(2) *Labeling of packages.* Each licensed manufacturer or licensed importer of armor piercing ammunition shall clearly and conspicuously label each package in which armor piercing ammunition is contained, *e.g.,* each box, carton, case, or other container. The label shall include the words ''ARMOR PIERCING'' in block letters at least ¼ inch in height. The lettering shall be located on the exterior surface of the package which contains information concerning the caliber or gauge of the ammunition. There shall also be placed on the same surface of the package in block lettering at least ⅛ inch in height the words ''FOR GOVERNMENTAL ENTITIES OR EXPORTATION ONLY.'' The statements required by this subparagraph shall be on a contrasting background.

(c) *Voluntary classification of firearms and armor piercing ammunition.* The Director may issue a determination to a person whether an item is a firearm or armor piercing ammunition as defined in this part upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 478.112 [Amended]

■ 8. Amend § 478.112 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)''; and

■ b. In paragraph (b)(1)(iv)(G), remove ''serial number'' and add in its place ''serial number(s)''.

§ 478.113 [Amended]

■ 9. Amend § 478.113 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove the word ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)'';

■ b. In paragraph (b)(1)(iv)(G), remove the words ''serial number'' and add in

AMERICAN OVERSIGHT

their place the words "serial number(s)";
■ c. In paragraph (c)(2)(ii), remove the word "manufacturer" and add in its place the word "manufacturer(s)";
■ d. In paragraph (c)(2)(iii), remove "country of manufacturer" and add in its place "country or countries of manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)"; and
■ e. In paragraph (c)(2)(vii), remove the words "serial number" and add in their place "serial number(s)".

§ 478.114 [Amended]

■ 10. Amend § 478.114 as follows:
■ a. In paragraph (a)(1)(v)(A), remove the word "manufacturer" and add in its place "manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)";
■ b. In paragraph (a)(1)(v)(G), remove the words "serial number" and add in their place "serial number(s)"; and
■ c. In paragraph (b)(2)(ii), add "or privately made firearm (if privately made in the United States)" after "ammunition".
■ 11. Revise § 478.122 to read as follows:

§ 478.122 Records maintained by importers.

(a) Each licensed importer shall record the name of the importer(s), manufacturer(s) and/or privately made firearm (if privately made in the United States), type, model, caliber or gauge, country or countries of manufacture (if imported), and serial number(s) of each firearm imported or otherwise acquired (including a frame or receiver to be disposed of separately), the date of such importation or other acquisition, and if otherwise acquired, the name and address, or the name and license number of the person from whom it was received. The information required by this paragraph shall be recorded not later than 15 days following the date of importation or other acquisition in a format with the applicable columns set forth in paragraph (b) of this section.

(b) A record of each firearm disposed of by an importer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed importer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearm was transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.*, date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns below, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles:

IMPORTER'S OR MANUFACTURER'S FIREARMS ACQUISITION AND DISPOSITION RECORD

Description of firearm						Import/manufacture/acquisition		Disposition		
Importer(s), manufacturer(s), and/or PMF (if privately made in the U.S.)	Type	Model	Caliber or gauge	Country or countries of manufacture (if imported)	Serial number(s)	Date of import, manufacture, or acquisition	Name and address of nonlicensee; or if licensee, name and license No. (if acquired)	Date of disposition	Name	Address of nonlicensee; license No. of licensee; or Form 4473 Serial No. if filed numerically

IMPORTER'S OR MANUFACTURER'S ARMOR PIERCING AMMUNITION DISPOSITION RECORD

Date of disposition	Manufacturer	Caliber or gauge	Quantity of projectiles	Purchaser—name and address

(c) The Director may authorize alternate records to be maintained by a licensed importer to record the acquisition and disposition of firearms and armor piercing ammunition when it is shown by the licensed importer that such alternate records will accurately and readily disclose the information required by this section. A licensed importer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate records and the need therefor. Such alternate records shall not be employed by the licensed importer until approval in such regard is received from the Director.

■ 12. Revise § 478.123 to read as follows:

§ 478.123 Records maintained by manufacturers.

(a) Each licensed manufacturer shall record the name of the manufacturer(s), importer(s) (if any) and/or privately made firearm (if privately made in the United States), type, model, caliber or gauge, and serial number(s) of each firearm manufactured or otherwise acquired (including a frame or receiver to be disposed of separately), the date of such manufacture or other acquisition, and if otherwise acquired, the name and address or the name and license number of the person from whom it was received. The information required by this paragraph shall be recorded not later than the close of the next business day following the date of such manufacture or other acquisition, except that, when a commercial record is held by the licensed manufacturer separately from other commercial documents and readily available for inspection, containing all acquisition information required for the record, the period for making the required entry into the record may be delayed not to exceed the seventh day following the date of receipt. The information required by this paragraph shall be recorded in a format containing the applicable columns prescribed by § 478.122.

AMERICAN OVERSIGHT

(b) A record of each firearm disposed of by a manufacturer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed manufacturer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearms were transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns prescribed by § 478.122, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles.

(c) The Director may authorize alternate records to be maintained by a licensed manufacturer to record the acquisition or disposition of firearms and armor piercing ammunition when it is shown by the licensed manufacturer that such alternate records will accurately and readily disclose the information required by this section. A licensed manufacturer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate record and the need therefor. Such alternate records shall not be employed by the licensed manufacturer until approval in such regard is received from the Director.

§ 478.124 [Amended]

■ 13. Amend § 478.124 as follows:

■ a. In paragraph (c)(4), remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ b. In the fourth sentence of paragraph (f), remove ''Upon receipt of such Forms 4473, the'' and add in its place ''The'', remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''.

■ 14. Amend § 478.125 as follows:

■ a. In paragraph (e):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'', wherever they appear, and add in their place ''serial number(s)'', and remove ''as provided in paragraph (g)'' and add in its place ''as provided in paragraphs (g) and (i)'';

■ ii. Add a sentence after the sixth sentence; and

■ iii. In the table Firearms Acquisition and Disposition Record remove ''Name and address or name and license No.'' and add in its place ''Name and address of nonlicensee; or if licensee, name and License No.'', and remove ''Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically'' and add in its place ''Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically'';

■ b. In paragraph (f)(1):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ ii. Add a sentence after the fifth sentence;

■ c. In paragraph (f)(2) table Firearms Collectors Acquisition and Disposition Record, remove ''Manufacturer'' and add in its place ''Manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''Serial No.'' and add in their place ''Serial number(s)''; and

■ d. Add paragraph (j).

The additions read as follows:

§ 478.125 Record of receipt and disposition.

* * * * *

(e) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(f) * * *

(1) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(j) *Privately made firearms.* Licensees must record each receipt (whether or not kept overnight) or other acquisition (including from a personal collection) and disposition (including to a personal collection) of a privately made firearm as required by this part, except that such information need not be recorded if the firearm is being identified under the direct supervision of another licensee with their information. Once a privately made firearm is identified by the licensee in accordance with section 478.92(a)(2), the licensee shall update the record of acquisition entry with the identifying information.

§ 478.125 [Amended]

■ 15. Amend § 478.125a as follows:

■ a. In the first sentence of paragraph (a)(4), remove ''manufacturer and importer (if any)'' and add in its place ''manufacturer(s) and importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)'', remove ''Manufacturer and importer (if any)'' and add in its place ''Manufacturer(s) and importer(s) (if any)'', and remove the words ''Serial No.'' and add in their place ''serial number(s)''.

■ 16. In § 478.129, revise paragraphs (b), (d), and (e) to read as follows:

§ 478.129 Record retention.

* * * * *

(b) *Firearms Transaction Record.* Licensees shall retain each Form 4473 until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the

AMERICAN OVERSIGHT

business premises readily accessible for inspection under this part. Paper forms over 20 years of age may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part. Forms 4473 shall be retained in the licensee's records as provided in § 478.124(b): Provided, that Forms 4473 with respect to which a sale, delivery or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

* * * * *

(d) *Records of importation and manufacture.* Licensees shall maintain records of the importation, manufacture, or other acquisition of firearms, including ATF Forms 6 and 6A as required by subpart G of this part, until business is discontinued. Licensed importers' records and licensed manufacturers' records of the sale or other disposition of firearms after December 15, 1968, shall be retained until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

(e) *Records of dealers and collectors.* The records prepared by licensed dealers and licensed collectors of the sale or other disposition of firearms and the corresponding record of receipt of such firearms shall be retained until business or licensed activity is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business or collection premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

* * * * *

PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

■ 17. The authority citation for 27 CFR part 479 continues to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

■ 18. In § 479.11:

■ a. Add definitions for "Complete muffler or silencer device" and "Complete weapon";

■ b. Revise the definition of "Frame or receiver";

■ c. Add a definition for "Readily"; and

■ d. Add a sentence at the end of the definition of "Transfer".

The additions and revision read as follows:

§ 479.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Frame or receiver. The term "frame or receiver" shall have the same meaning as in 27 CFR 478.11.

* * * * *

Readily. A process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process. Factors relevant in making this determination, with no single one controlling, include the following:

(a) Time, *i.e.,* how long it takes to finish the process;

(b) Ease, *i.e.,* how difficult it is to do so;

(c) Expertise, *i.e.,* what knowledge and skills are required;

(d) Equipment, *i.e.,* what tools are required;

(e) Availability, *i.e.,* whether additional parts are required, and how easily they can be obtained;

(f) Expense, *i.e.,* how much it costs;

(g) Scope, *i.e.,* the extent to which the subject of the process must be changed to finish it; and

(h) Feasibility, *i.e.,* whether the process would damage or destroy the subject of the process, or cause it to malfunction.

* * * * *

Transfer. * * * For purposes of this part, the term shall not include the temporary conveyance of a lawfully possessed firearm to a manufacturer or dealer qualified under this part for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor.

* * * * *

§ 479.62 [Amended]

■ 19. In § 479.62(b)(3), remove "manufacturer" and add in its place "manufacturer(s)" and remove the words "serial number" and add in their place "serial number(s)".

§ 479.84 [Amended]

■ 20. In § 479.84(b)(8), remove "manufacturer" and add in its place "manufacturer(s)", remove the words "importer (if known)" and add in their place "importer(s) (if known)", and remove the words "serial number", wherever they may be, and add in their place "serial number(s)".

§ 479.88 [Amended]

■ 21. In § 479.88(b), remove "manufacturer" and add in its place "manufacturer(s)", remove the word "importer" and add in its place "importer(s)", and remove the words "serial number" and add in their place "serial number(s)".

§ 479.90 [Amended]

■ 22. In § 479.90(b), remove the words "manufacturer", wherever they may be, and add in their place "manufacturer(s)", remove the word "importer" and add in its place "importer(s)", and remove the words "serial number" and add in their place "serial number(s)".

■ 23. Revise § 479.102 to read as follows:

§ 479.102 Identification of firearms.

(a) *Identification required.* You, as a manufacturer, importer, or maker of a firearm, must legibly identify the firearm as follows:

(1) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon, including a weapon parts kit, defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee or maker on any other firearm. Except as provided in paragraph (b)(5) of this section, each frame or receiver thereof must also be marked with either: Your name (or recognized abbreviation), and city and State (or recognized abbreviation) where you as a manufacturer or importer maintain your place of business, or in the case of a maker, where you made the

AMERICAN OVERSIGHT

firearm; or if a licensee, your name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.*, ''12345678–[number]''; and

(2) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (b)(5) of this section, the additional information shall include:

(i) The model, if such designation has been made;

(ii) The caliber or gauge;

(iii) When applicable, the name of the foreign manufacturer or maker; and

(iv) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(3) *Frame or receiver, machine gun conversion part, or silencer part disposed of separately.* Except as provided in paragraph (b)(4) of this section, each part defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by you must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(4) *Size and depth of markings.* The engraving, casting, or stamping (impressing) of the serial number and additional information must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(5) *Period of time to identify firearms.* You must identify a complete weapon or complete muffler or silencer device no later than seven days following the date of completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except as provided in paragraph (b)(4) of this section, you must identify each part, including a replacement part, defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

(6) *Meaning of marking terms.* For purposes of this section, the terms ''legible'' and ''legibly'' mean that the identification markings use exclusively Roman letters (*e.g.*, A, a, B, b, C, c) and Arabic numerals (*e.g.*, 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(b) *Exceptions*—(1) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from you showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(2) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from you. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested time period is reasonable and will not hinder the effective administration.

(3) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.*, ''12345678–[serial number]''.

(4) *Firearm muffler or silencer parts*—(i) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under this part may transfer a part defined as a muffler or silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a new complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(ii) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under this part may transfer a replacement part defined as a muffler or silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

(5) *Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE].* Licensed manufacturers and licensed importers may continue to identify firearms of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1) and (2) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

(c) *Voluntary classification of firearms.* The Director may issue a determination to a person whether an item is a firearm as defined in this part

AMERICAN OVERSIGHT

upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 479.103 [Amended]

■ 24. In § 479.103, at the end of the third sentence, add ", except as provided in § 479.102(b)(4)."

§ 479.112 [Amended]

■ 25. In § 479.112(a), second sentence, remove the words "serial number" and add in their place the words "serial number(s)".

§ 479.141 [Amended]

■ 26. In § 479.141, remove the word "manufacturer" and add in its place "manufacturer(s)" and remove the words "serial number" and add in their place "serial number(s)".

Dated: May 7, 2021.

Merrick B. Garland,

Attorney General.

[FR Doc. 2021–10058 Filed 5–20–21; 8:45 am]

BILLING CODE 4410–FY–P

AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002834

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002854

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002855

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

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August 17, 2021

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002866

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002882

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002886

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002887

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002918

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

Respectfully submitted,

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August 17, 2021

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002936

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002949

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002950

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002951

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

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August 17, 2021

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002962

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002977

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002982

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002983

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
STATE OF MISSOURI,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 2:21-cv-00067-Z

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 7

I. Defendants are likely to succeed on appeal 8

A. MPP's termination is not reviewable 8

B. Terminating MPP does not violate § 1225 12

C. The Secretary's decision to terminate MPP satisfies the APA..... 15

II. The balance of equities strongly favors a stay 21

CONCLUSION 23

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012) 9, 21

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 14

Bennett v. Spear,
520 U.S. 154 (1997) 10

Cent. & S. W. Servs. v. EPA,
220 F.3d 683 (5th Cir. 2000) 22

Cohen v. United States,
578 F.3d 1 (D.C. Cir. 2009) 10, 21

Crane v. Johnson,
783 F.3d 244, 247 (5th Cir. 2015) 9

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 9, 18

Encino Motorcars v. Navarro,
136 S. Ct. 2117 (2016) 18

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 3, 15, 17

F.C.C. v. Prometheus Radio,
141 S. Ct. 1150 (2021) 19

Gupta v. McGahey,
709 F.3d 1062 (11th Cir. 2013) 10

Hamama v. Adducci,
912 F.3d 869 (6th Cir. 2018) 23

AMERICAN OVERSIGHT

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 22

Heckler v. Chaney,
470 U.S. 821 (1985) 9

Innovation Law Lab v. McAleenan,
924 F.3d 503 (9th Cir. 2019) 4, 10

Jama v. ICE,
543 U.S. 335 (2005) 8

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 20

Knauff v. Shaughnessy,
338 U.S. 537 (1950) 4

Lin v. United States,
690 F. App'x 7 (D.C. Cir. 2017) 8

Lincoln v. Vigil,
508 U.S. 182 (1993) 8

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 13

Lousiana ex rel. Guste v. Verity,
853 F.2d 322 (5th Cir. 1988) 12

Matter of E-R-M- & L-R-M-,
25 I.&N. Dec. 520 (BIA 2011) 4, 5

Matter of M-D-C-V-,
28 I.&N. Dec. 18 (B.I.A. 2020) 13

Motor Vehicle Mfrs. v. State Farm,
463 U.S. 29, 51 (1983)) 18, 19

AMERICAN OVERSIGHT

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014).....11

Nken v. Holder,
556 U.S. 418 (2009).....7

Padilla v. ICE,
953 F.3d 1134 (9th Cir. 2020).....14

Sugar Cane Growers v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....22

Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368, 389 (5th Cir. 2021).....22

Texas Oil & Gas Ass'n v. EPA,
161 F.3d 923 (5th Cir. 1998).....19

Texas v. Equal Emp. Opportunity Comm'n,
933 F.3d 433 (5th Cir. 2019).....11

Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015)..... 7, 8, 9

Wolf v. Innovation Law Lab,
140 S. Ct. 1564 (2020).....4

Statutes

5 U.S.C. § 701(a)(2).....8

5 U.S.C. § 704.....10

6 U.S.C. § 202(5).....4

6 U.S.C. § 251.....4

8 U.S.C. § 1103(a)(3).....4

8 U.S.C. § 1182(d)(5)(A)..... 12, 13

AMERICAN OVERSIGHT

8 U.S.C. § 1225(b)(1).....4

8 U.S.C. § 1225(b)(2)(A).....11

8 U.S.C. § 1225(b)(2)(C).....2, 8

8 U.S.C. § 1226(e).....13

8 U.S.C. § 1252(f)(1).....22

42 U.S.C. § 265.....5

42 U.S.C. § 268.....5

AMERICAN OVERSIGHT

MO-AG-22-0644-A-002994

INTRODUCTION

This Court should stay, pending completion of appellate proceedings, the district court's extraordinary injunction. That injunction requires the Department of Homeland Security (DHS)—within seven days—to re-implement the Migrant Protection Protocols (MPP), a former government program through which the Secretary of Homeland Security exercised her *discretionary* statutory authority to return certain noncitizens arriving at the southern border to Mexico pending removal proceedings. Because the injunction takes effect at 12:01 a.m. on Saturday, August 21, 2021, the government respectfully requests an administrative stay by Thursday, August 19, so that this Court can consider the stay motion in an orderly manner. The government also respectfully requests, if this Court is inclined to deny the stay or deny the administrative stay, that the Court enter an administrative stay of no fewer than seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

A stay is warranted because the district court's legal and factual conclusions are deeply flawed, and its injunctive remedy is legally improper, profoundly disruptive to foreign policy, and virtually impossible to implement on the required timeline. In January 2019, DHS instituted MPP with policy guidance implementing statutory authority in 8 U.S.C. § 1225(b)(2)(C), providing that the Secretary "*may* return" certain noncitizens "arriving on land ... from a foreign territory contiguous

AMERICAN OVERSIGHT

to the United States" "to that territory" pending resolution of their removal proceedings. (emphasis added). Following the change in administration, the acting Secretary temporarily suspended new enrollments in MPP. Following a comprehensive review, on June 1, 2021, the Secretary terminated MPP, finding it unjustified by the resources it required and incompatible with the administration's broader strategy and foreign policy objectives at the time. AR1-7.

Despite the Executive's clear authority to determine immigration policy and § 1225's express commitment of the decision whether to return noncitizens to Mexico to the Secretary's discretion, on August 13, 2021, the district court vacated the Secretary's decision. The court also issued a nationwide, permanent injunction requiring DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225] without releasing any aliens *because of* a lack of detention resources." Op. 52. That injunction is set to take effect at 12:01 a.m. on Saturday, August 21. *Id.* at 53; *see* Fed. R. Civ. P. 6(a)(1).

The district court's order is wrong in multiple respects. Section 1225(b)(2)(C) is *discretionary*: the Secretary *may*—not *must*—return noncitizens to Mexico or Canada. Contrary to the district court's conclusion, nothing in the Immigration and Nationality Act (INA) dictates how that discretion must be exercised, let alone

AMERICAN OVERSIGHT

suggests that it *must* be exercised if DHS cannot detain every noncitizen arriving at the border who is placed in removal proceedings. The district court's contrary conclusion would mean that until MPP was created in 2019, every Administration had been in continuous and systematic violation of the INA since the relevant provisions were enacted in 1996. The district court also erred by finding that the Secretary's decision violated the Administrative Procedure Act (APA). The Secretary issued a thorough, seven-page memo—based on a 691-page administrative record—that reviewed MPP's "mixed effectiveness" and acknowledged the competing policy considerations. The Secretary then forthrightly grounded his decision in a policy choice to devote DHS's scarce resources to pursuing measures that he judged to be more effective and consistent with this Administration's priorities in managing the challenges of regional migration. In finding that comprehensive explanation insufficient, the district court contravened settled APA precedent holding that, when the government changes policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

A stay is urgently need because the injunction will impose immediate, substantial harms on the United States by causing operational chaos at the international border. It will also severely interfere in foreign affairs by effectively

AMERICAN OVERSIGHT

dictating foreign policy with respect to Mexico and Central American nations. This Court should grant an immediate administrative stay while it receives briefing and considers this stay request, and then stay the district court's injunction pending appellate proceedings. Appellate courts confronting similar injunctive orders have recognized that a stay pending appellate proceedings is warranted. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the nation's immigration laws. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see, e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). For decades, the Executive has exercised that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 523 (BIA 2011).

First, Congress has authorized DHS to initiate expedited removal proceedings in 8 U.S.C. § 1225(b)(1) against certain applicants for admission who lack valid entry documents.[1] Alternatively, the Secretary may place a noncitizen seeking

[1] References to the Attorney General in § 1225 now mean the Secretary. 6 U.S.C. §§ 251, 552(d).

AMERICAN OVERSIGHT

admission into full removal proceedings held before an immigration judge with potential appeal to the Board of Immigration Appeals, § 1229a, if that noncitizen is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). The statute leaves to DHS's discretion whether to seek expedited or full removal against noncitizens. *E-R-M-*, 25 I.&N. Dec. at 523. When DHS places noncitizens into proceedings under § 1229a, Congress has provided that, if the noncitizen is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute also authorizes DHS, within certain limits, to choose between detaining applicants for admission pending their removal proceedings and releasing them pending those proceedings. *Id.* §§ 1182(d)(5), 1225(b)(2)(A), 1226(a).

Migrant Protection Protocols. On January 25, 2019, then-Secretary Nielsen instituted MPP, authorizing immigration officers to "exercise[e] [their] prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving from Mexico, and providing guidance for making that determination. *See* Administrative Record (AR) 151. Implementing MPP required the assistance of Mexico, which took a variety of steps to assist the United States and the individuals who were returned under the program. AR152-53. In April, 2020, however, immigration proceedings were suspended in light of the COVID-19 pandemic

AMERICAN OVERSIGHT

(including for noncitizens waiting in Mexico under MPP), and DHS's use of MPP dramatically decreased as many noncitizens encountered at the border were instead expelled under 42 U.S.C. §§ 265, 268 based on an order from the CDC. AR3, 6.

On January 21, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." AR581. President Biden subsequently directed DHS "to promptly review and determine whether to terminate or modify [MPP]." Executive Order 14010, 86 Fed. Reg. 8267 (Feb 2, 2021). And on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a lengthy memorandum. AR1-7.

This Lawsuit. On April 13, 2021, the States of Missouri and Texas filed this suit in the Northern District of Texas, seeking injunctive relief. On August 13, following a one-day bench trial, the district court issued a nationwide injunction requiring DHS "to enforce and implement MPP." Op. 52, Dkt. 94 (Ex. A). The court concluded that the case is justiciable (Op. 21-34); that § 1225(b)(2)(C) *mandates* returning noncitizens to Mexico whenever DHS lacks the resources to detain them (Op. 32, 41-44); that the Secretary's decision terminating MPP violated the APA (Op. 31-42); and that a nationwide injunction with monthly reporting requirements, rather than remand without vacatur, was appropriate (Op. 45-52). The court delayed the effective date of its ruling to August 21, 2021. Op. 53. The government promptly

AMERICAN OVERSIGHT

appealed, and the district court subsequently denied the government's request for a stay pending appeal. ECF 100.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail and will be severely and irreparably harmed without a stay; a stay will not substantially harm Plaintiffs; and the public interest supports a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The Court should also grant an administrative stay while it considers this request. At an absolute minimum, the Court should grant an administrative stay to give the government an opportunity to seek emergency relief from the Supreme Court.

I. Defendants are likely to succeed on appeal.

A. MPP's termination is not reviewable

The district court erred in holding the Secretary's decision is reviewable. Op. 26-34.

At the outset, the States lack standing to pursue their claims. The district court held that the States are suffering cognizable injuries from the termination of MPP, Op. 49, primarily based on speculation about an increase in "the number of aliens released and paroled" who will seek driver's licenses. *Id.* at 22. But there is no evidence below that either State has issued a single driver's license to any individual who would have been subject to MPP but for its termination, nor did the States

AMERICAN OVERSIGHT

substantiate any other costs directly traceable to MPP's termination. *Cf. Texas v. U.S.*, 809 F.3d 134, 155, 160 (5th Cir. 2015) (driver's license theory of standing requires evidence that the States had "to hire employees, purchase equipment, and obtain office space"). Moreover, the alleged harm is not redressable because MPP did not require that *anyone* be returned, nor could anyone be returned pursuant to MPP without Mexico's agreement. *See Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017) (redressability cannot be shown where relief requires action by "foreign nations not before the court") (collecting cases).

Even if the States had standing, the agency decision is unreviewable. The APA precludes review of certain categories of decisions traditionally regarded as "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2), and the INA similarly prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii). Both of those provisions separately shield from review the Secretary's decision whether to use the contiguous-territory-return authority, which is entirely discretionary: the Secretary "*may* return" certain noncitizens to a contiguous territory. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" "connotes discretion." *Jama v. ICE*, 543 U.S. 335, 346 (2005). "[T]he statutory scheme … provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809

AMERICAN OVERSIGHT

F.3d 164, 168 (5th Cir. 2015). Even the district court acknowledged it could not dictate to the Secretary whether to return an individual noncitizen. Op. 51. And for the same reason, the court cannot dictate that the Secretary must "authorize line-level officers to [return noncitizens to Mexico]." *Contra id.*

In addition, whether to use § 1225(b)(2)(C)'s "return" authority in an individual case or class of cases represents an exercise of enforcement discretion, because it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," such as how to best expend limited "agency resources" and whether a "particular enforcement action … fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying prosecutorial discretion are "greatly magnified in the [immigration] context," *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for enforcement policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Here, the Secretary weighed these concerns and determined that other strategies would be more effective and better align with foreign policy goals, AR1-7, and it was improper for the district court to displace his judgment.

The district court concluded that "the decision to terminate MPP 'is more than a non-enforcement policy.'" Op. 31 (quoting *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020)). But decisions on how and where to secure

AMERICAN OVERSIGHT

noncitizens during removal proceedings, and whether to detain them at all, are quintessential enforcement decisions inextricably intertwined with the decision to pursue removal. *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). And unlike the DACA program at issue in *Regents*, the Secretary's decision not to subject applicants for admission to contiguous-territory return does not itself confer any affirmative legal benefits or status.

The district court also erred in concluding that § 1225(b) provides a standard that the court could apply. Op. 32. In the court's view, because § 1225(b)(2)(A) references detention of noncitizens placed in § 1229a proceedings, "DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity." Op. 32. But that understanding of the statute is patently incorrect, as explained below. *Infra* p. 12.

Finally, the decision to terminate MPP is not a reviewable final agency action, 5 U.S.C. § 704, because it does not determine "rights or obligations" or produce "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The June 2021 memorandum ending MPP, like the January 2019 memorandum establishing "MPP[,] qualifies as a general statement of policy." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). A "general statement of policy … is not a 'final agency action,' rendering it unreviewable," *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717

AMERICAN OVERSIGHT

(D.C. Cir. 2011) (en banc), unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (similar).

B. Terminating MPP does not violate § 1225.

The district court acknowledged that "DHS does not have to use [the return] authority." Op. 32. The court nevertheless held that terminating MPP violated § 1225, which provides that certain noncitizens "shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In the court's view, "where Defendants cannot meet their detention obligations" due to "resource constraints," Op. 44, § 1225(b) "directs DHS ... to return certain aliens to Mexico," Op. 32, so "terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." Op. 44. That conclusion misconceives the statutory scheme and would upend decades of practice spanning multiple administrations.

To start, the operative complaint challenges the June 1 memorandum, not any policies governing release from detention. *See* ECF 48 ¶¶ 95-141. Even if the court were right that § 1225 mandated detention, nothing in the statute suggests a direct relationship between that purported detention mandate and the return authority, such that the Secretary is *required* to return any noncitizen he fails to detain. The return

AMERICAN OVERSIGHT

authority is explicitly discretionary. *Supra* p. 8. Accordingly, a violation of any detention mandate would be just that—a violation of the detention mandate. Plaintiffs cannot bootstrap their objections to DHS's alleged detention practices into a basis for invalidating the Secretary's separate decision whether to continue using his contiguous-territory-return authority.[2]

In any event, § 1225 does *not* mandate universal detention. The INA provides DHS with various options for processing noncitizens beyond discretionary returns or detention. DHS "*may ... in [its] discretion*" release a noncitizen placed in § 1229a proceedings through "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see* 8 C.F.R. §§ 1.2, 235.3(c). And in certain circumstances, "pending a decision on whether the alien is to be removed" and "[e]xcept as provided in [§ 1226(c)]," noncitizens present in the United States may be released on "bond" or "conditional parole," § 1226(a)(2)(A)-(B).

Subject to specific legal constraints, Congress entrusted the decision whether to detain, release, or return a particular noncitizen to the Secretary's discretion by using discretionary language and barring judicial review. 8 U.S.C. § 1182(d)(5)(A)

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[2] Given Plaintiffs' claims, the administrative record did not contain evidence concerning release practices and policies. The court independently abused its discretion by relying on "evidence outside the administrative record." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988).

AMERICAN OVERSIGHT

(Secretary "may … in his discretion parole") ; *id.*, § 1225(b)(2)(C) ("may return"); *Loa-Herrera v. Trominski,* 231 F.3d 984, 991 & n.12 (5th Cir. 2000) ("[Secretary's] discretionary judgment regarding the application of [§ 1226]—including the manner in which that discretionary judgment is exercised, and whether the procedural apparatus supplied satisfies regulatory, statutory, and constitutional constraints—is not ... subject to review.") (citing 8 U.S.C. § 1226(e))). The district court's core legal analysis is thus categorically mistaken: the statute does not impose on DHS a binary choice between detention or return to Mexico for noncitizens arriving from Mexico.[3]

Further proof of the error in the district court's detain-or-return reasoning is found in the history of the return provision, and the absurd results that would follow from the court's view. Congress enacted § 1225(b)(2)(C) in 1996, to codify statutory authority for ad hoc returns that the Board had found lacking. *In re M-D-C-V-*, 28 I.&N. Dec. 18, 25-26 & n.10 (B.I.A. 2020). But MPP—and its broad use of return authority—came into existence only in 2019. AR151. By the district court's logic, Op. 32, every presidential administration for the last 25 years has been systematically violating § 1225 by paroling or otherwise releasing millions of inadmissible applicants for admission rather than returning them to Mexico. And

[3] The Court's characterization of contiguous return as an alternative to detention under § 1225(b)(1), Op. 32, 41-43, is particularly misguided, as noncitizens in ongoing expedited removal proceedings are not eligible for contiguous return, § 1225(b)(2)(B)(ii).

AMERICAN OVERSIGHT

under the injunction, all future administrations will be required to return all eligible noncitizens arriving from Mexico until the government can detain every applicant for admission—a condition that has never existed. Nothing in the INA remotely supports that extreme result.

The district court compounded its error by concluding that § 1182 does not permit DHS to parole noncitizens "simply because DHS does not have the detention capacity." Op. 43 n.11. The Court lacked jurisdiction to reach that conclusion, *supra* 12-13. Regardless, it is the agency, not the court, that determines what is a "significant public benefit," § 1182(d)(5), that warrants parole, 8 C.F.R. §212.5(b)(5) ("parole" for "significant public benefit" includes "[a]liens whose continued detention is not in the public interest as determined by" relevant officers), and that determination has always encompassed resource constraints, *see Padilla v. Immigr. & Customs Enf't,* 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (describing ICE policy allowing parole "in light of available detention resources"); ECF 98-1, ¶¶ 13-14 (same).

C. The Secretary's decision to terminate MPP satisfies the APA.

The Secretary's decision easily satisfies the APA's "highly deferential" standard, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983), because it is fully explained and supported by the record, acknowledges the agency's change of position, and is within the range of possible options. The

AMERICAN OVERSIGHT

Secretary's 7-page decision articulates a clear connection between terminating MPP and achieving the Administration's objectives to address the root causes of migration, improve regional migration management, and expand bilateral efforts to combat smuggling and trafficking networks. The Secretary described how he considered the relevant information, including the prior administration's assessments of MPP, the effectiveness of related efforts to address challenges, and the resources required to implement the program, concluding that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR3; *see* 192-203, 426-58, 468-487, 543-50, 589-621, 651-53. He also considered alternatives and the impact of terminating MPP. AR5. Ultimately, the Secretary found that, "on balance, any benefits of maintaining … MPP are far outweighed by the benefits of terminating the program." AR6.

That comprehensive analysis amply satisfies the APA's deferential standard of review: "the new policy is permissible under the statute, [] there are good reasons for it, and [] the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515-16. To the extent the Secretary reached different conclusions than those set out in prior MPP assessments, he adequately explained why subsequent developments or different foreign-policy priorities warranted changes. Nothing more is required. *Id.*

AMERICAN OVERSIGHT

The district court's contrary ruling is deeply flawed. The court stated that DHS "ignored critical factors," such as prior assessments regarding MPP's goal of encouraging noncitizens without meritorious claims to return home. Op. 35-36. But the memorandum, and lengthy record supporting it, show that the Secretary evaluated all "prior DHS assessments of the program," and "the anticipated benefits and goals articulated at the outset of the program and over [its] course." AR3, *see also* 151, 192-203, 452, 490, 543, 554-56. Rather than ignore "the importance of deterring meritless asylum applications," Op. 36, the Secretary simply exercised his judgment and discretion to address that problem using different policy tools. For example, the Secretary described other "reforms" the Administration is undertaking—including creation of a dedicated docket for certain arriving noncitizens—to improve the processing of asylum applications and "promote compliance and increase appearances throughout proceedings." AR6 (noting "additional anticipated regulatory and policy changes").

The Secretary also noted ways in which MPP had failed to accomplish this particular goal effectively. The Secretary observed that DHS "originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs," but that in fact, "backlogs increased." AR4, *see* AR187, 653. Moreover, the Secretary concluded that the "focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their

AMERICAN OVERSIGHT

proceedings," and the "approximately 44 percent" of "cases completed through the entry of *in absentia* removal orders" raised questions for him "about the design and operation of the program." AR4; *see* AR557-80, 634-38, 660-63. Although MPP was "intended to reduce burdens" on DHS personnel and resources, "the program imposed additional responsibilities that detracted from [DHS's] critically important mission sets." AR4, 452-55, 660-73.

The district court also concluded that the Secretary had failed to consider "warnings by career DHS personnel" that terminating MPP might "lead to a resurgence of illegal aliens attempting to illegally" enter. Op. 37. Again, the record establishes that the Secretary did not ignore that problem; he sought to address it using different strategies that he reasonably believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." AR5. Moreover, the court's ruling is based entirely on inadmissible hearsay about what prior DHS officials believe other officials *may* have told the presidential transition team. But the transition team is not the agency, and those statements are "not part of the administrative record." Op. 37. n.10. The actual administrative record showed that over a quarter of MPP enrollees were subsequently reencountered attempting to enter—meaning MPP produced, at least in those cases, *additional* border encounters. AR4, 660-73.

AMERICAN OVERSIGHT

The court next stated that DHS had failed to consider the States' "fiscal harm from the termination of MPP." Op. 37. But the States submitted no evidence of additional costs since April 2020, when MPP enrollments significantly declined, or since January 2021, when new enrollments were suspended. AR3. The court's insistence that DHS was required to investigate whether border encounters increased after new enrollments were suspended, *id.*, makes little sense given that MPP enrollments declined much earlier due to COVID-19 and Title 42. Regardless, the Secretary *did* consider "the impact such a decision could have on border management and border communities." AR4-5, 582, 680. And the court's conclusion that the Secretary failed to consider State reliance interests, Op. 37-38, is meritless given that the States have no cognizable reliance interest in a *discretionary* program, and did not identify any "substantial," long-held reliance interests they possess. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The district court also held the Secretary had failed to consider "more limited policies" than terminating MPP, Op. 38, but the Secretary expressly "considered various alternatives, including maintaining the status quo or resuming new enrollments in the program," and concluded that "preserving MPP in this manner" would "be a poor use of [DHS] resources" given the identified defects in the program as it operated. AR5. "DHS was not required … to 'consider all policy alternatives in reaching [its] decision,'" and has "considerable flexibility" when deciding how to

AMERICAN OVERSIGHT

"wind-down" a program. *Regents*, 140 S. Ct. at 1914-15 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 51 (1983)). The court's conclusion that DHS was required to set out "example" alternative versions of MPP, Op. 38, reflects a misunderstanding of APA review.

The district court also erred by finding that the Secretary acted arbitrarily when he concluded that the high rate of in absentia removal orders under MPP raised concerns about MPP, without definitively establishing that those orders "resulted from aliens abandoning *meritorious* asylum claims." Op. 39-41. But the Secretary reasonably found that MPP did not adequately "ensure that conditions in Mexico enabled migrants to attend their proceedings," which was supported by record evidence showing a substantially lower in absentia rate for non-MPP cases over the same period. AR660-63. The APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *F.C.C. v. Prometheus Radio*, 141 S. Ct. 1150, 1160 (2021), and often "the available data does not settle a regulatory issue and the agency must then exercise its judgment." *State Farm*, 463 U.S. at 52. If, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).[4]

[4] The court also ruled it was arbitrary to consider COVID-related immigration court closures because courts had reopened, Op. 41. But infrastructure used for MPP remains shuttered. ECF 98-2, ¶¶ 10-11.

AMERICAN OVERSIGHT

Finally, as explained above, the district court's conclusion that DHS failed to consider section 1225(b)'s supposed requirement to return noncitizens that it does not detain, Op. 41-42, is based on an erroneous legal premise. Regardless, the Secretary considered "various options" "at its disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." AR6; *see* 8-146, 560, 563, 569-75, 675-76.

II. The balance of equities strongly favors a stay.

The injunction undermines the Executive Branch's constitutional and statutory authority to enforce the immigration laws, and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013); *see Arizona*, 567 U.S. at 396 ("Some discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation's international relations.").

MPP depended on returned individuals being able to reside temporarily in Mexico, which necessitated "close collaboration and negotiation with the Government of Mexico." ECF 64 at 2, ¶ 5. When first implemented, Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and providing essential services. ECF 98-1, ¶ 15. DHS cannot restart MPP without significant cooperation from Mexico. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003014

Requiring DHS to re-implement MPP is thus tantamount telling the United States how to conduct its foreign policy, including with respect to delicate and ongoing discussions with Mexico. *Id.* ¶¶ 9-15; ECF 98-3, ¶¶ 7-20. The court's statement that DHS can simply unilaterally reinstitute MPP and send non-Mexican nationals to Mexico without its agreement, Op. 49 n.15, is both astonishing and utterly refuted by the record.

Ordering DHS to immediately "implement MPP," Op. 52, would also cause severe damage to ongoing efforts to manage migration and combat criminal networks by requiring diplomatic and DHS resources be shifted to restarting MPP. AR6. DHS has been in the process of unwinding MPP and its infrastructure for months, and restarting it would "involve significant and complicated burdens on border security personnel and resources," undermining other high-priority efforts and critically important DHS missions. AR2-3, 5-7, 587-88; ECF 64 at 5, ¶ 10-11; ECF 98-1, ¶¶ 15-20. Reinstating MPP would "require new and costly investments from both governments to re-establish the infrastructure that sat dormant for more than a year due to COVID-19." ECF 64 at 8-10, ¶¶ 16-18. That undertaking cannot be accomplished in a safe, orderly, and humane manner in a matter of days. And the injunction's requirement that the government build or obtain "sufficient detention capacity to detain all aliens subject to" the district court's extreme view of § 1225(b), and not "releas[e] any aliens *because of* lack of detention resources," Op. 52, would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003015

similarly upend the government's ability to prioritize finite enforcement resources. ECF 98-1, ¶ 5, 9-14.

These extraordinary and unprecedented harms dwarf those of the States, which submitted *no* evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or since new enrollments ended. *Supra* p.7. Without evidence of concrete harm, Plaintiffs cannot even establish Article III standing, much less harm from a stay pending appeal.

A stay pending appeal is thus particularly appropriate, as there is no plausible "way to restore the status quo ante" in seven days, *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), and attempting to do so would cause massive disruption and implicate issues "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). For similar reasons, even if this Court agreed with the district court that the agency has not adequately considered relevant factors or explained its decision, remand without vacatur and without an injunction would be the only appropriate remedy. *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* Here, "there is a serious possibility that [DHS] will be able to remedy its [supposed APA] failures," *id.*, and

AMERICAN OVERSIGHT

so the district court's mandatory injunction, which causes "serious disruptions," is an abuse of discretion and should be stayed. *See Cent. & S. W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also* 8 U.S.C. § 1252(f)(1); *Hamama v. Adducci*, 912 F.3d 869, 880 (6th Cir. 2018) (holding § 1252(f)(1) bars such injunctive relief).

CONCLUSION

The Court should issue an immediate administrative stay, and then stay the district court's injunction pending completion of appellate proceedings. If the Court is inclined to deny the stay or administrative stay, the Court should enter an administrative stay for at least seven days to give the government an opportunity to seek emergency relief from the Supreme Court.

AMERICAN OVERSIGHT

Respectfully submitted,

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August 17, 2021

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AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,200 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 16 and 17, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that Appellees oppose this motion and plan to file a response in opposition.

/s/ Brian C. Ward
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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brian C. Ward
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AMERICAN OVERSIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

THE STATE OF TEXAS, THE STATE OF MISSOURI, Plaintiffs, v. JOSEPH R. BIDEN, JR. *et al.*, Defendants.	§ § § § § § § § § §	2:21-CV-067-Z

MEMORANDUM OPINION AND ORDER

The Court enters the below-listed findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure after a consolidated hearing and trial on the merits on Plaintiff States Texas and Missouri's various claims against the federal Defendants.[1] For the reasons that follow, the Court **FINDS** and **CONCLUDES** that Plaintiffs are entitled to relief on their APA and statutory claims against Defendants. The Court will therefore enter judgment in favor of Plaintiffs. The Court also crafts injunctive relief to ensure Plaintiffs receive a full remedy.

I. PROCEDURAL BACKGROUND

Only four months old, this case already has a complicated procedural history. Thus, the Court will quickly summarize the record before entering its findings of fact and conclusions of law.

On April 13, 2021, Plaintiffs filed this suit challenging the temporary suspension of the Migrant Protection Protocols ("MPP"). ECF No. 1. MPP was a program implemented by the

[1] Defendants are the United States of America; President Biden in his official capacity; the Department of Homeland Security ("DHS") and DHS Secretary Mayorkas in his official capacity; the United States Customs and Border Protection ("CBP") and Acting Commissioner of CBP Troy Miller in his official capacity; the United States Immigration and Customs Enforcement "ICE" and Acting ICE Director Tae Johnson; and the United States Citizenship and Immigration Services ("CIS") and Acting CIS Director Tracy Renaud in her official capacity.

AMERICAN OVERSIGHT

Department of Homeland Security that returned some aliens temporarily to Mexico during the pendency of their removal proceedings. Specifically, Plaintiffs alleged that DHS's "two-sentence, three-line memorandum" that suspended enrollments in the Migrant Protection Protocols pending review of the program was a violation of the APA, 8 U.S.C § 1225, the Constitution, and a binding agreement between Texas and the federal government. *See* ECF No. 1 at 4; ECF No. 45 (showing the original administrative record to consist solely of the Secretary's January 20 Memorandum without any supporting documentation).

On May 3, Defendants made a motion to transfer this case to the Southern District of Texas. ECF No. 11. On June 3, the Court denied this motion in a written order. *See* ECF No. 47 at 9 ("Defendants' evidence, taken as a whole, does not establish that the convenience of the parties and witnesses will be enhanced by transferring this case.").

On May 14, Plaintiffs moved for a preliminary injunction. ECF No. 30. But before briefing was concluded, DHS completed its review of MPP and issued a new memorandum (the "June 1 Memorandum") that *permanently* terminated MPP. ECF No. 46. The Court concluded the June 1 Memorandum mooted Plaintiffs' original complaint but allowed Plaintiffs to amend their complaint and file a new motion seeking to enjoin the June 1 Memorandum. *See* ECF No. 52 at 3 ("[T]he January 20 Memorandum expired upon the completion of DHS's review of the program.").

Accordingly, Plaintiffs amended their complaint and renewed their motion for a preliminary injunction. *See* ECF Nos. 48, 53. On June 22, Defendants filed the administrative record. ECF No. 61. Three days later, Defendants filed their response to Plaintiffs' motion. ECF No. 63. Plaintiffs filed their reply on June 30.

But in addition to opposing Plaintiffs' Motion, Defendants also moved to strike the entire appendix attached to Plaintiffs' Motion because it arguably ran afoul of the "record rule." The

AMERICAN OVERSIGHT

Court expedited briefing on this motion and denied the motion by written order for the reasons stated in ECF No. 76.

Next, the parties agreed with the Court that this case involved mainly questions of law. Accordingly, the parties favored consolidating the preliminary injunction hearing with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). ECF No. 68. The Court ordered the consolidation, provided notice to the parties, and allowed each party to file a supplemental brief before the hearing. *Id.*

Lastly, on July 20, two days before the hearing, Defendants filed a notice of a "corrected administrative record." ECF No. 78. By this notice, Defendants added the 2019 DHS assessment of MPP to the administrative record — even though Defendants knew for at least three weeks that the document was *not* included in the certified administrative record. ECF No. 85 at 2. Plaintiffs moved to strike this last-minute addendum to the administrative record. The Court denied that motion by written order on July 21. ECF No. 85 ("The delay between the government's acquiring knowledge of the missing document and its filing of notice with the Court comes perilously close to undermining the presumption of administrative regularity. But the Court finds the presumption is not overcome in this case.").

On July 22, the Court held a consolidated hearing and bench trial on the merits. The parties filed their proposed findings of fact and conclusions of law on July 27. ECF Nos. 91, 92. The parties also filed supplemental briefs on the scope of relief available to Plaintiffs. ECF Nos. 90, 93. Pursuant to Fed. R. Civ. P. 52(a), the Court may now enter its findings of facts and conclusions of law.

AMERICAN OVERSIGHT

II. EVIDENTIARY OBJECTIONS[2]

1. At the bench trial, Defendants made several objections to Plaintiffs' exhibits which the Court deferred ruling upon. Trial Tr. 8–30. The Court now overrules Defendants' objections under Fed. R. Evid. 401 as the exhibits are relevant to Plaintiffs' claims and overrules Defendants' objections under Fed. R. Evid. 403. "Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision." *Gulf States Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981).

2. The Court overrules Defendants' privilege objections as to Exhibits A10 and C. The content Defendants seek to protect has been in the public record for months. Even if Defendants were unaware of Exhibit A10 and C at the time the exhibits were published, Defendants have been on notice since June 8, 2021, when Plaintiffs filed their Appendix in Support. ECF No. 54. The Court finds Defendants' privilege objections to be untimely and moot.

3. The Court sustains Defendants' hearsay objections under Fed. R. Evid. 802 as to Plaintiffs' Exhibits A-7, A-9, A-11, A-12, A-13, and A-15 to the extent the information within the exhibits is offered for the truth of the matters asserted.

4. The Court overrules Defendants' objections under Fed. R. Evid. 702 as to Plaintiffs' Exhibits D, E, F, F-1, G, G-1, H, H-1, and I. Defendants object to these exhibits, generally arguing Plaintiffs impermissibly offered expert testimony. *See* ECF No. 92 at 28. Defendants' objections fail to identify with specificity which declarants and which parts of each exhibit were

[2] Citations to Plaintiffs' Appendix in Support, found at ECF No. 54, are labeled App. ###. Citations to the administrative record, found at ECF No. 61, are labeled AR ###.

AMERICAN OVERSIGHT

impermissibly offered. Further, Defendants fail to state with specificity why each declarant is unqualified.

5. Even so, the Court reviewed each declaration and finds Defendants' objections unpersuasive. For example, in reviewing Plaintiffs' Exhibit D, Declaration of Mark Morgan, the Court noted Mark Morgan served as the Acting Commissioner of the United States Customs and Border Patrol from 2019-2021. App. 390. Prior to that service, Mr. Morgan served as the Acting Chief of the United States Immigration and Customs Enforcement. *Id.* Prior to that assignment, Mr. Morgan served twenty years as an FBI agent. *Id.* The Court finds Mr. Morgan more than sufficiently qualified to opine and present testimony in the form of a declaration regarding immigration laws, policies, procedures, and practices.

6. Any objections not previously discussed are overruled.

III. FINDINGS OF FACT[3]

1. Because the Court consolidated the hearing on the motion with a trial on the merits, the proper standard for factual findings is the preponderance of the evidence.

A. Overview of the relevant statutory framework

2. Section 1225 of Title 8 of the United States Code establishes procedures for DHS to process aliens who are "applicant[s] for admission" to the United States, whether they arrive at a port of entry or cross the border unlawfully. 8 U.S.C. § 1225(a)(1).

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[3] In preparing this memorandum opinion and order, the Court carefully considered the trial arguments, the record, and the admitted exhibits and applied the standard in this circuit for findings of fact and conclusions of law. *See Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) (discussing standard for findings and conclusions under Rule 52). In accordance with that standard, the Court has not set out its findings and conclusions in "punctilious detail" or "slavishly traced the claims issue by issue and witness by witness, or indulged in exegetics, parsing or declaiming every fact and each nuance and hypothesis." *Id.* The Court instead has limited its discussion to those legal and factual issues that form the basis for its decision. *Id.*

Where appropriate, any finding of fact herein that should more appropriately be regarded as a conclusion of law shall be deemed as such, and vice versa.

AMERICAN OVERSIGHT

3. An immigration officer must first inspect the alien to determine whether he is entitled to be admitted. § 1225(a)(3). Section 1225(b)(2)(A) provides that, if an immigration officer "determines" that an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under Section 1229a of this title" to determine whether he will be removed from the United States.

4. Alternatively, if an alien lacks valid entry documentation or misrepresents his identity, he shall be "removed from the United States without further hearing or review unless" he "indicates either an intention to apply for asylum . . . or a fear of persecution." § 1225(b)(1)(A)(i). If the alien makes such a showing, then he "shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Such an alien then would also be placed in a Section 1229a full removal proceeding. See 8 C.F.R. § 208.30(f).

5. Under either route, Section 1229a proceedings involve a hearing before an immigration judge with potential review by the Board of Immigration Appeals. 8 U.S.C. § 1229a; 8 C.F.R. § 1003.1. In a full removal proceeding, the government may charge the alien with any applicable ground of inadmissibility, and the alien may seek asylum or any other form of relief or protection from removal to his home country. 8 U.S.C. § 1229a(a)(2), (c)(4).

6. Most importantly for this case, when DHS places an applicant for admission into a full removal proceeding under Section 1229a, the alien is subject to *mandatory* detention during that proceeding. § 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under Section 1229a of this title.") (emphasis added). DHS does retain the discretion to parole certain aliens "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A).

AMERICAN OVERSIGHT

7. But Congress allows DHS an alternative to mandatory detention in the United States: "In the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, [DHS] may return the alien to that territory pending a proceeding under Section 1229a of this title." § 1225(b)(2)(C). This contiguous-territory-return authority enables DHS to avoid having to detain aliens arriving on land from Mexico (or Canada), and instead allows DHS to temporarily return those aliens to the foreign territory from which they just arrived pending their immigration proceedings.

B. MPP was created to combat an influx of illegal aliens during the Trump administration

8. In 2018, the southern border of the United States experienced an immigration surge and a resulting "humanitarian and border security crisis." AR 186; App. 005. Federal officials encountered an approximately 2,000 inadmissible aliens each day in 2018. App. 005. By May 2019, that number had increased to 4,800 aliens crossing the border daily. AR 682.

9. The resulting influx of immigrants had "severe impacts on U.S. border security and immigration operations." App. 302. But most aliens lacked meritorious claims for asylum — "only 14 percent of aliens who claimed credible fear of persecution or torture were granted asylum between Fiscal Year 2008 and Fiscal Year 2019." App. 005. With so many "fraudulent asylum claims," "[t]he dramatic increase in illegal migration" was "making it harder for the U.S. to devote appropriate resources to individuals who [were] legitimately fleeing persecution." App. 302–03.

10. The influx did not just divert resources from legitimate asylum seekers, but illegal aliens with *meritless* asylum claims were being released into the United States. "[M]any of these individuals . . . disappeared into the country before a judge denie[d] their claim and simply bec[a]me fugitives." App. 303. "Between Fiscal Year 2008 and Fiscal Year 2019, 32 percent of

AMERICAN OVERSIGHT

aliens referred to [the Executive Office for Immigration Review] absconded into the United States and were ordered removed *in absentia*." App. 005.

11. In response, the Trump Administration implemented a program known as the Migrant Protection Protocols. On December 20, 2018, the Secretary of Homeland Security announced the MPP program, under which DHS would begin the process of invoking the authority provided at § 1225(b)(2)(C).[4] This statutory authority allows DHS to return to Mexico certain third-country nationals — *i.e.*, aliens who are not nationals or citizens of Mexico — arriving in the United States from Mexico for the duration of their removal proceedings under 8 U.S.C. § 1229a. AR 151.

12. The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." App. 303–04.

13. The same day, the United States obtained the Government of Mexico's agreement to temporarily permit "entry of certain foreign persons from within the United States who have entered that country through a port of entry or who have been apprehended between ports of entry and interviewed by the authorities of migration authorities of that country, and have received a notice to attend a hearing before a judge." AR 149.

14. On January 25, 2019, DHS issued guidance for implementation of MPP. Three days later, DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide. AR 155, 156, 684.

15. Under the issued guidance, DHS officers determined whether aliens were amenable to the MPP process. If they were, the DHS officer could issue a Notice to Appear (NTA), place the alien

[4] Section 235(b)(2)(C) of the Immigration and Nationality Act (INA)

AMERICAN OVERSIGHT

into a removal proceeding under Section 1229a, and then return the alien to Mexico to await removal proceedings *unless* the alien affirmatively demonstrated a fear of persecution or torture in Mexico. AR 161.

16. Certain categories of noncitizens were not amenable to MPP: unaccompanied alien children — as defined in 6 U.S.C. § 279(g); citizens or nationals of Mexico; noncitizens processed for expedited removal under 8 U.S.C. § 1225(b)(1); noncitizens "in special circumstances"; returning lawful permanent residents seeking admission; noncitizens with an advance parole document or in parole status; noncitizens with known physical or mental health issues; noncitizens with a criminal history or a history of violence; noncitizens of interest to the Government of Mexico or the United States; any noncitizen who demonstrated that they are more likely than not to face persecution or torture in Mexico; and other noncitizens at the discretion of the Port Director or Border Patrol counterpart. AR 161.

17. On February 12, 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, in anticipation of expansion of MPP across the border. AR 165–70. After June 7, 2019, DHS began constructing temporary structures at the southern border in Brownsville and Laredo, Texas, to hold immigration hearings for noncitizens subject to MPP, and notified Congress of their completion in August 2019. These temporary facilities functioned as virtual courtrooms, with immigration judges appearing by video connection from their courthouses within the United States. AR 208, 684.

C. The Department of Homeland Security found MPP to be effective

18. Upon review, DHS found MPP to be effective. In its October 28, 2019, Assessment of the Migrant Protection Protocols, DHS stated that "MPP has demonstrated operational effectiveness." AR 683. DHS noted that it had "returned more than 55,000 aliens to Mexico under MPP" and that

AMERICAN OVERSIGHT

"MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." *Id.*

19. Specifically, DHS found "[s]ince a recent peak of more than 144,000 in May 2019, total enforcement actions . . . have decreased by 64% through September 2019." *Id.* Moreover, DHS found "[b]order encounters with Central American[5] families — who were the main driver of the crisis and comprise a majority of MPP-amenable aliens — have decreased by approximately 80%." *Id.*

20. Additionally, DHS stated "although MPP is one among many tools that DHS employed in response to the border crisis, DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border — including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." *Id.*

21. In addition to finding MPP effective at deterring border encounters and decreasing the number of illegal aliens present in the United States, DHS also found that "MPP is restoring integrity to the [immigration] system." *Id.* As examples of this restoration, DHS found that "MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." *Id.* at 684. And "MPP returnees who do not qualify for relief or protection are being quickly removed from the United States. Moreover, aliens without meritorious claims — which no longer constitute a free ticket into the United States — are beginning to voluntarily return home." *Id.*

22. DHS did recognize that there were some flaws in the original implementation of MPP. On October 25, 2019 — just three days before releasing its assessment of MPP — DHS released the

[5] These countries are also sometimes referred to as the "Northern Triangle." The Northern Triangle countries are Guatemala, Honduras, and El Salvador.

AMERICAN OVERSIGHT

Migrant Protection Protocols Red Team Report. AR 192. This report found several issues and recommended improvements — but not termination — of MPP. Some of these improvements included standardizing documents and protocols to ensure aliens received a fair process and hearing on their claims. AR 192–201.

23. MPP also faced legal challenges. In *Wolf v. Innovation Law Lab*, a district court enjoined the implementation of MPP. 366 F. Supp. 3d 1110 (N.D. Cal. 2019). The Ninth Circuit stayed that injunction, but a separate panel affirmed the injunction on the merits. 951 F.3d 1073 (9th Cir. 2020). The Ninth Circuit then granted a stay as far as the district court's injunction applied outside the territorial limits of the Ninth Circuit but otherwise denied the government's request for a stay. 951 F.3d 986 (9th Cir. 2020).

24. But the Supreme Court stayed the injunction in full granting the Trump Administration a legal victory. 140 S. Ct. 1564 (Mar. 11, 2020). The Supreme Court also granted certiorari. 141 S. Ct. 617 (Oct. 19, 2020). The case was later dismissed from the merits docket as moot. *Wolf*, 2021 WL 2520313, at *1 (June 20, 2021) (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)).

25. But throughout the legal challenges, DHS found MPP was meeting its intended goals. AR 554. First, DHS found "MPP provides a streamlined pathway for aliens to defensively apply for protection or relief from removal, while upholding *non-refoulement* obligations through screenings of fear in Mexico." *Id.* Second, DHS found "MPP provides a pathway for aliens to proceed efficiently through the U.S. immigration court processes, as compared to non-detained dockets." *Id.* at 555. Third, DHS found "MPP decreases the number of aliens released into the interior of United States for the duration of their U.S. removal proceedings." *Id.* And fourth, DHS found "MPP implementation contributes to decreasing the volume of inadmissible aliens arriving

AMERICAN OVERSIGHT

in the United States on land from Mexico — including those apprehended between the [ports of entry]." *Id.*

26. By December 31, 2020, DHS had enrolled 68,039 aliens in the MPP program. *Id.*[6] DHS concluded its review of MPP and found it to be a "cornerstone" of DHS's efforts to restore integrity to the immigration system:

> These unprecedented [immigration] backlogs have strained DHS resources and challenged its ability to effectively execute the laws passed by Congress and deliver appropriate immigration consequences: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.
>
> This broken system has created perverse incentives, with damaging and far-reaching consequences for both the United States and its regional partners. In Fiscal Year 2019, certain regions in Guatemala and Honduras saw 2.5% of their population migrate to the United States, which is an unsustainable loss for these countries.
>
> MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings. Even more importantly, MPP also provides an opportunity for those entitled to relief to obtain it within a matter of months. MPP, therefore, is a cornerstone of DHS's ongoing efforts to restore integrity to the immigration system — and of the United States' agreement with Mexico to address the crisis at our shared border.
>
> AR 687.

[6] The COVID-19 pandemic accounted for the markedly fewer aliens enrolled in MPP in 2020. Due to the pandemic, MPP removal proceedings began to be postponed on April 22, 2020. AR 466. Additionally, beginning in March 2020, DHS assisted in the enforcement of Title 42 — a statutory provision not relevant to this suit — to expel certain amenable noncitizens from Mexico and the Northern Triangle countries back to Mexico, and certain amenable noncitizens from other countries to their countries of origin if Mexico will not accept them, with limited exceptions. AR 621–22, 631. Title 42 expulsions accounted for 102,234 and 111,175 repatriations in 2020 and the first quarter of 2021. AR 660.

AMERICAN OVERSIGHT

D. During the transition period, the outgoing Trump Administration entered into an Agreement with Texas and warned the incoming Biden Administration of the dangers of ending MPP

1. DHS and Texas enter into an Agreement

27. Shortly before leaving office, the Trump Administration entered into a Memorandum of Understanding (the "Agreement") between Texas and DHS. App. 317–26. The Agreement was finalized on January 8, 2021. *Id.* at 325.

28. The Agreement purportedly established "a binding and enforceable commitment between DHS and Texas," in which Texas agreed to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* at 319. In return, DHS agreed "to consult Texas and consider its views before taking any action, adopting or modifying a policy or procedure, or making any decision that could:

(1) reduce, redirect, reprioritize, relax, or in any way modify immigration enforcement;

(2) decrease the number of ICE agents performing immigration enforcement duties;

(3) pause or decrease the number of returns or removals of removable or inadmissible aliens from the country;

(4) increase or decline to decrease the number of lawful, removable, or inadmissible aliens;

(5) increase or decline to decrease the number of releases from detention;

(6) relax the standards for granting relief from return or removal, such as asylum;

(7) relax the standards for granting release from detention;

(8) relax the standards for, or otherwise decrease the number of, apprehensions or administrative arrests;

(9) increase, expand, extend, or in any other way change the quantity and quality of immigration benefits or eligibility for other discretionary actions

AMERICAN OVERSIGHT

for aliens; or

(10) otherwise negatively impact Texas.

In case of doubt, DHS will err on the side of consulting with Texas." *Id.* at 319.

29. To enable this consultation process, the Agreement requires DHS to "[p]rovide Texas with 180 days' written notice . . . of any proposed action" subject to the consultation requirement. *Id.* at 320. That would give Texas "an opportunity to consult and comment on the proposed action." *Id.* After Texas submitted its views, "DHS will in good faith consider Texas's input and provide a detailed written explanation of the reasoning behind any decision to reject Texas's input before taking any action" covered by the Agreement. *Id.*

30. The parties agree DHS did not follow these procedures when it issued the June 1 Memorandum. But DHS did send a letter that purported to terminate the Agreement "effective immediately" on February 2, 2021. *Id.* at 347–48. Texas avers that the termination letter also did not comply with the Agreement and chose to interpret a letter as a notice of intent to terminate. ECF No. 53 at 21. Accordingly, even under Texas's view, the Agreement is only "binding until August 1, 2021." *Id.*

2. The Biden Administration was warned of the consequences of terminating MPP

31. During the latter half of 2020, the Biden transition team met with career staff from DHS. According to Mark Morgan — who is former Acting Commissioner of CBP, former Acting Director of ICE, and Marine — CBP "career employees . . . fully briefed the Biden transition officials on the importance of MPP and the consequences that would follow a suspension of MPP." App. 399. Morgan stated: "transition personnel were specifically warned that the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally enter our [southwest border]." *Id.* And officials were also "warned smuggling organizations would

AMERICAN OVERSIGHT

exploit the rescission and convince migrants the U.S. borders are open. They were warned the increased volume was predictable and would overwhelm Border Patrol's capacity and facilities, as well as HHS facilities." *Id.*

E. The Biden Administration first suspended, then terminated MPP.

32. The incoming Biden Administration (1) knew MPP had been found effective by DHS as a matter of policy, (2) knew MPP had been successfully defended in court, and (3) had received warnings about the consequences that would attend the repealing of MPP. But the Biden Administration suspended new enrollments in MPP on its first day in office. On January 20, 2021, the Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." AR 581.

33. Since that day, DHS has not offered a single justification for suspending new enrollments in the program during the period of review. Indeed, when the original administrative record was filed prior to the June 1 Memorandum's issuance, it contained only a single document — the January 20 Memorandum. *See* ECF No. 45. There was no cost-benefit analysis or any sort of reasoned decisionmaking for a court to review.

34. But the flaws of the January 20 Memorandum were mooted when DHS completed its review and issued the June 1 Memorandum that terminated the MPP program. AR 1–7; ECF No. 52 at 3 ("[T]he January 20 Memorandum expired upon the completion of DHS's review of the program.").

AMERICAN OVERSIGHT

35. In the June 1 Memorandum, DHS Secretary Mayorkas found that his "review confirmed that MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." AR 3.

36. In particular, Secretary Mayorkas made several conclusions. First, the Secretary "determined that MPP does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls." *Id.*

37. Second, the Secretary was concerned that MPP did not ensure that aliens waiting in Mexico were able to attend their immigration proceedings. "The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings." *Id.* at 4. The Secretary noted that "[i]n particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) raises questions for me about the design and operation of the program." *Id.*

38. Third, the Secretary found that MPP was "intended to reduce burdens on border security personnel and resources, but over time the program imposed additional responsibilities that detracted from the Department's critically important mission sets." *Id.* The Secretary also added that "[a] number of the challenges faced by MPP have been compounded by the COVID-19 pandemic." *Id.* The Secretary concluded by stating "as a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents." *Id.*

39. The June 1 Memorandum contained no discussion or analysis of DHS's previous assessment that MPP removed "perverse incentives" and decreased the number of aliens attempting to illegally cross the border.

40. The June 1 Memorandum contained no discussion or analysis regarding DHS's ability to fulfill its statutory obligation to detain certain classes of aliens in the absence of MPP.

AMERICAN OVERSIGHT

F. The termination of MPP has and will continue to increase the number of aliens being released into the United States and has and will continue to impose harms on Plaintiff States Texas and Missouri

1. The termination of MPP increases the number of aliens present in the United States

41. First, Defendants' termination of MPP necessarily increases the number of aliens present in the United States regardless of whether it increases the absolute number of would-be immigrants. MPP authorized the return of certain aliens to Mexico. Without MPP, Defendants are forced to release and parole aliens into the United States because Defendants simply do not have the resources to detain aliens as mandated by statute. App. 307 ("[R]esource constraints during the [May 2019] crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable."); App. 330 n.7 ("Continued detention of a migrant who has more likely than not demonstrated credible fear is not in the interest of resource allocation.").

42. Second, the termination of MPP has contributed to the current border surge. DHS previously acknowledged that "MPP implementation contribute[d] to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." AR 555. MPP removed the "perverse incentives" which enticed aliens with "a free ticket into the United States." AR 684, 687; Trial Tr. 147:23–25 (Defense counsel: "I think it's fair to say that [MPP] probably deterred some individuals from coming to the United States.").

43. Since MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed. Defendants' data shows encounters jumping from 75,000 in January 2021, when MPP was suspended, to about 173,000 in April 2021, when this case was filed. AR 670. Since then, encounters have continued to increase: CBP data shows nearly 189,000 encounters occurred in June 2021. U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP

AMERICAN OVERSIGHT

(Aug. 3, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters; FRE 201.[7]

44. Even if the termination of MPP played *no* role in the increasing number of migrants, the lack of MPP as a tool to manage the influx means that more aliens will be released and paroled into the United States as the surge continues to overwhelm DHS's detainment capacity.

45. Texas is a border state. But Missouri also faces an increased number of aliens due to the termination of MPP. Statistically, for every 1,000 aliens who remain unlawfully in the United States, fifty-six end up residing in Missouri. App. 006.

2. *Texas and Missouri have suffered injuries because of the increased numbers of aliens present in their states*

a. Driver's Licenses

46. As a result of the termination of MPP, some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses.

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[7] Moreover, the Court takes judicial notice of the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS — filed in the District Court of the District of Columbia in Title 42 related litigation. ECF No. 113-1 at 7–9, No. 1:21-CV-100-EGS (D.D.C. Aug. 2, 2021) (emphasis added). The Court finds David Shahoulian is a "source[] whose accuracy cannot reasonably be questioned." FRE 201.

> In May and June 2021, for example, CBP recorded over 180,000 and 188,000 encounters, respectively, at the southwest border . . . These constitute the highest numbers of monthly encounters recorded by CBP in more than twenty years, including during previous surges when the Department was not constrained by COVID-19 capacity considerations. As noted above, due to COVID-19-related guidance, border facilities are currently expected to operate at only 25 to 50 percent capacity, depending on individual facility infrastructure and facility type.
>
> Based on preliminary data, the number of border encounters continued to increase in July 2021. Over the first 29 days of July, CBP encountered an average of **6,779** individuals per day, including 616 unaccompanied children and 2,583 individuals in family units. Overall, according to preliminary data, CBP is likely to have encountered about 210,000 individuals in July, the highest monthly encounter number since Fiscal Year 2000. July also likely included a record number of unaccompanied child encounters, exceeding 19,000, and the second-highest number of family unit encounters, at around 80,000.
>
> . . .
>
> Based on current trends, the Department expects that total encounters this fiscal year are likely to be **the highest ever recorded**.

AMERICAN OVERSIGHT

AR555; AR587–588. Texas provides driver's licenses to aliens so long as their presence in the United States is authorized by the federal government. App. 426. Each additional customer seeking a Texas driver's license imposes a cost on Texas. App. 427.

47. Because "driving is a practical necessity in most of" Texas, "there is little doubt that many" aliens present in Texas because of MPP's termination would apply for driver's licenses. *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015). The Chief of the Texas Department of Public Safety's Driver License Division gave estimates of the costs of providing additional driver's licenses. App. 428.

48. Missouri likewise faces a cost of verifying lawful immigration status for each additional customer seeking a Missouri driver's license. App. 006.

b. Education

49. Some school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States. AR423; AR431; AR496; AR547; AR617. Texas estimates that the average funding entitlement for 2021 will be $9,216 per student in attendance for an entire school year. App. 440. For students qualifying for bilingual education services, it would cost Texas $11,432 for education per child for attendance for an entire school year. *Id.* The total costs to Texas (and Missouri) of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases. App. 442.

c. Healthcare

50. Some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas and Missouri. AR555; AR587–588; App. 006. Texas funds three healthcare programs that require significant expenditures to cover illegal aliens: the Emergency Medicaid Program, the Family

AMERICAN OVERSIGHT

Violence Program, and the Texas Children's Health Insurance Program. App. 450. Texas is required by federal law to include illegal aliens in its Emergency Medicaid Program. 42 C.F.R. § 440.255(c). Texas also incurs costs for uncompensated care provided by state public hospital districts to illegal aliens. App. 452. The total costs to the State will increase as the number of aliens within the state increases. *Id.*

51. Missouri is similarly situated. App. 006.

d. Law enforcement and correctional costs

52. Some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will commit crimes in Texas and Missouri. AR555; AR587–588; App. 006; App. 362–63; App. 372; App. 388. In one year alone, the Texas Department of Criminal Justice housed 8,951 illegal alien criminals for a total of 2,439,110 days at a cost of over $150 million, with less than $15 million reimbursed by the federal government. App. 460. "[T]o the extent the number of aliens in [Texas Department of Criminal Justice] custody increases, TDCJ's unreimbursed expenses will increase as well." App. 460.

53. Some aliens who would have otherwise been enrolled in MPP are victimized by human traffickers in Texas. App. 406; App. 418. Aliens "are particularly susceptible to being trafficked." App. 419. Increasing the number of aliens "present in the United States, including those claiming asylum, is likely to increase human trafficking." App. 423; App. 409. Missouri is likewise a destination and transit State for human trafficking of migrants from Central America who have crossed the border illegally. App. 409–410.

54. Human trafficking causes fiscal harm to Texas and Missouri. App. 418–19.

AMERICAN OVERSIGHT

e. *Parens patriae*

55. Aliens who would have otherwise been enrolled in MPP are being paroled into the United States. App. 307; App.330 n.7; AR 183–84. Aliens paroled into the United States are eligible for work authorization thereby increasing the supply of workers by some amount. App. 337; App. 555. Some aliens who would have otherwise been enrolled in MPP will work for employers in Texas or Missouri. AR 555; AR 587–88; App. 362–63; App. 372; App. 388.

IV. CONCLUSIONS OF LAW

The Court's opinion proceeds in the following order: (1) the Court finds that it has jurisdiction and Plaintiffs have established standing; (2) the Court concludes there are no other jurisdictional or procedural hurdles to judicial review of Plaintiffs' claims; (3) the Court proceeds to the merits of Plaintiffs' APA and statutory claims; (4) and then the Court declines to address the merits of Plaintiffs' constitutional and Agreement-based claims.

A. Plaintiffs have standing

1. Federal courts are courts of limited jurisdiction which possess only that power authorized by Constitution and statute. *Xitronix Corp. v. KLA-Tencor Corp.*, 916 F.3d 429, 435 (5th Cir. 2019). "The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998)).

2. "[T]he states have the burden of establishing standing," *Texas*, 809 F.3d at 150, by showing "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

AMERICAN OVERSIGHT

3. "Each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation" *Lujan v. Defender of Wildlife*, 504 U.S. 555, 561 (1992). "And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* (quoting *Gladstone, Relators v. Village of Brentwood,* 441 U.S. 91, 115 n. 31 (1979)).

4. Here, the Court consolidated the preliminary injunction hearing with trial on the merits, so the preponderance of evidence standard applies. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020).

1. *Texas and Missouri have suffered harms that are concrete, non-speculative, and are traceable to Defendants' conduct — and are redressable.*

5. First, Texas and Missouri have both shown that they have suffered and will continue to suffer "concrete and particularized" injuries attributable to Defendants' actions. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

6. Plaintiffs have established that the termination of MPP will increase the cost of providing driver's licenses to aliens released and paroled into the United States, inflicting on the States an actual and imminent injury. *See Texas*, 809 F.3d at 155 ("[L]icenses issued to beneficiaries would necessarily be at a financial loss.").

7. Second, Plaintiffs' injuries are fairly traceable to the actions of Defendants. As stated above, the termination of MPP necessarily increases the number of aliens released and paroled into the United States and the Plaintiff States specifically.

8. Paroled and released aliens seeking to obtain driver's licenses is the "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S.

AMERICAN OVERSIGHT

Ct. 2551, 2566 (2019); *Texas,* 809 F.3d at 156 ("[T]here is little doubt that many [aliens] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

9. Third, the Court has the power to redress Plaintiffs' injuries. The APA allows the Court to "set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Additionally, injunctive relief authorizing DHS officers to return aliens to Mexico via the MPP program pending the resolution of their asylum claims would decrease the number of aliens paroled and released into the United States and into Plaintiff States specifically. Consequently, the amount of fiscal injury suffered by Plaintiffs would decrease.

10. Accordingly, the Court finds Plaintiffs have more likely than not established Article III standing under the driver's license theory of injury approved by applicable Fifth Circuit precedent.[8]

11. The same line of reasoning applies to the increased healthcare costs, education costs, and enforcement and correctional costs that Plaintiffs will suffer because of the termination of MPP.

2. Plaintiffs have not established parens patriae standing

12. Texas and Missouri have not established by a preponderance of the evidence that they are entitled to *parens patriae* standing.

13. *Parens patriae* is a type of standing that allows a state to sue a defendant to protect the interests of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

[8] Even if Missouri has failed to establish standing, it does not prevent the Court from proceedings to the merits because Texas has standing. *See, e.g.*, *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857, at *18 (S.D. Tex. July 16, 2021) (Hanen, J.) ("Texas has standing. Since one of the Plaintiff States has standing, this Court need not analyze the standing of any other plaintiff."); *Massachusetts*, 549 U.S. at 518.

AMERICAN OVERSIGHT

14. Preliminarily, in *Alfred L. Snapp*, the Supreme Court stated "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n. 16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)). This so-called *Mellon* bar does not sweep as widely as it may seem. In *Massachusetts v. EPA*, the Supreme Court crafted a distinction: "There is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n. 17 (citing *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 447 (1945)).

15. Here, Texas is asserting rights *under* the INA rather than attempting to protect its citizens from the *operation* of the INA. Accordingly, the *Mellon* bar does not apply. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662, 694–98 (S.D. Tex. 2018).

16. "To have [*parens patriae*], standing the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition." *Alfred L. Snapp*, 262 U.S. at 601. The Supreme Court then articulated two general categories of "quasi-sovereign" interests: a state has an interest "in the health and well-being — both physical and economic — of its residents in general" and a state has an "interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607.

17. Plaintiffs aver that they have standing under the first category because they allege the termination of MPP forces their citizens to compete in distorted labor markets in which it is more difficult to obtain a job. ECF No. 53 at 27–28. The Court finds this is a valid "quasi-sovereign" interest. *Texas*, 328 F. Supp. 3d at 698.

AMERICAN OVERSIGHT

18. Plaintiffs fail, however, to prove by a preponderance of the evidence that the termination of MPP caused or will cause a distorted labor market. Plaintiffs' entire argument rests on the proposition that "the basic economic law of supply and demand applies to the labor market, so an increase in the supply of illegal aliens authorized to work will harm the employment prospects of Texans and Missourians competing with them." ECF No. 53 at 28. There are no citations to studies, articles, analyses, or anything else that would allow the Court to conclude that the termination of MPP has distorted Texas's or Missouri's labor markets. *See, e.g.*, *Texas v. United States*, No. 1:18-CV-068, 2021 WL 3025857, at *15 (S.D. Tex. July 16, 2021) (discussing the addition of 114,000 work-eligible individuals who "Texas employers are financially incentivized under the [Affordable Care Act] to hire.").

19. Plaintiffs' simple invocation of the law of supply and demand is not enough for the Court to conclude that Plaintiffs carried their burden at the *merits* stage.

3. Plaintiffs are entitled to special solicitude

20. Texas and Missouri are entitled to special solicitude because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 at 518.

21. The Fifth Circuit has identified two additional factors that must be present in a case for States to be entitled to special solicitude: the presence of a procedural right to challenge agency action and the invasion of a "quasi-sovereign" interest. *Texas*, 809 F.3d at 152–53.

22. First, the Fifth Circuit has already held that the APA provides Texas the procedural right needed for special solicitude. *Id.* at 152 ("The Clean Air Act's review provision is more specific than the APA's, but the latter is easily adequate to justify 'special solicitude' here.").

23. Second, the termination of MPP "affects the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to

AMERICAN OVERSIGHT

some aliens and subsidizing those licenses." *Id.* at 153. As the Supreme Court noted: "When a State enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts v. EPA*, 549 at 519. Like Massachusetts, Texas and Missouri surrendered their power over immigration when they joined the Union. *See Arizona v. United States*, 567 U.S. 387, 394–400 (2012). Plaintiffs States, like Massachusetts, "now rely on the federal government to protect their interests." *Texas*, 809 F.3d at 154.

24. Accordingly, "[t]hese parallels confirm that [the termination of MPP] affects the states 'quasi-sovereign' interests." *Id.*

25. As a result, although unnecessary to the Court's finding of standing, the Court finds Texas and Missouri are entitled to special solicitude in its standing analysis.

B. There are no jurisdiction or procedural hurdles to judicial review

1. The termination of MPP is final agency action

26. The APA states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In the Fifth Circuit, "whether an agency action is final is a jurisdictional issue, not a merits question." *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004). "The Supreme Court has long taken a pragmatic approach to finality." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (internal marks omitted).

27. Agency action is "final" only if it both (1) "consummate[es] the agency's decisionmaking process" and (2) determines "rights or obligations" or produces "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

28. The June 1 Memorandum meets both *Bennett* standards and is thus an action amenable to judicial review.

AMERICAN OVERSIGHT

29. First, the parties do not contest that the June 1 Memorandum marks the consummation of the decisionmaking process. AR 002 (The June 1 Memorandum was published after the Secretary "completed the further review undertaken pursuant to Executive Order 14010.").

30. Second, the June 1 Memorandum produces legal consequences and determines rights and obligations. *EEOC*, 933 F.3d at 445 ("[W]hether the agency action binds the *agency* indicates whether legal consequences flow from that action.").

31. The June 1 Memorandum had the immediate legal consequence of "terminating the MPP program." AR 002.

32. The June 1 Memorandum had the immediate legal consequence of rescinding "the Memorandum issued by Secretary Nielsen dated January 25, 2019 entitled 'Policy Guidance for Implementation of the Migrant Protection Protocols,' and the Memorandum issued by Acting Secretary Pekoske dated January 20, 2021 entitled 'Suspension of Enrollment in the Migrant Protection Protocols Program.'" AR 007.

33. The June 1 Memorandum directed "DHS personnel, *effective immediately*, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." *Id.* (emphasis added).

34. Moreover, the June 1 Memorandum determined rights and obligations. The June 1 Memorandum prevents DHS line officers from using MPP, a tool that was previously available to them. "Where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *EEOC*, 933 F.3d at 442 (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016)).

35. Accordingly, the June 1 Memorandum constitutes final agency action.

AMERICAN OVERSIGHT

2. No statute precludes judicial review

36. Judicial review is presumptively available under the APA "except to the extent that statutes preclude judicial review." 5 U.S.C 701(a)(1); *Texas*, 809 F.3d at 163 ("[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'") (quoting *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 63–64 (1993)).

37. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 164 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

38. First, 8 U.S.C. § 1252(g) does not preclude judicial review.

39. Section 1252(g) states 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 Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

40. Texas and Missouri are not bringing this case on "behalf of any alien." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) ("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)). This is further confirmed by the fact that the remedy ordered by the Court in this case does not affect the status of any alien or immigration proceeding.

41. Second, 8 U.S.C. § 1252(b)(9) does not preclude judicial review.

AMERICAN OVERSIGHT

42. Section 1252(b)(9) states: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from *any action taken or proceeding* brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this Section." (emphasis added). This Section functions as a limit on where aliens can seek judicial review of their immigration proceedings.

43. But the Supreme Court has recently stated: "As we have said before, § 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." *Regents*, 140 S. Ct. at 1907 (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841, 875–76 (2018) (plurality opinion) (internal marks omitted)). "And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings." *Id.*

44. Third, 8 U.S.C. § 1252(f)(1) does not preclude judicial review.

45. Section 1252(f)(1) states: "No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter."

46. But this section does not apply because Plaintiffs are not seeking to *restrain* Defendants from enforcing Section 1225. Plaintiffs are attempting to make Defendants *comply* with Section 1225.

47. Fourth, 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude judicial review.

48. Section 1252(a)(2)(B)(ii) states: "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

AMERICAN OVERSIGHT

Secretary of Homeland Security, other than the granting of relief under Section 1158(a) of this title."

49. But Plaintiffs are not challenging the substantive exercise of the Attorney General's discretion. Instead, they are challenging whether the government complied with its legal obligations under the APA in terminating MPP. *See e.g.*, *Nora v. Wolf*, No. 20-0993, 2020 WL 3469670, at *7 (D.D.C. June 25, 2020) ("But Claim One does not take on the individual decisions made to return each plaintiff to Mexico; it is directed at an agency decision – the decision to "expand" MPP implementation to Tamaulipas."); *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 191 (3d Cir. 2020) (same); *Cruz v. Dep't of Homeland Sec.*, No. 19-CV-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019) (same).

50. This reading of the statute is further confirmed by Section 1252(a)(2)(B)(ii)'s title: "**Denials of discretionary relief**." This title indicates the objective of the statute is to prevent aliens from challenging the federal government's refusal to grant discretionary relief. *Texas*, 809 F.3d at 164.

51. Lastly, the overall structure of the INA does not evidence a clear intent by Congress to preclude judicial review. *Texas*, 809 F.3d at 163. Congress's choice to expressly preclude certain types of claims does not show by "clear and convincing evidence" that Congress also meant to implicitly preclude all *other* types of claims. *Id.*; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (An "express exception . . . implies that there are no other[s]"); ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).").

52. Accordingly, no statute or statutory scheme precludes judicial review of Plaintiffs' APA claim.

AMERICAN OVERSIGHT

3. The termination of MPP is not an agency action committed to agency discretion by law

53. The APA precludes review "of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Texas*, 809 F.3d at 165 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); 5 U.S.C. § 701(a)(2).

54. Section 1225(b)(2)(c) states: "In the case of an alien described in subparagraph (A) who is arriving on land . . . from a foreign territory contiguous to the United States, [DHS] *may* return the alien to that territory pending a proceeding under Section 1229a of this title." (emphasis added). But the mere presence of the word "may" does not place the agency's actions outside of the ambit of judicial review. *Regents*, 140 S. Ct. at 1905 ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.").

55. Rather, "[t]o honor the presumption of review, [courts] read the exception in § 701(a)(2) quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.* (internal citations omitted).

56. First, this limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)). But the decision to terminate MPP "is more than a non-enforcement policy." *Regents*, 140 S. Ct. at 1907. Although the termination of MPP *itself* does not confer affirmative benefits, the interaction between the termination of MPP and the lack of detention capacity necessarily means more aliens will be released and paroled into the Plaintiff States. And parole *does* create affirmative benefits for aliens such as work authorization. App. 337; *Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA *need not directly confer* public benefits.") (emphasis added).

AMERICAN OVERSIGHT

57. Moreover, the MPP program is not about enforcement proceedings *at all*. Any alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a. The only question MPP answers is *where* the alien will *be* while the federal government pursues removal — in the United States or in Mexico.

58. Second, under Fifth Circuit precedent, agency decisions are "completely unreviewable under the committed to 'agency discretion by law' exception" if "the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Texas*, 809 F.3d at 168.

59. The INA provides guidance as to how DHS should exercise its discretion "according to the general requirements of reasoned agency decisionmaking." *New York*, 139 S. Ct. at 2569. Section 1225 imposes mandatory-detention obligations on Defendants. § 1225(b)(2)(A) ("[T]he alien shall be detained"); AR 682 ("The law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings."). To avoid violating Section 1225's obligations, DHS must use its authority to return aliens to Mexico when an influx of aliens exceeds DHS's detention capacity. These statutory obligations provide courts guidance on how DHS's contiguous-territory-return authority should be exercised.

60. DHS does not *have* to use this authority; it could always detain every alien required by Section 1225. But if it is incapable of detaining such a large number, then the statute implicitly demands, or, at the very least, directs DHS use its authority to return certain aliens to Mexico.

61. Accordingly, the decision to terminate MPP is "not one of those areas traditionally committed to agency discretion." *New York*, 139 S. Ct. at 2568.

AMERICAN OVERSIGHT

4. Plaintiffs are within the zone of interests of the INA

62. "Because the states are suing under the APA, they 'must satisfy not only Article III's standing requirements, but an additional test: The interest they assert must be arguably within the zone of interests to be protected or regulated by the statute that they say was violated.'" *Texas*, 809 F.3d at 162 (quoting *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199, 2210 (2012) (internal marks omitted)).

63. "That '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.'" *Id.* "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.'" *Id.* "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.*

64. First, the Court concludes that the proper scope of the zone-of-interest inquiry is the entirety of the INA. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) ("In considering whether the "zone of interest" test provides or denies standing in these cases, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the National Bank Act."). The Court is "not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes." *Id.* And, historically, the Fifth Circuit's "treatment of APA claims in the immigration context [] considers the INA as a whole." *Texas v. United States*, No. 6:21-CV-003, 2021 WL 2096669, at *22 (S.D. Tex. Feb. 23, 2021); *Texas*, 809 F.3d at 193 n. 80.

AMERICAN OVERSIGHT

65. Here, Plaintiffs are seeking to require the Secretary to engage in reasoned decisionmaking under the APA before the Secretary terminates MPP requiring the state to choose between "spending millions of dollars to subsidize driver's licenses or changing its statutes." *Id.*

66. The INA and Section 1225 in particular protect the states' interest by mandating the detention or return to Mexico of aliens who would otherwise impose costs on the states.

67. Accordingly, "[t]he interests the states seek to protect fall within the zone of interests of the INA." *Texas*, 809 F.3d at 193.

C. The termination of MPP violated the APA

68. 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). This means "[f]ederal administrative agencies are required to engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (internal marks omitted). To do so, "the 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.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

69. Review under the APA's arbitrary and capricious standard is "highly deferential." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983). District courts must "accord the agency's decision a presumption of regularity" and "are prohibited from

AMERICAN OVERSIGHT

substituting [the court's] judgment for that of the agency." *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985).

70. "Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Garner*, 767 F.2d at 116 (quoting *State Farm*, 463 U.S. at 50). This "record rule" normally dictates that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

71. But courts allow extra-record evidence when it is necessary to determine whether the agency "considered all the relevant factors." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981).[9]

72. If a court finds that an administrative agency failed to engage in reasoned decisionmaking, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

1. DHS ignored critical factors

73. "Agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan*, 576 U.S. at 750 (internal marks omitted). Although the June 1 Memorandum claims that Defendants "reviewed all relevant evidence and weighed the costs and benefits of" their decision, AR 006, an agency merely "[s]tating that a factor was considered, however, is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Courts "do not defer to the agency's conclusory or unsupported suppositions." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010). Rather, the Court "must

[9] See ECF No. 76 at 11–12. There, the Court discussed the applicable exceptions to the "record rule" and found that Plaintiffs may submit extra-record evidence on its APA claims.

AMERICAN OVERSIGHT

make a "searching and careful" inquiry to determine if [DHS] actually *did* consider [the relevant factors]. *Getty*, 805 F.3d at 155 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)) (emphasis in original).

74. Defendants failed to consider several critical factors.

75. First, the Secretary failed to consider several of the main benefits of MPP. As the Court stated above in the findings of fact, DHS had previously found that "aliens without meritorious claims — which no longer constitute[d] a free ticket into the United States — [were] beginning to voluntarily return home." AR 684. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." AR 687.

76. The June 1 Memorandum never once mentions these benefits. At the very least, the Secretary was required to show a reasoned decision for discounting the benefits of MPP. Instead, the June 1 Memorandum does not address the problems created by false claims of asylum or how MPP addressed those problems. Likewise, it does not address the fact that DHS previously found that "approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges," App. 303, and that MPP discouraged such aliens from traveling and attempting to cross the border in the first place. AR 687.

77. To be sure, DHS could have determined, "in the particular context before it, that other interests and policy concerns outweigh[ed] any [benefits MPP had]. Making that difficult decision was the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914.

78. By ignoring its own previous assessment on the importance of deterring meritless asylum applications without "a reasoned analysis for the change," Defendants acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 42.

AMERICAN OVERSIGHT

79. Second, the Secretary also failed to consider the warnings by career DHS personnel that "the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally" cross the border. App. 399.[10] This is all the more important because the Secretary had the opportunity to see if the warnings were predictive because the Secretary suspended enrollments in MPP on January 20, 2021. From that date until June 1, 2021 when MPP was permanently terminated, the Secretary had the opportunity to observe the ever-increasing number of border encounters. U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP (Aug. 3, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters. But the Secretary never discussed the rise in border encounters in the June 1 Memorandum or discussed why the warnings by career DHS personnel were misguided or incorrect even as the data appeared to show that the career officials were, in fact, prescient.

80. Third, the Secretary failed to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law. The Court has already found that the states face fiscal harm from the termination of MPP. But the fact that Plaintiffs suffer fiscal injuries does not indicate the June 1 Memorandum is arbitrary and capricious. Rather, it is the fact that the agency did *not* consider the costs to the States *at all*.

81. Fiscal burdens on states are "one factor to consider" — even if the agency could conclude that "other interests and policy concerns outweigh" those costs. *Regents*, 140 S. Ct. at 1914 (listing possible valid reliance interests, including damage to a state's coffers; "State and local governments could lose $1.25 billion."). But once again, even though "[m]aking that difficult decision was the agency's job, [] the agency failed to do it." *Id.*

[10] The briefing materials from the career officials were not part of the administrative record.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003057

82. Moreover, the Secretary failed to address whether the States had any "reliance interests" in the ongoing implementation of MPP. "When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Id.* at 1913 (*Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). "It would be arbitrary and capricious to ignore such matters." *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 1800).

83. Fourth, the Secretary also failed to meaningfully consider more limited policies than the total termination of MPP. "When an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51) (internal marks omitted). The entirety of the Secretary's reasoning in not modifying MPP is contained in a single sentence: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR 005. The Secretary does not identify a single example of what a modified MPP would look like or what kind of investment would be needed to modify or scale back MPP. Courts "do not defer to the agency's conclusory or unsupported suppositions." *United Techs. Corp.*, 601 F.3d at 562.

2. DHS's given reasons were arbitrary

84. On the other hand, one of the key reasons the Secretary gave for terminating for MPP is arbitrary. In discounting the expeditious pace at which MPP completed removal proceedings, the Secretary stated:

AMERICAN OVERSIGHT

> It is certainly true that some removal proceedings conducted pursuant to MPP were completed more expeditiously than is typical for non-detained cases, but this came with certain significant drawbacks that are cause for concern. The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions for me* about the design and operation of the program.
>
> AR 004 (emphasis added).

85. Certainly, the June 1 Memorandum was concerned about the rate of *in absentia* removals, which were around 44 percent under MPP. And that concern was a key factor in the Secretary's decision to terminate MPP.

86. But the June 1 Memorandum never provides any reason why DHS determined that *in absentia* removals resulted from aliens abandoning *meritorious* asylum claims when DHS previously concluded that *in absentia* removals were a result of aliens abandoning *meritless* claims. AR 684 ("Moreover, aliens without meritorious claims . . . are beginning to voluntarily return home."). Instead, the June 1 Memorandum states only that this data "raises questions." AR 004. But it is the Secretary's job to answer such questions. *Regents*, 140 S. Ct. at 1914.

87. It is true that "the APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). But it is also true that the agency must *actually reach* some sort of conclusion. *State Farm*, 463 U.S. at 52 (("Rescission of [agency action] would not be arbitrary and capricious simply because there was no evidence in direct support of the agency's *conclusion* . . . the agency must then exercise its judgment in moving from the facts and probabilities on the record *to a policy conclusion*.") (emphasis added).

88. Merely noting the presence of "questions" provides no "justification for rescinding [MPP] before engaging in a search for further evidence" that could answer those questions. *Id.*; *see also*

AMERICAN OVERSIGHT

Whitman-Walker Clinic, Inc. v. HHS, 485 F. Supp. 3d 1, 44 (D.C. Cir. 2020) (finding agency action arbitrary when the agency "took no position whatsoever on the actual effects that a [policy change] would have").

89. Besides assuming without evidence that the 44% *in absentia* rate was attributable to MPP, the Secretary never explained why 44% is itself an unacceptably high number. The June 1 Memorandum does not consider any relevant comparator for determining whether the rate of in absentia removal orders under MPP was unusually high. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data.").

90. The federal government's data shows similarly high rates of *in absentia* removals *prior to* implementation of MPP. Executive Office for Immigration Review, Adjudication Statistics: *Comparison of* In Absentia *Rates*, https://www.justice,gov/eoir/page/file/1153866/download. For example, the *in absentia* rate was 42% in 2015 and 43% in 2017. *Id.* Failing to exam the relevant data is arbitrary and capricious. Again, "the agency must examine the relevant data." *State Farm*, 463 U.S. at 43.

91. In their briefing, Defendants posit a new theory not mentioned in the June 1 Memorandum. ECF No. 63 at 32–33; *but see Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1014 (5th Cir. 2019) (A court "may uphold agency action only on the grounds that the agency invoked when it took the action."). Defendants argue that 44 percent of MPP cases resulted in *in absentia* removal orders, while only 11 percent of non-MPP cases resulted in *in absentia* orders during the same time period. *Id.* at 33. And the disparity between MPP and non-MPP *in absentia* removal orders is evidence of the ineffectiveness of the program in deterring fraudulent claims. *Id.*

92. But even if the Court considered this argument, it is not persuasive. A higher rate of *in absentia* removal is consistent with DHS's findings that MPP reduced the "perverse incentives" to

AMERICAN OVERSIGHT

pursue meritless asylum applications. There is nothing in the record that provides any analysis or reasoning explaining how higher *in absentia* removals resulted from aliens abandoning meritorious, rather than unmeritorious, asylum claims as DHS had previously found. AR 684 ("Moreover, aliens without meritorious claims — which no longer constitute a free ticket into the United States — are beginning to voluntarily return home."); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("If the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must offer "a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy.").

93. Another of the Secretary's stated conclusions is arbitrary. In the June 1 Memorandum, the Secretary justified, in part, terminating MPP because of the court closures caused by the COVID-19 pandemic:

> As immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021, DHS spent millions of dollars each month to maintain facilities incapable of serving their intended purpose. Throughout this time, of course, tens of thousands of MPP enrollees were living with uncertainty in Mexico as court hearings were postponed indefinitely. As a result, any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.

94. The Secretary's reasoning is without any merit. Even according to the June 1 Memorandum, immigration courts were reopened by the end of April 2021. *Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic.

3. DHS failed to consider or acknowledge the effect terminating MPP would have on its compliance with Section 1225

95. As detailed more below, the June 1 Memorandum failed to consider the effect terminating MPP would have on DHS's ability to detain aliens subject to *mandatory* detention under Section 1225.

AMERICAN OVERSIGHT

96. DHS had previously recognized that "[t]he law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings." AR 682. But "resource constraints during the crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable." *Id.*

97. MPP addressed the resource problem by reducing the number of aliens DHS would have to detain by returning certain aliens to Mexico. *Id.*; AR 687. In terminating MPP, the Secretary was required to consider whether DHS could meet its statutory obligation to detain aliens seeking asylum without MPP as a tool. This the Secretary did not do.

98. Not once did the June 1 Memorandum discuss DHS's mandatory-detention obligation. In fact, a perusal of the *entire* administrative record shows *zero* evidence of DHS's detention capacity. Trial Tr. 114 (DHS counsel: "the [administrative] record doesn't contain *any* information about detention capacity.") (emphasis added). By "fail[ing] to consider an important aspect of the problem," the Secretary acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

99. For the above stated reasons, Defendants' termination of MPP was arbitrary and capricious and in violation of the APA. Accordingly, the Court concludes that Plaintiffs' APA claim is meritorious.

D. The termination of MPP causes Defendants to violate Section 1225

100. The Court begins by quickly re-summarizing the relevant statutory framework.

101. Section 1225 provides that if an immigration officer determines that an alien subject to expedited removal *does not* have a credible fear of persecution, the alien "*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added).

AMERICAN OVERSIGHT

102. An alien subject to expedited removal and determined by an immigration officer to have a credible fear of persecution "*shall be detained* for further consideration of the application for asylum." § 1225(b)(1)(B)(ii) (emphasis added).

103. An alien seeking admission and not subject to expedited removal, whom an examining immigration officer determines is not clearly and beyond a doubt entitled to be admitted, "*shall be detained*" for removal proceedings. § 1225(b)(2)(A) (emphasis added).

104. Aliens who are not subject to expedited removal and arrive on land from a foreign territory contiguous to the United States may be returned by the government to that territory pending asylum proceedings as an alternative to detention. § 1225(b)(2)(C); AR 682.

105. MPP used this statutory authority to return aliens to Mexico pending their removal proceedings. AR 682.

106. Accordingly, Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory. Failing to detain or return aliens pending their immigration proceedings violates Section 1225.[11]

107. Without MPP, Defendants only remaining option under Section 1225 is mandatory detention. But DHS admits it does not have the capacity to meet its detention obligations under Section 1225 because of "resource constraints." AR 682; App. 330 n. 7 ("Continued detention of

[11] DHS does have the discretion to parole some aliens. But parole is available "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Nor is parole intended "to replace established refugee processing channels." App. 336. By enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress "specifically narrowed the executive's discretion" to grant parole due to "concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 & n.15 (2d Cir. 2011). Any class-wide parole scheme that paroled aliens into the United States simply because DHS does not have the detention capacity would be a violation of the narrowly prescribed parole scheme in section 1182 which allows parole "only on a *case-by-case* basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). *See also* AR 184 ("The number of asylum seekers who will remain in potentially indefinite detention pending disposition of their cases will be almost entirely a question of DHS's detention capacity, and *not whether the individual circumstances* of individual cases warrant release or detention,' [according to UT law professor Steve] Vladeck.") (emphasis added).

AMERICAN OVERSIGHT

a migrant who has more likely than not demonstrated credible fear is not in the interest of resource allocation or justice.").

108. Under *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them.

109. Accordingly, the Court concludes that Plaintiffs' statutory claim is meritorious as well.

E. The Court does not need to decide Plaintiffs' Take Care Clause claim

110. Because the Court will grant Plaintiffs full relief on their APA and statutory claims, there is no further relief related to the June 1 Memorandum that the Court can grant.

111. Where the Court has made a full disposition of the case without addressing a constitutional claim, it will not address the issue. *See Matal v. Tam*, 137 S. Ct. 1744, 1755 ("We have often stressed that it is important to avoid the premature adjudication of constitutional questions and that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable.") (internal marks and citations omitted).

F. The Agreement with Texas has expired and is therefore moot.

112. Because the Court will grant Plaintiffs full relief on their APA and statutory claims, there is no further relief related to the June 1 Memorandum that the Court can grant.

113. Any further agency action responsive to this opinion shall take place after August 1, 2021, which is when Texas agrees the Agreement was terminated. Therefore, the Agreement will not apply to any new agency action either.

114. The Court accordingly dismisses this claim as moot.

AMERICAN OVERSIGHT

V. REMEDIES

115. Having found Plaintiffs' APA and statutory claims are meritorious, it is the Court's remaining task to craft to proper relief.

A. Vacatur and Remand

116. The APA provides that "[t]he reviewing court *shall* . . . hold unlawful and *set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added).

117. As a textual matter,[12] the mandatory language of the APA has led courts to make remand and vacatur the default remedy for agency action that violates the APA. *United Steel v. Mine Safety and Health Admin.*, 925 F.3d 1279, 1287 (D.C. 2019); *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019) ("[D]istrict courts have a duty to vacate unlawful agency actions."). Remand, without vacatur, is only "generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Assoc. of Mfrs. v. US Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389–90.

118. The D.C. Circuit considers two factors when deciding whether to remand without vacatur: "(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *United Steel*,

[12] Defendants aver that "nothing in section 706(2)'s text specifies whether a rule, if found invalid, should be set side on its *face* or *as applied* to the challenger." ECF No. 93 at 11. And Defendants further argue the Court should adopt the narrower "as-applied" reading of the statute and only set aside agency action as to the named Plaintiffs. But that argument is in error. "The APA empowers courts to determine *rule validity*, not just whether the *application* of the rule is valid." Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. R. 1120, 1133 (2019); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018) ("T]he APA and these organic statutes go further by empowering the judiciary to act directly against the challenged agency action. This statutory power to 'set aside' agency action is more than a mere non-enforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions — in the same way that an appellate court formally revokes an erroneous trial-court judgment."). The question of whether courts should extend relief beyond the named litigants *in the APA context* is a question of *severability*, not a question of whether the APA authorizes such relief — it does. Mitchell, *supra*, at 1013.

AMERICAN OVERSIGHT

925 F.3d at 1287; *accord Cent. & S. W. Servs., Inc. v. E.P.A.*, 220 F.3d 683, 692 n.6 (5th Cir. 2000) ("EPA gave ample reasons for its application of the Rule to the members of the regulated community in general. It simply failed to explain why it refused to grant the national variance to the electric utilities. We conclude that it would be disruptive to vacate application of the Rule to other segments of the industry.").

119. Under the first prong, the Court finds that the deficiencies in the June 1 Memorandum are serious and are unlikely to be resolved on a simple remand. As the Court has found, Defendants failed to consider the main benefits of MPP: (1) MPP deterred aliens, especially from the Northern Triangle, from attempting to illegally cross the border, (2) MPP allowed DHS to avoid systemic violation of Section 1225's detention requirements, and (3) MPP reduced the burden on states caused by tens of thousands of aliens being released.

120. Moreover, DHS *knew* of these failings when it issued the June 1 Memorandum because Plaintiffs first brought suit on April 13, 2021 — nearly two months earlier. DHS had the opportunity to consider Plaintiffs' suit and engage in reasoned decisionmaking to avoid the flaws the Court has identified in this opinion.

121. Additionally, the June 1 Memorandum is not only arbitrary and capricious for a lack of reasoned decisionmaking, but it is also substantively unlawful because, in these circumstances, termination of MPP causes Defendants to systemically violate Section 1225. It will continue to be unlawful to terminate MPP until DHS has the capacity and willingness to detain immigrants claiming asylum under Section 1225.

122. Under the second prong, the Court finds vacatur will not be unduly disruptive. In their supplemental briefs addressing remedies, Defendants emphasizes the "chaos" and "disruptive consequences" that would follow vacatur of the June 1 Memorandum. ECF Nos. 70, 93 at 4–7

AMERICAN OVERSIGHT

("An order interfering with DHS's termination of MPP, or otherwise requiring DHS to reinstitute the program, would wreak havoc on the Administration's approach to managing migration in the region, including by undermining the Government's ability to engage in the delicate bilateral (and multilateral) discussions and negotiations required to achieve a comprehensive solution."). The government further states "restarting MPP would 'come at tremendous opportunity cost,' 'draw resources from other efforts,' 'create doubt about the reliability of the United States as a negotiating partner,' 'hamstring the Federal Government's ability to conduct the foreign policy discussions' necessary to manage migration, and 'have significant resource implications and be damaging to our national and economic security.'" *Id.*

123. But these problems are entirely self-inflicted. "Such inconveniences are common incidental effects of injunctions, and the government could have avoided them by delaying preparatory work until the litigation was resolved." *Texas*, 809 F.3d at 187. Here, Texas filed suit challenging the suspension of enrollments in MPP on April 13, 2021, which is nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum. DHS "could have avoided" any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review "until the litigation was resolved." *Id.*[13] Mexico is capable of understanding that DHS is required to follow the laws of the United States which includes the APA and INA.

124. And, as evidenced by Defendants' briefs, DHS seemingly relies on the premise that it *actually terminated* MPP back in January 2021 and has been dismantling the program ever since

[13] The Court notes that only slightly more than two months has passed between the issuance of the June 1 Memorandum and the Court's *final* disposition of this case on the merits.

AMERICAN OVERSIGHT

then, even though the January 20 Memorandum only purported to suspend the enrollment of aliens in MPP.[14]

125. DHS argues, in a brief dated July 7, 2021, that it began acting "to unwind MPP and its infrastructure," *before* the June 1 Memorandum terminating MPP, which is only two months old. ECF No. 70 at 8 ("[N]ew initiatives" to replace MPP have been "in place for nearly *six months*."). Similarly, in the same brief, Defendants stated that re-implementing MPP would be difficult because MPP "had been terminated for *some* time." *Id.* at 9 (emphasis added)

126. Again, in the same brief, Defendants argues that "Mexico had already begun taking action to redeploy resources." *Id.* at 9. But Defendants' citation shows that Mexico was redeploying resources already by April 28, a month *before* DHS issued the June 1 Memorandum. ECF No. 64 at 14. In another portion, Defendants state MPP began being wound down on "February 11, 2021." *Id.* at 17–18. Defendants also state that vacatur would nullify "more than four months of diplomatic and programmatic engagement," ECF No. 70 at 11, even though MPP had only been terminated for one month when that brief was submitted.

127. In other words, DHS's apparent argument is that MPP has been in the process of termination for *months*, far preceeding the actual issuance of the June 1 Memorandum, and it is simply *too late* for a court to vacate their actions. But if the decision to terminate MPP was made far in advance of the June 1 Memorandum, that reduces the entire June 1 Memorandum into *post hoc* arguments for a decision that was already made. *Compare* ECF No. 64 at 5 ("Upon completion of the required review, the Secretary announced his decision to terminate MPP [on June 1, 2021.]") *with id.* at 17 ("[T]he U.S. government announced the wind-down of the MPP policy on February 11, 2021.").

[14] There is no question that the January 20, 2021 Memorandum would have been found to be arbitrary and capricious as there is *no* administrative record or any stated basis for agency action for the Court to review. *See* ECF No. 45.

AMERICAN OVERSIGHT

128. Additionally, DHS's arguments also only relate to the effect vacatur would have on its diplomatic engagements with foreign countries.[15] ECF No. 70 at 7–11.

129. DHS's reliance on the effects of foreign affairs is unpersuasive. DHS's first duty is to uphold *American* law. It cannot just point at diplomatic efforts as an excuse to not follow the APA or fulfill its statutory obligations.

130. Accordingly, Plaintiffs are entitled to vacatur and remand because the June 1 Memorandum violates the APA and is in substantive violation of Section 1225.

B. Injunctive Relief is warranted

131. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). The four factors are: "(1) that [Plaintiffs have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

132. Regarding the first factor, as discussed in the Section on standing, *supra* § IV.A.1, Plaintiffs have shown that they are suffering ongoing and future injuries as a result of the termination of MPP.

[15] At various points, Defendants argue that the Court is unable to redress Plaintiffs' injuries because any relief would be dependent on Mexico's cooperation. *See, e.g.*, ECF No. 913 at 10–11. This is not correct. The United States initiated MPP unilaterally pursuant to U.S. law, not pursuant to bilateral agreement or treaty with Mexico. App. 307. The program was then "implemented and expanded . . . through ongoing discussions with Mexico." *Id.* In other words, MPP was adopted and launched unilaterally, just as it was later terminated unilaterally. App.307; *see also* App.303. And even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing to admit asylum applicants at ports of entry in the first place — before they ever enter the United States.

AMERICAN OVERSIGHT

133. Regarding the second factor, Texas and Missouri are unable to recover the additional expenditures from the federal government. *Texas*, 2021 WL 2096669, at *48 ("[N]o Party has suggested that Texas could recover any of its likely financial injury here, and the Court cannot conceive of any path for Texas to pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm."); *see also Texas*, 328 F. Supp. 3d at 737 (deeming an injury irreparable because "there [was] no source of recompense").

134. Regarding the third and fourth factors,[16] the ongoing and future injuries sustained by Plaintiffs outweigh any harms to Defendants as Defendants have no "interest in the perpetuation of unlawful agency action." *League of Women Voters of United States, v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Rather, there is a "public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994).

135. Moreover, the public interest favors Plaintiffs because the public has an "interest in stemming the flow of illegal immigration." *United States v. Escobar*, No. 2:17-CR-529, 2017 WL 5749620 at *2 (S.D. Tex. Nov. 28, 2017) (citing *United States v. Martinez–Fuerte*, 428 U.S. 543, 556–58 (1976)). And the public has interest in the enforcement of immigration laws, including Section 1225. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat 3359, 3384 (1986) ("[T]he immigration laws of the United States should be enforced vigorously and uniformly.")

[16] Federal courts may consider the third and fourth together as they overlap considerably. *Texas*, 809 F.3d at 187; *Nken v. Holder,* 556 U.S. 418, 435 (2009) ("Once an applicant satisfies the first two factors [for a stay of an alien's removal pending judicial review], the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.").

AMERICAN OVERSIGHT

136. Lastly, the Supreme Court has cautioned that a district court vacating an agency action under the APA should not issue an injunction unless an injunction would "have [a] meaningful practical effect independent of its vacatur." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

137. Here, an injunction is warranted for two reasons. First, an injunction is needed to prevent the continued systemic violation of Section 1225. Second, Defendants have indicated that, *even if* the June 1 Memorandum were declared invalid, they would not necessarily return any aliens to Mexico. ECF No. 63 at 9 ("Reinstating MPP would not *require* DHS to return anyone to Mexico.") (emphasis in original). ECF No. 92 at 47 ("DHS retains discretion to . . . release *all* noncitizens inspected for admission under Section 1225(b)(2)(A) or arrested while present in the United States under Section 1226.") (emphasis added).

138. Defendants are correct in stating that this Court does not have the power to tell a DHS line officer which individual aliens are amenable to MPP and must be enrolled. But Defendants are *incorrect* in arguing this Court has no power to enjoin a "blanket policy" that removes all discretion from line officers to utilize MPP. *Texas*, 2021 WL 2096669, at *51 ("But this injunction does not enjoin *individual* removal decisions. As described above, it enjoins a *blanket* policy that is contrary to law. The Government makes much of its discretion in individual matters . . .. But nothing in this preliminary injunction changes that."); ECF No. 63 at 9 ("Reinstating MPP . . . would merely authorize line-level officers to [return aliens to Mexico] in their discretion.").

139. Lastly, Fifth Circuit precedent dictates that, in immigration related cases, proper relief includes nationwide injunctions. A geographically limited injunction would be improper because federal *immigration* law must be uniform. *Texas*, 809 F.3d at 187–88; *see also Texas*, 2021 WL 2096669, at *52; *Texas*, 2021 WL 247877, at *7–8. Furthermore, a geographically limited

AMERICAN OVERSIGHT

injunction would likely "be ineffective because [aliens] would be free to move among states." *Id.* at 188.

140. Accordingly, the Court will grant the narrowest injunction possible that afford Plaintiffs full relief on their claims.

VI. CONCLUSION

For the reason stated above, the Court finds that Plaintiffs have proven their APA and statutory claims by the preponderance of the evidence. Accordingly, it is **ORDERED**:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **PERMANENTLY ENJOINED** and **RESTRAINED** from implementing or enforcing the June 1 Memorandum.

2. The June 1 Memorandum is **VACATED** in its entirety and **REMANDED** to DHS for further consideration.

3. Defendants are **ORDERED** to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens *because of* a lack of detention resources.

4. To ensure compliance with this order, starting September 15th, 2021, the Government must file with the Court on the 15th of each month, a report stating (1) the total monthly number of encounters at the southwest border; (2) the total monthly number of aliens expelled under Title 42, Section 1225, or under any other statute; (3) Defendants' total detention capacity as well as current usage rate; (4) the total monthly number of "applicants for

AMERICAN OVERSIGHT

admission" under Section 1225; (5) the total monthly number of "applicants for admission" under Section 1225 *paroled* into the United States; and (6) the total monthly number of "applicants for admission" under Section 1225 released into the United States, *paroled or otherwise*.

5. This injunction is granted on a nationwide basis.

6. Nothing in this injunction requires DHS to take any immigration or removal action nor withhold its statutory discretion towards any individual that it would not otherwise take.

7. The Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this permanent injunction.

8. The Court **STAYS** the applicability of this opinion and order for **7 days** to allow the federal government time to seek emergency relief at the appellate level.

SO ORDERED.

August 13, 2021.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

AMERICAN OVERSIGHT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA Plaintiff, v. GUSTAVO CARRILLO-LOPEZ, Defendant.	Case No. 3:20-cr-00026-MMD-WGC ORDER

I. SUMMARY

On June 25, 2020, Defendant Gustavo Carrillo-Lopez was indicted on one count of deported alien found in the United States in violation of 8 U.S.C. § 1326(a) & (b) ("Section 1326"). (ECF No. 1.) Before the Court is Carrillo-Lopez's motion to dismiss the indictment (the "Motion") on the grounds that Section 1326 violates the equal protection guarantee of the Fifth Amendment under the standard articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).[1] (ECF No. 26.) On January 22, 2021, the Court heard oral argument on the Motion (ECF No. 39 ("Oral Argument")), and on February 2, 2021, the Court held an evidentiary hearing (ECF Nos. 48, 49 (the "Hearing").[2] Because Carrillo-Lopez has established that Section 1326 was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx persons, and the government fails to show that Section 1326 would have been enacted absent racial animus—and as further discussed below—the Court will grant the Motion.

[1]The government responds. (ECF No. 29.) Carrillo-Lopez replies. (ECF No. 30.) Carrillo-Lopez filed two supplements to the Motion. (ECF Nos. 31, 33.)

[2]At the Hearing, Carrillo-Lopez called two defense experts: Professor Kelly Lytle Hernández and Professor Benjamin Gonzalez O'Brien. The Court ordered both parties to file post-hearing briefs. (ECF Nos. 50 (Carrillo-Lopez brief); 51 (government brief).)

AMERICAN OVERSIGHT

II. DISCUSSION

Having considered the briefing, arguments of counsel, and expert testimony of Professors Benjamin Gonzalez O'Brien and Kelly Lytle Hernández, the Court ultimately grants the Motion. First, the Court will explain the applicable standard of review: the test outlined in *Arlington Heights*. Next, the Court will determine whether Carrillo-Lopez has met his burden. Because Carrillo-Lopez has demonstrated that Section 1326 disparately impacts Latinx people and that the statute was motivated, at least in part, by discriminatory intent, the Court finds that he has. Finally, the Court reviews whether the government has shown that Section 1326 would have been enacted absent discriminatory intent. Because the government fails to so demonstrate, the Court finds its burden has not been met and that, consequently, Section 1326 violates the Equal Protection Clause of the Fifth Amendment.

A. *Arlington Heights* applies to Section 1326.

As a preliminary matter, the Court must determine which standard to apply. The parties dispute, but the Court finds that the test outlined in *Arlington Heights* applies to criminal immigration laws such as Section 1326.

Under the Fifth Amendment's equal protection guarantee, a law can violate equal protection in three ways: (1) a law can discriminate on its face (*see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967)); (2) authorities can apply a facially neutral law in a discriminatory manner (*see, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); or (3) a legislature may enact a facially neutral law with a discriminatory purpose in a way that disparately impacts a specific group (*see, e.g.*, *Arlington Heights*, 429 U.S. at 265-68).

Carrillo-Lopez argues that Section 1326 violates his right to equal protection, specifically as articulated in *Arlington Heights.* The government counters that the statute should not be assessed under an equal protection framework because Congress' plenary power over immigration subjects immigration laws such as Section 1326 to a highly deferential standard of review. (ECF No. 29 at 7-11 (citing *Kleindienst v. Mandel*, 408

AMERICAN OVERSIGHT

U.S. 753, 765 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).)[3] The government asserts that criminal immigration laws are to receive the same deferential review, or rational bias review. (*Id.* at 10-11 (citing *U.S. v. Hernandez-Guerrero,* 147 F.3d 1075, 1078 (9th Cir. 1998); *U.S. v. Ruiz-Chairez,* 493 F.3d 1089 (9th Cir. 2007); *U.S. v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995)).)

Arlington Heights applies here. As an initial matter, the Supreme Court has held that greater protections under the Fifth Amendment necessarily apply when the government seeks to "punish[] by deprivation of liberty and property." *Wong Wing v. United States,* 163 U.S. 228, 237 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). The Court is unpersuaded that a criminal law enacted by Congress is free from constitutional equal protection constraints, even if the offense relates to immigration.

The federal government's plenary power over immigration does not give it license to enact racially discriminatory statutes in violation of equal protection. The Ninth Circuit Court of Appeals and a plurality of the United States Supreme Court declined to adopt the standard advanced by the government in race-based equal protection challenges of immigration decisions by the executive, and instead applied *Arlington Heights*. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.,* 908 F.3d 476, 518-20 (9th Cir. 2018), *rev'd in part, vacated in part sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891 (2020));[4] *see also Ramos v. Wolf*, 975 F.3d 872, 896-99 (9th Cir. 2020) (declining to apply a more deferential standard in favor of *Arlington Heights*). In both *Regents* and *Wolf,* the Ninth Circuit distinguished *Trump v. Hawaii,* 138

[3]The government describes at length how the "facially legitimate and bona fide" test initially laid out in *Mandel* and *Fiallo* was later held to be equivalent to the rational basis test, arguing that rational basis applies here. (*Id.* at 9 (citing *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995)).)

[4]On review, a plurality of the Supreme Court agreed with the Ninth Circuit that *Arlington Heights* applied. *See Dep't of Homeland Sec.* 140 S. Ct. at 1915-16. Ultimately, the plaintiff's claims were rejected on other grounds. *Id.*

AMERICAN OVERSIGHT

S. Ct. 2392 (2019), where the Court applied a more deferential standard to an establishment clause challenge of an executive order concerning immigration. Specifically, the Ninth Circuit found that the standard applied in *Trump* did not similarly apply to equal protection challenges because it differed "in several potentially important respects, including the physical location of the plaintiffs within the geographic United States, the lack of national security justification for the challenged government action, and the nature of the constitutional claim raised." *Regents*, 908 F.3d at 520; *see also Wolf*, 975 F.3d at 895 ("[T]he deferential standard of review applied in *Trump v. Hawaii* turned primarily on the Court's recognition of the fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference.").

The government's counterargument is not persuasive. The Ninth Circuit recognized a difference between situations that invoke the President's expansive executive authority "to respond to changing world conditions" in matters of national security and the Court's mandate to ensure all people are afforded equal protection under the law. *See Wolf*, 975 F.3d at 896 (quoting *Trump*, 138 S. Ct. at 2419). That Carrillo-Lopez challenges a criminal law—which goes to the "nature" of the Fifth Amendment's protective concern—applicable to those within the United States, rather than an immigration policy addressing national security concerns of those not within the United States, is further evidence that his equal protection challenge should be reviewed under a more heightened standard than the rational-basis standard that the government proposed.[5]

Moreover, the three Ninth Circuit cases the government relies on to argue that immigration laws are subject to rational-basis review despite "§1326's criminal character"

[5]If anything, the Supreme Court's justification in *Trump v. Hawaii* for increased deference is inapplicable to Congressional action, as the Court's review does not directly implicate the executive's core function. *See Ramos*, 975 F.3d at 895 ("[T]he deferential standard of review applied in *Trump v. Hawaii* turned primarily on the Court's recognition of the fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference.").

AMERICAN OVERSIGHT

fail to support such an argument. (ECF No. 30 at 10.) First, *Hernandez-Guerrero* establishes only that Congress did not exceed its constitutional authority under its immigration powers when it enacted Section 1326. *See* 147 F.3d at 1078. The Ninth Circuit did not hear or address an equal protection challenge to Section 1326 in *Hernandez-Guerrero*, much less determine which standard of review applies. Moreover, both *Lopez-Flores,* 63 F.3d at 1475, and *Ruiz-Chairez*, 493 F.3d at 1091, simply establish that a challenged alienage classification qualifies for rational-basis review. But here, race and national origin, not alienage, is the classification in dispute.

Finally, the Court finds persuasive the fact that several district courts have similarly applied *Arlington Heights* to race-based immigration challenges brought by individuals residing in the United States,[6] including when reviewing equal protection challenges to Section 1326.[7]

Considering the above, the Court finds that Section 1326 must be reviewed under the *Arlington Heights* equal protection framework.

B. Carrillo-Lopez has met his burden under *Arlington Heights.*

Having found that *Arlington Heights* applies, the Court must now determine whether Carrillo-Lopez has met his burden. The Court finds that he has.

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[6] *See, e.g.*, *La Clinica de la Raza v. Trump*, -- F. Supp. 3d --, Case No. 19-cv-04980-PJH, 2020 WL 6940934, at *17 (N.D. Cal. Nov. 25, 2020); *California v. U.S. Dep't of Homeland Sec.*, 476 F. Supp. 3d 994, 1022-23 (N.D. Cal. 2020); *Cook Cnty., Illinois v. Wolf*, 461 F. Supp. 3d 779, 788-89 (N.D. Ill. 2020); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018); *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018).

[7] *See United States v. Machic-Xiap*, --F. Supp. 3d. --, Case No. 3:19-cr-407-SI, 2021 WL 3362738, at *10-16 (D. Or. Aug. 3, 2021) (applying *Arlington Heights* to an equal protection challenge to § 1326); *United States v. Wence*, Case No. 3:20-cr-0027, 2021 WL 2463567, at *2-4 (D.V.I. Jun. 16, 2021) (same). *But see United States v. Gutierrez-Barba*, Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *5 (D. Ariz. May 25, 2021) (applying rational-basis review after construing defendant's challenge as relating to alienage).

AMERICAN OVERSIGHT

Under *Arlington Heights*, the moving party has the burden of demonstrating: (1) disparate impact;[8] and (2) that "racially discriminatory intent or purpose" was a "motivating factor in the decision." 429 U.S. at 265-68. Determining discriminatory intent requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including, but not limited to: "[t]he historical background of the decision"; "[t]he legislative or administrative history"; "[t]he specific sequence of events leading to the challenged action"; "[d]epartures from normal procedural sequence"; or whether the impact of the law "bears more heavily on one race than another." *Id.* at 266-68. If the movant demonstrates that a racially discriminatory intent or purposes was a motivating factor in the challenged decision, the burden then shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n. 21.

Before Section 1326 was enacted in 1952, Congress first criminalized unlawful reentry in 1929 as part of the Undesirable Aliens Act ("the Act of 1929").[9] *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, ch. 690, 70 Congress, 45 Stat. 1551 (1929). The Immigration and Nationality Act of 1952 ("INA"), often referred to as The McCarran-Walter Act ("McCarran-Walter Act"), again codified the unlawful reentry provision first passed in 1929 under Title 8 of the United States Code, at 8 U.S.C.A. § 1326.[10] Section 1326 was

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[8]The Court opined that "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* (quoting *Washington v. Davis,* 426 U.S. 229, 242 (1976)).

[9]In relevant part, the statute reads: "That (a) if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after the enactment of this act, and if he enters or attempts to enter the United States after the expiration of sixty days after the enactment of this act, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than $1,000 or by both such fine and imprisonment." Undesirable Aliens Act, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (1929).

[10]The recodified statute reads: "Any alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at

AMERICAN OVERSIGHT

subsequently amended in 1988, 1990, 1994, and 1996, always to increase its deterrent value.[11]

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any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both." Immigration and Nationality Act, Pub. L. No. 82-414, § 276, 66 Stat. 229 (codified at 8 U.S.C. § 1326 (1952)).

[11]Section 1326 was first amended in the Anti-Drug Abuse Act of 1988 by adding subsection (b) which created increased penalties for those with prior felony convictions. *See* Pub. L. 100-690, title VII § 7345(a), 102 Stat. 4471 (Nov. 18, 1988) (codified at 8 U.S.C. § 1326 (1988)). The new Section 1326(b) provided that a person with a prior felony conviction who reenters may be imprisoned up to five years, and a person with an aggravated felony conviction may be imprisoned up to 15 years.

In 1990, the Immigration Act of 1990 removed the $1,000 cap and authorized greater fines under Title 18. *See* Pub. L. 101-649, title V § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990).

In 1994, the Violent Crime Control and Law Enforcement Act of 1994 again increased penalties for violating Section 1326 and included those with misdemeanor convictions in the heightened penalty category. *See* Pub. L. 103-322, title XIII § 130001(b), 108 Stat. 2023 (Sept. 13, 1994) (codified at 8 U.S.C. § 1326 (1994)). Specifically, the 1994 Amendments increased the imprisonment time for those with a prior felony conviction from up to five years to up to 10 years, and for those with a prior aggravated felony conviction from up to 15 years to up to 20 years. The amendment also included persons with "three or more misdemeanors involving drugs, crimes against the person, or both" in the group with the penalty of up to 10 years imprisonment. Finally, the amendment broadened the definition of 'deportation' to include "any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law." *Id.*

In 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") again amended Section 1326. Pub. L. 104-132, title IV §§ 401(c), 438(b), 441(a), 110 Stat. 1267-68, 1276, 1279 (Apr. 24, 1996) (codified at 8 U.S.C. § 1326 (2000)). AEDPA added subsections (c) and (d) to Section 1326. Subsection (c) mandates incarceration for any person who reenters after they were deported by judicial order, and subsection (d) limits collateral attack of the underlying deportation order. The AEDPA amendments also added § 1326(b)(3), which allowed persons excluded from entry under § 1225(c) to be imprisoned for a period of 10 years, which may not be served concurrently with any other sentence.

Again in 1996, as part of the Omnibus Consolidated Appropriations Act of 1997, Congress added a fourth paragraph to § 1326(b). *See* Pub. L. 104-208, div. C title III §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324(a), 324(b); 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629 (Sept. 30, 1996). Section 1326(b)(4) added a penalty for persons convicted of nonviolent offenses who had been removed while on parole, supervised release, or probation, who then reenter. The penalty is up to 10 years'

AMERICAN OVERSIGHT

Carrillo-Lopez relies on the *Arlington Heights* factors to argue that racial animus—as evidenced through the historical background, legislative history, sequence of events leading up to passage—was, at minimum, a motivating factor in the passage of Section 1326 that disparately impacts Mexican and Latinx individuals. That racial animus would make Section 1326 presumptively unconstitutional under *Arlington Heights.* (ECF No. 26 at 2.) The government responds that "even assuming Congress's 1929 illegal reentry law was wholly the result of impermissible racial animus, well-established doctrine holds that such legislative history would have no bearing on the law enacted by a subsequent Congress in 1952." (ECF No. 29 at 2.)

First, the Court finds that Section 1326 does indeed disparately impact Mexican and Latinx individuals. The Court further finds, as other district courts have, that discriminatory intent motivated the criminal unlawful reentry statute in 1929.[12] But the Court further concludes the evidence Carrillo-Lopez provides demonstrating the animus which tainted the Act of 1929, along with other proffered evidence contemporaneous with the INA's enactment in 1952, is sufficient for Carrillo-Lopez to meet his burden that discriminatory intent was a motivating factor of both the 1929 and 1952 enactments.

Because the Court finds Carrillo-Lopez has met his burden under *Arlington Heights*, the burden shifts to the government to prove that the statute would have passed even if the impermissible purpose had not been considered. Because the government fails to provide sufficient evidence to meet its burden, the Court will grant the Motion.

1. Disparate Impact on Latinx Individuals

The Court determines first that Section 1326 disparately impacts Latinx individuals. In some "rare" instances, there is a "clear pattern unexplainable on grounds other than

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imprisonment and a fine. These amendments also further broadened the scope of persons to which Section 1326 applied by replacing the 1994 definition of deportation with 'removal,' which "includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under with Federal or State law." *Id.*

[12]*See, e.g.*, *Machic-Xiap*, 2021 WL 3362738 at *1 ("[T]he Court finds that racism has permeated the official congressional debate over United States immigration laws since the late 19th and early 20th centuries, including the 1929 Act.")

AMERICAN OVERSIGHT

race" that a statute would affect some groups and not others, but "absent a pattern [of disparate impact] as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other factors." 429 U.S. 252 at 266. Carrillo-Lopez acknowledges, and in fact does not contend, that disparate impact alone in this case is enough to meet his burden. Rather, he proffers evidence of both disparate impact and discriminatory intent to meet his burden under *Arlington Heights.* The Court finds he has met his burden as to both.

Carrillo-Lopez argues, convincingly, that Section 1326 disparately impacts Mexican and Latinx defendants. (ECF No. 26 at 20.) While no publicly available data exists as to the national origin of those prosecuted under Section 1326, over 97% of persons apprehended at the border in 2000 were of Mexican decent, 86% in 2005, and 87% in 2010. (*Id.* (citing *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, 2007-2019* (URL omitted).) In lieu of prosecution data, Carrillo-Lopez argues that immigration policy under President Trump and Department of Justice directives to prosecuting attorneys demonstrate that many, if not all, apprehensions are ultimately prosecuted.[13] Carrillo-Lopez then compares the data to other successful challenges under *Arlington Heights* to show that they meet the necessary standard of disproportionality. (*Id.*)

Importantly, the government does not dispute that Section 1326 bears more heavily on Mexican and Latinx individuals. Instead, the government attributes that impact to other causes—geography and proportionality. Specifically, the government argues that the stated impact is "a product of geography, not discrimination"[14] and the statistics are

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[13]"The Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. And the Department of Justice will take up those cases." (ECF No. 26 at 20-21 (citing U.S. Dep't of Justice, Statements of AG Sessions (Apr. 6, 2018) (URL omitted)).)

[14]"Those numbers are neither surprising nor illuminating of Congress's motives in the 1920s. Indeed, if it were enough to state an equal protection claim that a broad-scale immigration law disparately affected individuals of any particular ethnicity—including those from a country sharing 1,954 miles of border with the United States—virtually any

AMERICAN OVERSIGHT

rather "a feature of Mexico's proximity to the United States, the history of Mexican employment patterns, and other socio-political and economic factors that drive migration from Mexico to the United States–not discrimination." (ECF No. 29 at 13, 25 (citing *Regents,* 140 S. Ct. at 1915-16).) As to "proportionality" it argues that "it makes sense that Mexican citizens comprised a high percentage of illegal entry defendants, given the suggestion that they made up a disproportionately high percentage of the overall illegal alien population." (ECF No. 29 at 14.) The Court is not persuaded.

First, the test for disparate impact only requires evidence that Section 1326 "bears more heavily on one race than another," a much less stringent standard than the government suggests. (ECF No. 30 at 12 (citing *Arlington Heights,* 429 U.S. at 266).) Carrillo-Lopez has met this standard by showing that Section 1326 bears more heavily on Mexican and Latinx individuals. From 1929 to 1939, the number of border crossing crimes increased substantially, making up anywhere from 84% to 99% of defendants." (ECF No. 26 at 17.) Over the course of a decade, well over 80% of border crossing apprehensions were those of Mexican or Latinx heritage.[15] These numbers are in line with other successful *Arlington Heights* challenges. *See Ave. 6E Investments, LLC v. City of Yuma, Ariz.,* 818 F.3d 493, 505-06 (finding disparate impact where a concentration of most low-income housing is in neighborhoods that are 75% Hispanic); *Arce v. Douglas,* 793 F.3d 968, 977 (9th Cir. 2015) (finding disparate impact where 90% of enrollees at a targeted program were of Mexican or Hispanic origin); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 704 (9th Cir. 2009) (finding disparate impact where 71% of Latino areas were excluded from benefits while extending benefits to areas that were only 48% Latino).

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such law could be challenged on that ground." (ECF No. 29 at 13 (citing *Regents,* 140 S. Ct. at 1915-16).)

[15]And as noted, those apprehensions are being prosecuted. *See* U.S. Dep't of Justice, Statements of AG Sessions (Apr. 6, 2018) (URL omitted) ("The Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. And the Department of Justice will take up those cases.").

AMERICAN OVERSIGHT

The government also attempts to use the Supreme Court's reasoning in *Regents* to support its proportionality argument, but that reliance is misplaced.[16] In *Regents,* the Court found that disparate impact *alone* had not been demonstrated. But, as discussed above, Carrillo-Lopez does not attempt to meet his burden on disparate impact alone, but through a showing of disparate impact coupled with intent. Because the Court in *Regents* found that the plaintiffs had failed to demonstrate discriminatory intent, whereas this Court ultimately finds that Carrillo-Lopez has demonstrated both a disparate impact along with discriminatory intent, *Regents* is inapposite.

Second, the Court is unpersuaded by the government's argument that geography explains disparate impact. As Carrillo-Lopez notes (ECF No. 30 at 13-14), the Ninth Circuit has previously found disparate impact in situations where "geography" might arguably explain the disparity. *See Comm. Improvement,* 583 F.3d at 704-06 (finding that planning decisions made with racist purpose in predominantly Latino neighborhoods disparately impacts Latino people); *Arce,* 793 F.3d at 978 (finding that education decisions with racist purpose in Latino city has disparate impact on Latino students); *D.N.C. v. Hobbs,* 948 F.3d 989, 1004-06 (9th Cir. 2020) (en banc) (finding that voting decisions with racist purpose in state where American Indian, Latino, and Black neighborhoods have limited transit and mail access disparately impacts those communities). Moreover, the government's argument is circular and inconclusive. It cannot be the case that the mere over-policing of certain locations—here the Southern border as opposed to the Northern border—prevents a specific group from raising equal protection challenges. Or that because Mexican citizens will likely make up more unlawful reentries because they are a higher percentage of the overall illegal alien population, they cannot raise equal protection challenges. Ultimately, the law still bears more heavily on

[16] In *Regents*, the Court reasoned that "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds." 140 S. Ct. at 1915.

AMERICAN OVERSIGHT

those individuals than others, which is the standard that Carrillo-Lopez has met here. The Court accordingly finds that Section 1326 disparately impacts Latinx individuals.

2. The Act of 1929 was first enacted with a racially discriminatory purpose.

In his Motion and at the subsequent Oral Argument and Hearing, Carrillo-Lopez submitted significant evidence of the non-exhaustive factors outlined in *Arlington Heights* to argue that the Act of 1929 was passed with discriminatory intent. The government ultimately conceded that discriminatory intent motivated the passage of the Act of 1929.[17] But because the background of the Act of 1929 is relevant to the eventual passage of Section 1326 in 1952, and because the 1952 Congress adopts language from the Act of 1929 almost word for word, the Court will address each of the proffered *Arlington Heights* factors as they relate to the 1929 statute. The Court concludes, as did both parties, that Carrillo-Lopez presents sufficient evidence to demonstrate the Act of 1929 was motivated by racial animus.

a. Historical Background

Arlington Heights permits courts to consider "the historical background of the decision." 429 U.S. at 265-68. Carrillo-Lopez first explains how immigration legislation and racism were intimately entwined in the 1920s. Kelly Lytle Hernández, Professor of History at the University of California, Los Angeles, gives context to that history through a sworn declaration in which she testifies that "the criminalization of unauthorized entry was a racially motivated act." (ECF Nos. 26-2 at 2; 49). Professor Lytle Hernández provided context for the passage of the Act of 1929, explaining that the legislation came on the heels of the National Origins Act of 1924 which "narrow[ed] the pathways of legal immigration" by reserving 96 percent of all quota slots for European immigrants. (ECF

[17]At Oral Argument, the government's counsel stated: "I would say that, yes, the statements from those legislators would be sufficient were we considering the 1929 law, but we're not." (ECF No. 47 at 38.) The Court asked for confirmation—"so you agree that they've offered enough evidence to demonstrate that the 1929 enactment stems from racial animus under *Arlington Heights*"—to which the government's counsel responded, "Yes, your Honor." (*Id.* at 38-39.)

AMERICAN OVERSIGHT

No. 26-2 at 4.) But the National Origins Act exempted immigrants from the Western Hemisphere, in part due to pressures from American industry who relied on Mexican labor. (*Id.*) Nativists and proponents of eugenics argued against this exemption.

At the Hearing, Professor Lytle Hernández emphasized how racial animus "bec[am]e more intense" heading into the 1920s, a period referred to as the "Tribal Twenties," when nativism and eugenics became more widely accepted and began to impact Congressional immigration proposals. (ECF Nos. 49 at 27-28; 26-2 at 5 ("[T]he Nativists in Congress never gave up their quest to end Mexican immigration to the United States. After the passage of the 1924 Immigration Act, they proposed bill after bill attempting to add Mexico to the quota system. Between 1926 and 1930, Congress repeatedly debated the future of Mexican immigration into the United States.").) Additionally, and among other things, Professor Lytle Hernández also addressed the "Juan Crow regime" that developed in the 1920s, "a racialized subjugation system in place that mirrors what [was] happening in the American South." (ECF No. 49 at 32.)

b. Sequence of Events and Legislative History

Courts may also consider "the specific sequence of events leading to the challenged action." *Arlington Heights,* 429 U.S. at 265-68. Professor Lytle Hernández again provided insight into the events surrounding the passage of the Act of 1929, notably the National Origins Act of 1924 which established a quota system based on national origin that specifically exempted immigrants from the Western Hemisphere, including Mexicans. (ECF No. 49 at 27-28.) This exemption resulted in a "pretty rapid turn to focusing on getting Mexican immigrants included on the quota," with two major pieces of legislation attempted in 1926 and 1928, but both protested by "major employers and industries across the west" who were "concerned that they w[ould] be cut off from access to Mexican workers." (*Id.* at 28-30.) Professor Lytle Hernández explained that while employment lobbies won initially, "the nativists [were] furious in Congress . . . so [sought] to pursue this through other means" which ultimately led to the Act of 1929 which criminalizes unlawful entry and reentry." (*Id.* at 28-29.) She concludes that it is her

AMERICAN OVERSIGHT

"professional opinion" that "the illegal reentry provision of the 1929 law was intended to target Latinos." (ECF No. 49 at 34.)

Relatedly, the Court may consider "the relevant legislative or administrative history." 429 U.S. at 265-68. Here, Carrillo-Lopez argues that legislative history "easily clears the low threshold of showing that racism and eugenics were a 'motivating factor' . . ." (ECF No. 26 at 15.) While there was little discussion or debate prior to the Senate's passage of the Act of 1929, the bill was introduced after prior attempts failed. Carrillo-Lopez argues these prior failed attempts clearly indicate racial animus. For example, a House Committee on Immigration and Naturalization hearing on "The Eugenical Aspects of Deportation" included testimony from principal witness Dr. Harry H. Laughlin, a well-known eugenicist who suggested that "immigration control is the greatest instrument which the Federal Government can use in promoting race conservation of the Nation" (ECF No. 26-3 at 11, 19), and compared drafters of deportation laws to "successful breeders of thoroughbred horses" (*id.* at 44). Chairman of the House Immigration and Naturalization Committee, Representative Albert Johnson, then advocated for Congress's use of "the principle of applied eugenics" to reduce crime by "debarring and deporting" people. (*Id.* at 25.) These remarks and earlier debates were essentially incorporated into the 1929 discussion because after the initial legislation failed, a compromise was brokered with the agricultural industry and the bill was resubmitted and quickly passed from the Senate to the House. (ECF Nos. 26 at 14; 26-9 at 2-3; 26-10 at 2 (passed full Senate with relatively little debate, but when presented, Senator Blease remarks that he was "asked to get the measures over to the house [within two days] if I possibly could"); 26-11 at 2-3 (report submitted from the Committee of Immigration and Naturalization to the full House, reading: "the hearings in the Sixty-ninth Congress on the subject matter contained in the bill were exhaustive. Much important testimony was developed.") During debate on the bill in the House, representatives made similar racist remarks, including testimony from Representative Fitzgerald who argued that Mexicans

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003087

were "poisoning the American citizen" because they were of a "very undesirable" class. (ECF No. 26-4 at 8.)

c. Departure from Normal Substantive Considerations

The next *Arlington Height's* factor a court can consider is "the legislature's departure[] from normal procedures or substantive conclusions." 429 U.S. at 265-68. Here, Carrillo-Lopez argues that the "1920s was the first and only era in which Congress openly relied on the now discredited theory of eugenics to enact immigration legislation," with illegal reentry laws as one of "few laws still in effect from that era." (ECF No. 26 at 16.) Further, the discussions departed from typical conclusions underlying immigration law because the "racial vitriol expressed during the debates was directed almost exclusively at Mexicans—even though Canadians were also entering the United States in record numbers." (*Id.* (citing ECF No. 26-4 at 9.))

Taking these factors into account, the Court is persuaded that Carrillo-Lopez has proffered sufficient evidence under the *Arlington Heights* framework to demonstrate that racial animus was a strong motivating factor in the passage of the Act of 1929. The evidence clearly indicates, as both parties and other district courts agree, that the Act of 1929 was passed during a time when nativism and eugenics were widely accepted, both in the country at large and by Congress, and that these racist theories ultimately fueled the Act's passage.

3. The 1952 reenactment did not cleanse Section 1326 of its racist origins and was also motivated by discriminatory intent.

The government argues that evidence relating to the Act of 1929 has "no bearing on the passage of the law [Carrillo-Lopez] actually challenges."[18] (ECF No. 29 at 15.) Instead, the government argues that reenactment of an existing law, in the absence of

[18]The original briefs on the Motion focused on the Act of 1929. (ECF Nos. 26, 29, 30.) Following the Hearing, the Court ordered post-hearing briefing specifically addressing the question of whether the racial animus motivating the Act of 1929 tainted the statute's reenactment in 1952 through the INA. (ECF Nos. 50, 51.)

AMERICAN OVERSIGHT

discriminatory intent, cleanses the law of prior discriminatory motivation.[19] (ECF No. 51 at 4-5.) The government there argues that the history of 1929 is therefore irrelevant to the Court's inquiry under *Arlington Heights* and the Court must limit its attention to the passage of the INA in 1952.

Carrillo-Lopez counters that "the absence of any repudiation of the racial animus that led to the adoption of the statute in 1929 should be construed as the defendant meeting his burden."[20] (ECF No. 50 at 5.) But in the alternative, Carrillo-Lopez argues that he exceeds his burden by further demonstrating that the 1952 Congress not only remained silent, but repeatedly recodified Section 1326 with more punitive measures with knowledge of the law's disparate impact, over a presidential veto addressing the bill's racism, and at a moment in history when Congress was simultaneously passing other legislation disparately impacting Latinx migrants. (ECF No. 50 at 1-2.) The Court will therefore consider whether the racial animus exhibited in the Act of 1929's passage can and did infect Section 1326's enactment in 1952.

While the Court might be persuaded that the 1952 Congress' silence alone is evidence of a failure to repudiate a racially discriminatory taint, the Court need not decide that issue. Instead, the Court finds the evidence that racial animus motivated the Act of 1929 is relevant to the 1952 *Arlington Heights* inquiry in two ways. First, evidence from the 1929 Congress is relevant as historical background for the passage of the INA in 1952. *See Machic-Xiap*, 2021 WL 2021 WL 3362738 at *12 (finding the history of the 1929 statute "strong" historical background evidence). The Court incorporates by reference this prior evidence as evidence of the historical background motivating the passage of Section 1326 in 1952. The Court will further explain below how the other

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[19]The government relies specifically on the Supreme Court's decision in *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and three circuit courts of appeals decisions, *see Hayden v. Paterson,* 594 F.3d 150, 164-68 (2d Cir. 2010); *Johnson v. Governor of State of Florida,* 405 F.3d 1214, 1223-26 (11th Cir. 2005) (en banc*); Cotton v. Fordice,* 157 F.3d 388, 391-92 (5th Cir. 1998).

[20]Specifically, codifications are "either responsive, i.e. reverse[] a prior piece of legislation, or [are] extensive, that is, passed in the context of knowing what the existing statute means and is intended to do, and builds on that." (*Id.*)

AMERICAN OVERSIGHT

Arlington Heights factors also support the finding that Section 1326's enactment was motivated at least in part by discriminatory intent.

But second, the Court finds the government is incorrect in its reliance on *Abbott*, because a prior version of a statute known to be motivated by racial animus may be considered as infecting its present iteration if it was not, in fact, substantially altered. *See Hunter*, 471 U.S. 222, 232-33 (1985) (finding that when a statute's original enactment was clearly motivated by racial animus, later amendments did not "legitimate[]" the provision); *see also Abbott*, 138 S. Ct. at 2324-25 (distinguishing its holding from *Hunter* because the statute in *Abbott* was substantially different from its predecessor and there was no evidence that the reenacting legislature "carried forward the effects of any discriminatory intent"). After the Court addresses the 1952-specific evidence, the Court will explain why the 1952 Congress cannot be presumed to have cured the animus present in 1929.

In light of these reasons, the Court considers that the totality of the evidence demonstrates racial animus motivated the 1952 enactment of Section 1326, regardless of whether silence alone would have been sufficient to demonstrate discriminatory intent.[21]

a. The 1952 enactment of Section 1326 was also motivated by discriminatory intent.

The Court does not rely solely on the evidence from 1929, but also considers contemporaneous evidence from 1952. In evaluating that evidence, the Court looks at the interplay between legislative history and relevant historical evidence. Specifically, the

[21]The Court notes that the authority the government relies upon specifies that courts must presume legislatures act in good faith in redistricting cases. *See Abbott*, 138 S. Ct. at 2324 ("'[I]n assessing the sufficiency of a challenge *to a districting plan*,' a court 'must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus . . . [a]nd the 'good faith of [the] state legislature must be presumed.'") (citing *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995)). Both *Miller* and *Abbott* emphasize the complexity of redistricting in the need for presumption of legislative good faith. The Court is not convinced that reasoning is analogous to this comparatively less complex statutory scheme, especially when animus has been demonstrated and the reenacted statute is nearly identical to its improper predecessor.

AMERICAN OVERSIGHT

Court considers: a relative lack of discussion compared to robust Congressional debate regarding other provisions of the INA; explicit, recorded use of the derogatory term "wetback" by supporters of Section 1326; Congressional silence while increasingly making the provision more punitive; Congress' failure to revise in the face of President Truman's veto statement calling for a reimagination of immigration policy; knowledge of the disparate impact of Section 1326 on Mexican and Latinx people; and passage of the so-called "Wetback Bill" by the same Congress only months prior. The Court recognizes that this evidence is circumstantial, and that each instance may not be as probative when considered alone. But in its totality, the cited evidence is sufficient to demonstrate that racial animus was at least one motivating factor behind the enactment of Section 1326.[22] The evidence specific to the 1952 enactment will be discussed in turn.

i. Silence Compared to Robust Debate on Other Provisions

As stated above, the Court does not now determine if silence alone is enough for Carrillo-Lopez to meet his burden. But the Court does consider whether a lack of debate regarding recodification of Section 1326 in 1952, when other provisions of the INA were debated and discussed, supports Carrillo-Lopez's argument that discriminatory intent was a motivating factor in its reenactment in 1952. The Court finds that it does.

Defense expert Professor Gonzalez O'Brien testified that the contrast between extensive congressional debate about other national origin provisions and the comparative lack thereof around Section 1326 suggests an acceptance of its history. (ECF No. 49 at 181.) Other instances of discriminatory immigration policy, Professor Gonzalez O'Brien notes, prompted the Congress to debate about what was deemed a problematic aspect of the original enactment—including during the 1952 enactment of the

[22]The Court notes that a recent district court decision from this circuit disagrees. *See Machic-Xiap*, 2021 WL 3362738 at *11-14. After considering the same evidence that is now before the Court—Truman's veto statement, the letter from DAG Ford, testimony from Professors Gonzalez O'Brien and Lytle Hernández—the court in that case found that the legislative history of Section 1326 is "inconclusive." *Id.* at *13. But this Court cannot agree that the evidence, when viewed in its totality, is insufficient to demonstrate that racial animus was at least one motivating factor for the passage of Section 1326. The Court explains its reasoning more fully below.

AMERICAN OVERSIGHT

INA.[23] (*Id.* at 180.) Professor Gonzalez O'Brien concludes "that's one of the reasons that I'm willing to say that this is a demonstration of racial—of continued racial animus, is that you're acknowledging in the debate over the McCarran-Walter Act, members of Congress are acknowledging that there are problematic racial aspects to the 1924 Johnson-Reed Act, which comes five years before the Undesirable Aliens Act, and yet they choose to not only recodify the 1326, but to recodify it[] without any examination." (ECF No. 49 at 180-81.)

Professor Gonzalez O'Brien's testimony depicts a Congress that was more concerned with which racial and ethnic groups warranted continued discriminatory exclusion, rather than any desire to confront or revise the nativism reflected in the Act of 1929. As a matter of logic, the 1952 Congress could have either examined that history or ignored it. If the 1952 Congress ignored the express nativist intent behind the Act of 1929, there is no reason to assume that the later enactment arose from some wholly unrelated motivation cleansed from discriminatory intent. If it did not ignore the Act of 1929's history, there was opportunity to either adopt its racial animus or refute its improper motivation and clarify a purpose for the statute that did not violate the Equal Protection Clause. Here, the 1952 Congress remained silent, even when other provisions of the law were being debated. When considered in comparison with the express debate over other racially problematic predecessor statutes, Congress' silence here weighs in favor of establishing Carrillo-Lopez meets his burden.

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[23]In particular, Professor Gonzalez O'Brien notes the continued debate over the use (and allocation) of quotas in the immigration scheme: "we see that debate with the McCarran-Walter Act, I mean the debate over national origins, and the kind of racial aspects of the, of the limits placed on quotas for southern and eastern Europeans. . . you see the continuation of that with the McCarran-Walter Act, and the insertion of tables during committee testimony, the insertion of tables showing that the largest quotas will still go to northern and western Europeans." (ECF No. 49 at 180.) He goes on to note that "in 1965 with debate over the Hart-Celler Act, and the elimination of national quotas and the acknowledgement that the national quota system had been one that was very clearly and explicitly meant to privilege certain groups based on perceptions of superiority and inferiority, particularly—you know, especially with 1924." (*Id.*)

AMERICAN OVERSIGHT

ii. President Truman's Veto

The Court also considers that Congress declined to comment on the racist forebears of Section 1326, even in the face of President Truman's veto of the INA. On June 25, 1952, President Truman vetoed INA, and included a veto statement. (ECF No. 44-1.) President Truman condemned the INA as "legislation which would perpetuate injustices of long standing against many other nations of the world" and "intensify the repressive and inhumane aspects of our immigration procedures." (*Id.* at 3.) Finding that the positive aspects of the INA were "heavily outweighed" by other provisions, President Truman expressed dismay that so much of the INA "would continue, practically without change" discriminatory practices first enacted in 1924 and 1929. (*Id.* at 4.)

On June 27, Congress overrode President Truman's veto and passed the INA. (*Id.*) Carrillo-Lopez argues that Congress' decision to pass the INA over a presidential veto that "explicitly called out the law for its racism" is evidence of racial animus. (ECF No. 50 at 5-6.) While President Truman did not explicitly address racism as to Mexican or Latinx individuals, he commented on the negative implications of expanding the grounds for deportation,[24] and implored Congress to reconsider the INA's passage: "Should we not undertake a reassessment of our immigration policies and practices in the light of the conditions that face us in the second half of the twentieth century? . . . I hope the Congress will agree to a careful reexamination of this entire matter." (ECF No. 44-1 at 10.) President Truman clearly wanted Congress to review the INA and reconsider its objectives, admonishing it was "the time to shake off this dead weight of past mistakes . . . time to develop a decent policy of immigration—a fitting instrument for our foreign policy and a

[24]President Truman specifically criticized the "unnecessarily severe" and inflexible penalties for deportation. (*Id.* at 8.) He continued, "[t]he bill would sharply restrict the present opportunity of citizens and alien residents to save family members from deportation. Under the procedures of present law, the Attorney General can exercise his discretion to suspend deportation in meritorious cases. In each such case, at the present time, the exercise of administrative discretion is subject to the scrutiny and approval of the Congress. Nevertheless, the bill would prevent this discretion from being used in many cases where it is now available and would narrow the circle of those who can obtain relief from the letter of the law. This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief." (*Id.* at 9.)

AMERICAN OVERSIGHT

true reflection of the ideals we stand for, at home and abroad . . .” (*Id.* at 6.) Professor Gonzalez O’Brien confirms that despite the fact that the INA is “sometimes characterized as racially progressive,” President Truman’s veto “explicitly notes” the INA was unnecessarily punitive, and inequitably so. (ECF No. 49 at 116-117).

As another court noted, the veto statement largely objected to the national origin quota system, not Section 1326. *See Machic-Xiap*, 2021 WL 3362738, at *13. But although President Truman did not address Section 1326 specifically, the veto statement represents in no uncertain terms a contemporary admonishment of an overly punitive and discriminatory immigration policy. Truman expressly drew the INA into dialogue with prior immigration legislation, from both 1924 and 1929, which were concededly racist. But the 1952 Congress rejected that call and overrode the veto. The Court finds that Congress’ failure to heed President Truman’s call to “reimagine” immigration while simultaneously making the INA, and particularly Section 1326, more punitive in nature, is evidence of at least indifference to the nativist motivations of the statute’s predecessor. The Court accordingly finds that Congress’ decision to proceed with the INA that President Truman denounced as discriminatory contributes to its finding that Carrillo-Lopez has met his burden.

iii. Deputy Attorney General Peyton Ford Letter

The Court considers additional legislative history—a letter of support from Deputy Attorney General Peyton Ford, which includes use of the racially derogatory word “wetback” as well as testimony in support of expanding the grounds for prosecution and conviction of unlawful reentry under Section 1326. On May 14, 1951, Attorney General Ford wrote to Pat McCarran, Chairman of the Committee on the Judiciary, in “response to [McCarran’s] request for the views of the Department of Justice relative to the bill (S. 716) to revise the laws relating to immigration, naturalization, and nationality; and for other purposes . . .” (ECF No. 44-2.) Congress’ decision to adopt this recommendation, the only substantive change made to Section 1326 in 1952, in light of its silence regarding all other aspects of the provision, is further evidence of racial animus.

AMERICAN OVERSIGHT

First, Attorney General Ford's letter expressly includes the racial slur "wetback." The letter specifically quotes from the report of the President's Commission on Migratory Labor, Migratory Labor in American Agriculture, March 26, 1951, which says: "Statutory clarification on the above points will aid in taking action against the conveyors and receivers of the *wetback*. These clarifications of the statute, together with increased funds and personnel for enforcement, are possibly all that are needed to deal effectively with the smuggler and the intermediary." (ECF No. 44-2 at 9 (emphasis added).) Common sense dictates, and many courts have acknowledged, that the term "wetback" is racist.[25] *See, e.g.*, *Machic-Xiap*, 2021 WL 3362738, at *13 ("Again, 'wetback' is a racial epithet."). Its use in testimony from a supporter of the bill is significant here. First, it evidences the racial environment and rhetoric in 1952, even among high-ranking government officials and committees, specifically with regard to Mexican and Latinx people. But it is also significant considering that Ford's recommendation was the only recommendation adopted by Congress as to Section 1326. Not only does Ford's letter employ racially derogatory language, but it advises Congress to expand the grounds for deportation. Specifically, the letter recommended amendments to the bill including clarifying the "found in" clause in Section 276 by:

> add[ing] to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. This change would overcome the inadequacies in existing law which have been observed in those cases in which it is not possible for the Immigration and Naturalization Service to establish the place of reentry, and hence the proper venue, arising in prosecutions against a deported alien under the 1929 act.

[25]Professor Gonzalez O'Brien goes on to explain that "the term with 'wetback' comes from the idea that individuals who are entering without inspection have to do so at an area where there is no bridge over the Rio Grande River and, therefore, they get wet and, therefore, the term wetback. But across the period of the 1940s and 1950s, this term has—is associated, and almost synonymous with Mexicans. And in addition to being synonymous with Mexicans and racialized in much the same way, it also has the attribution of a lot of the negative stereotypes that were associated with Mexican immigrants in the push, or [sic] quotas to be applied to immigration from Mexico and south of the Rio Grande, as well as during debate over the Undesirable Aliens Act." (ECF No. 49 at 89-90.)

AMERICAN OVERSIGHT

(ECF No. 44-2 at 7.)

At the Hearing, Professor Gonzalez O'Brien explained that this amendment was incorporated "explicitly to make it easier to enforce the 1929 law, by allowing prosecution of immigrants wherever they were found, even if you couldn't establish where they crossed." (ECF No. 49 at 184-85). This legislative history confirms, as Carrillo-Lopez argues, that the only substantive change made to Section 1326 in 1952 was this amendment which expanded the government's authority to enforce the original 1929 provision, thereby making Section 1326 more punitive in nature. Attorney General Ford's recommendation, conveyed to Congress along with racial slurs, was adopted by the 1952 Congress and became a part of Section 1326.

Again, while Attorney General Ford's recommendation alone may not be enough to prove discriminatory intent, the Court considers this evidence in context. The only significant alteration between the unlawful reentry provision in the Act of 1929 and Section 1326 was this one, recommended by Ford.[26] The 1952 Congress' silence does not evince a neutral viewpoint, but worked to expand the enforceability of an admittedly racist law. The Court therefore finds that this evidence contributes to its finding that Carrillo-Lopez meets his burden.

iv. Wetback Bill

The Court further considers the passage of the so-called "Wetback Bill" as evidence of historical background. The bill's passage is particularly probative because it was "passed by the same congress during the same time frame and with the same express aim as illegal reentry . . ." (ECF No. 50 at 10.) Senate Bill 1851, nicknamed the "Wetback Bill," was passed March 20, 1952, just a few months before the INA. *See* United Statutes at Large, 82 Cong. ch. 108, 66 Stat. 26 (March 20, 1952). The bill's stated aim was to "assist in preventing aliens from entering or remaining in the United States illegally." *Id.* Yet, as Carrillo-Lopez argues, the bill was reflective of Congress' racially

[26] *See* notes 9 & 10.

AMERICAN OVERSIGHT

discriminatory motivations, not only because of the nickname of the bill but also by the way it sought to achieve its stated aim.

First, the Wetback Bill evidences discriminatory motive simply in its use of the racial epithet "wetback." As Professor Gonzalez O'Brien testified: "In 1952, prior to the passage of the McCarran-Walter Act, you have a Bill that is introduced and passed on March 20th that is nicknamed the Wetback Bill. And this is a piece of anti-harboring legislature where, throughout the debate, Mexican undocumented entrants are regularly referenced as wetbacks. And Senator McFarland [of Arizona], during the debate over the Act of March 20th, 1952, notes that Senate Bill 1851, a Bill known as the Wetback Bill, was going to be debated. Initially, this legislation was aimed strictly at Mexicans." (ECF No. 49 at 97-98.)[27]

Aside from the use of derogatory language, the incongruities between the stated intent of the bill and the actual language of the bill demonstrate the Congress' racist motives and intent. While the stated aim of the bill was to prevent "aliens from entering or remaining in the United States illegally", as Carrillo-Lopez argues, it actually "illustrates the intent of congress to preserve the influx of cheap and exploitable labor, while simultaneously marginalizing those workers and excluding them from full participation in American life." (ECF No. 50 at 10.) By failing to punish employers who hired illegal immigrants and instead only punishing the laborers themselves, the "1952 and 1929 congresses were both balancing the hunger of the agricultural industry for exploitable labor and the desire to keep America's identity white." (*Id.*)

The Court agrees that the "context in which [] Mexican immigration was being discussed at that historical moment" is illustrative of the 1952 Congress' intent. (ECF No. 49 at 129-30.) Despite the lack of official debate surrounding the enactment of Section 1326, Professor Gonzalez O'Brien connects the Ford letter with the Wetback Bill to give a more nuanced understanding of the 1952 Congress' approach:

> what you do have is that you do have this note that's entered in the support for 1326 by the Department of Justice, and it's a letter from the Deputy Attorney General, Peyton Ford . . .So, again, you have the use of this

[27]Relatedly, Professor Gonzalez O'Brien notes that this "debate around wetbacks is—also enters into the McCarran-Walter Act." (ECF No. 49 at 99-100.)

AMERICAN OVERSIGHT

> racialized term to describe Mexican immigrants, even though you don't have debate around Mexican immigration in the McCarran-Walter Act itself, or during debate for the McCarran-Walter Act, in part, because you have this Bill that precedes it by two months, where much of the debate is how do we limit the number of Mexican immigrants and the trafficking of undocumented Mexican immigrants into the United States? And that Bill also contained the Texas proviso, which gave workers the kind of loophole of, you know, if you're employing undocumented laborers, it doesn't constitute harboring.

(ECF No. 49 at 129-30.) Professor Gonzalez O'Brien notably concludes that "understanding the recodification under McCarran-Walter, it has to be done in the context both of what came before it, but also what was occurring at that historical moment, and at that moment in time." (*Id.*)[28]

This context assists the Court in its "sensitive" inquiry demanded by *Arlington Heights*. *See* 429 U.S. at 564. In short, both the derogatory nickname of the Wetback Bill and its criminalization of Mexican immigrant laborers while shielding employers evidences the racially discriminatory motives and intent of the same Congress who enacted Section 1326 only two months later.

v. Congressional Awareness of Disparate Impact

Finally, the Court considers Congress' silence in light of their knowledge that Section 1326 disparately impacts Latinx people as further evidence of continued racial animus. Professor Lytle Hernández outlined the disparate impact of the criminal unlawful reentry statute over the 23 years between the law's enactment 1929 and reenactment in 1952. (ECF No. 26-1.) She specifically highlighted that "some years, Mexicans comprised 99 percent of immigration offenders" and by the 1930s "tens of thousands of Mexicans had been arrested, charged, prosecuted, and imprisoned for unlawfully entering the United States." (*Id.*)

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[28]"Q: And part of the legislative background also is the Wetback Bill that occurred two months earlier. Is that fair? A: That is fair. Q: And the Wetback Bill explicitly carved out from the harboring of aliens [sic] employers? A: That is correct. Q: And that tension between employers and the utilization of south of the border migrants was the same sort of tension that we see animating that debate in 1929. Is that fair? A: That's fair." (ECF No. 49 at 184-86 (excerpts of Professor O'Brien's testimony under defense counsel's examination.)

AMERICAN OVERSIGHT

Congress' knowledge that Section 1326 continued to disparately impact Mexican and Latinx people is evidenced by criticism from President Truman in his veto statement when he specifically critiqued the INA for expanding grounds for deportation[29] and from testimony provided by enforcers of the law—the Immigration and Naturalization Service. The Immigration and Naturalization Service testified regarding the "difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area" because many violators of immigration law "are not prosecuted or, if prosecuted, get off with suspended sentences or probation." (ECF No. 45 at 2.) Congress' silence about the prior racist iterations of this bill coupled with its decision to expand the grounds for deportation and carceral punishment, despite its knowledge of the disparate impact of this provision on Mexican and Latinx people, is some evidence that racial animus was a motivating factor.

When these factors are considered together, the Court finds there is sufficient evidence to conclude that racial animus continued to be a motivating factor in the recodification of 1952. As Professor Gonzalez O'Brien testified:

> if you look at all of those things, including the racial animus that was demonstrated in the McCarran-Walter Act itself . . . then I think all of those things suggest that the decision to pass this without debate, was largely driven by the same things that drove the original codification of 1326; and that was, in part, a desire to control access to Mexican labor, and also a tendency to view Mexicans, individuals from south of the Rio Grande, and at least in the terms of the 1950s, the wetback, as a problematic population. And you don't see any significant debate over – you have a stretch between 1959 and 1952, where you have 1326 in effect, and you don't see any debate over that policy on its merits. We've been doing this for over 20 years by that point. What are the merits of 1326? . . . You don't have debate over that in 1952.

(ECF No. 49 at 129-30.)

The totality of evidence shows that the same factors motivating the passage of Section 1326 in 1929 were present in 1952. Not only did Congress fail to repudiate the racial animus clearly present in 1929, but it expanded the government's power to enforce unlawful reentry, despite President Truman's call to reimagine immigration laws. The

[29] *See* note 24.

AMERICAN OVERSIGHT

1952 Congress incorporated the advice of supporters of the bill who used racial epithets in official documents, while contemporaneously passing another bill targeting "wetbacks." Although it is "not easy" to prove that racism motivated the passage of a particular statute, the Court reasons that it cannot be impossible, or *Arlington Heights* would stand for nothing.[30]

The Court therefore finds that Carrillo-Lopez has met his burden.

b. The authority cited by the government does not preclude consideration of the Act of 1929.

Essential to the government's position is its proposition that improper motivations infecting prior versions of legislation do not carry over to reenacted versions of a law. The government argues that the Supreme Court "ha[s] viewed variants of the 'taint argument' with equal skepticism," and several circuit and district courts have found that "the ultimate focus in subsequent litigation is the intent of the reenacting legislature, not the original one." (ECF No. 29 at 24.) As explained below, the Court finds these cases do not support the government's argument that a re-enacting Congress is always shielded from the legislation's prior motivations, and instead instruct the reviewing court to consider how much the reenacting Congress actually altered the legislation.

The government relies on *Abbott v. Perez* to argue that "the presumption of legislative good faith [is] not changed by a finding of past discrimination" nor can past discrimination "condemn governmental action that is not itself unlawful." (ECF No. 51 at 3-4.) In *Abbott*, electoral redistricting plans developed in 2011 were challenged as discriminatory. Responding to that concern, Texas adopted interim plans overseen by a federal district court that were later adopted by the 2013 Legislature. *See Abbott*, 138 S. Ct. at 2315. When reviewing the 2013 plans, the district court found discriminatory intent

[30] *Machic-Xiap*, 2021 WL 3362738 at *1. The *Machic-Xiap* court noted it was "unaware of any federal appellate decision holding that a facially neutral act passed by Congress was motivated by racial, ethnic, or religious animus." *Id.* When faced with the record before it and lacking clear guiding or distinguishing authority from federal appellate courts, this Court cannot ignore the extensive history—both from 1929 and contemporaneously in 1952—that suggests discrimination was in part motivating Congress' enactment of Section 1326.

AMERICAN OVERSIGHT

because the 2013 Legislature "failed to 'engage[] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* at 2318. The Supreme Court disagreed and ultimately upheld the 2013 districting plan because the "2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature." *Id.* at 2325. The Supreme Court reasoned that although a court had previously found that the 2011 Legislature "acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed." *Id.* Therefore "there can be no doubt about what matters: it is the intent of the 2013 Legislature." *Id.*

The facts here are distinguishable. Most importantly, here, the initial and recodified unlawful reentry statutes are nearly identical, with the exception of broader enforcement measures. In *Abbott,* the 2013 Legislature was not simply reenacting an earlier version of the districting plan, but an entirely new plan was implemented following a lower court's finding of discriminatory intent. In so doing, the new plan was explicitly created to "fix[] the problems identified," *id.* at 2329, or "cure[]" any prior discriminatory intent, *id.* at 2325. The holding in *Abbott* is based on the legislature's active response and engagement with the prior challenged statute. The Supreme Court in fact clarified:

> We do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, *both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature*. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

Id. at 2327 (emphasis added). The Court found the new legislature lacked discriminatory intent precisely because of the way that it responded to the challenged provision. Moreover, the Court expressly stated that how the reenacting legislature responds to a prior discriminatory statute is probative of the reenacting legislature's intent. Unlike in

AMERICAN OVERSIGHT

Abbott, the 1952 Congress adopted Section 1326 almost wholesale from the Act of 1929, revising it only to make it more punitive.[31]

The government's reliance on three circuit courts of appeals decisions is similarly unpersuasive. (ECF No. 51 at 4-5 (citing *Hayden v. Paterson,* 594 F.3d 150, 164-68 (2d Cir. 2010); *Cotton v. Fordice,* 157 F.3d 388, 391-92 (5th Cir. 1998); *Johnson v. Governor of State of Fla.,* 405 F.3d 1214, 1223-26 (11th Cir. 2005).) Contrary to the government's argument that re-enactment of an existing law "cleanses" it from "any discriminatory aspects of its history" (*id.* at 5), the Second Circuit in *Hayden* expressly warned against the possibility that a legislative body "might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose by (quietly) reenacting it without significant change." *Hayden*, 594 F.3d at 167 (reasoning that subsequent changes to legislation tainted by racial animus should "substantively change" the prior issue in a way that is "not inconsequential"). Clearly aware of this issue, the Fifth Circuit in *Cotton* and the Eleventh Circuit in *Johnson* also stress that the challenged amendments made substantive revisions to their racist predecessors which meaningfully impacted how they would be enforced.[32] The Second Circuit reasoned that its concerns were "ameliorated" because (i) there was no allegation of bad faith on the part of the re-enacting legislature, (ii) there was adequate deliberation that resulted in substantive changes when

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[31]The government further relies on the Supreme Court's decision in *McKlesky v. Kemp* to argue that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." 481 U.S. 279, 289 n.20 (1987). There, the Court looked at Georgia laws in force during and just after the Civil War, finding that "historical background of the decision is one evidentiary source" for proof of discrimination under *Arlington Heights*, but it has little probative value if it is not "reasonably contemporaneous" ultimately deciding that "although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent." *Id.* Here, the evidence offered and accepted by this Court regarding the 1952 reenactment was contemporaneous in time. Thus, *McKlesky* has no bearing on the Court's decision here.

[32]*See Cotton*, 157 F.3d at 391-92 (explaining that the amendment in question removed burglary, an offense commonly relied on to disenfranchise Black people, and broadened the applicability of the statute to include murder and rape to better fit the state's race-neutral disenfranchisement purposes); *Johnson*, 405 F.3d at 1223-24 (similarly reasoning that the specific amendment at issue went through multiple revisions and committee reviews with the purpose of removing the racial taint from a prior felon-disenfranchisement statute).

AMERICAN OVERSIGHT

the statute in question was reenacted, and (iii) there was no evidence of discriminatory intent of the reenacting legislature. *See Hayden*, 594 F.3d at 167.

Carrillo-Lopez's case is completely distinguishable. The legislatures in *Hayden*, *Cotton*, and *Johnson* substantively amended the prior iterations of the laws in question in an attempt to make them less racially targeted. But Section 1326 was not substantively changed, or even genuinely debated. Instead, the 1952 Congress sought only to ease law enforcement's burden in prosecuting those subject to Section 1326. While the *Hayden*, *Cotton*, and *Johnson* legislatures were expressly revising felon-disenfranchisement laws to make them more race-neutral, the 1952 Congress did not depart from the original enactment of Section 1326 and instead adopted it in its entirety into the INA. Moreover, that addition happened at a time that Congress did not appear to be overly concerned with its animus toward Mexican and Latinx people, but instead welcomed racist epithets. Carrillo-Lopez has demonstrated that the 1952 reenactment not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus and discriminatory intent. The Court therefore concludes that *Abbott*, *Hayden*, *Cotton*, and *Johnson* do not prohibit considering the motivations of the Act of 1929 when determining whether the 1952 Congress was motivated by a similar discriminatory intent.

4. The Court disagrees with the conclusions of other district courts that have addressed this issue.

The Court notes that Section 1326 has lately faced scrutiny in several district courts. The parties have routinely supplemented their briefing in response to these

AMERICAN OVERSIGHT

developments,[33] and the Court has worked to stay abreast of recent decisions.[34] As the Court understands the present status, no court that has addressed this issue has found that Section 1326 is unconstitutional under *Arlington Heights*. The Court will therefore explain its reasons for departing from the holdings of its sister courts.

The two cases cited by the government, *Medina-Zepeda* and *Palacios-Arias*, are distinguishable because they considered solely evidence from the 1952 reenactment. (ECF Nos. 43-1, 29-1.) Unlike in those cases, the Court here considers the surrounding legislative history and context of both the Act of 1929 and 1952 INA. The Central District of California reasoned in *Medina-Zepeda* that dicta in *Ramos v. Louisiana*, 140 S. Ct. 1390 2020), and *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020), was insufficient authority to justify relying solely on legislative history from the 1920s. (ECF No. 43-1 at 6 ("Defendant provides no authority or basis for the court to evaluate the 1952 statute solely on the basis of the legislative history relating to the Undesirable Aliens Act of 1929.").) The Court agrees with that reasoning. However, the Court here does not only consider historical background from the 1920s. *Medina-Zepeda* therefore cannot guide the Court's determination of whether Carrillo-Lopez has met his burden under *Arlington Heights*.

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[33]The parties supplemented their briefing with the following cases: *United States v. Palacios-Arias*, Case No. 3:20-cr-62-JAG (E.D. Va. Oct. 13, 2020) (ECF No. 29-1); *United States v. Rios-Montano*, Case No. 19-cr-2123 (S.D. Cal. Dec. 8, 2020) (ECF No. 31-1); *United States v. Medina-Zepeda*, Case No. CR 20-0057 (C.D. Cal. Jan. 5, 2021) (ECF No. 43-1). The government additionally cites to *United States v. Morales-Roblero*, 2020 WL 5517594 (S.D. Cal. Sept. 14, 2020) (ECF No. 29 at 6 n.6) and *United States v. Ruiz-Rivera*, Case No. 20-mj-20306-AHG (S.D. Cal. Sept. 2, 2020) (ECF No. 29 at 22 n.13) in its opposition brief. *Palacios-Arias* and *Medina-Zepeda* address the constitutionality of Section 1326, and will be discussed below. *Rios-Montano*, *Morales-Roblero*, and *Ruiz-Rivera* address the constitutionality of Section 1325, which is also part of the INA but has a separate legislative history. Accordingly, the Court will focus on cases that challenge Section 1326 specifically.

[34]In addition to the parties' briefing, the Court notes that several courts have lately ruled on this issue. *See United States v. Machic-Xiap*, Case No. 3:19-cr-407-SI, 2021 WL 3362738 (D. Or. Aug. 3, 2021); *United States v. Wence*, Case No. 3:20-cr-0027, 2021 WL 2463567 (D.V.I. Jun. 16, 2021); *United States v. Gutierrez-Barba*, Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801 (D. Ariz. May 25, 2021). The Court will address the arguments in *Machic-Xiap* and *Wence* below. However, the Court will not address *Gutierrez-Barba*, which applied a deferential rational-basis review instead of *Arlington Heights*, and is therefore unhelpful to the Court's analysis. *See* 2021 WL 2138801 at *5.

AMERICAN OVERSIGHT

The Court similarly finds *Palacios-Arias* distinguishable. (ECF No. 29-1.) The Eastern District of Virginia reasoned that evidence of animus from the 70th Congress cannot necessarily be imputed to the 82nd Congress. Again, the Court agrees. But Carrillo-Lopez has provided evidence of contemporaneous discriminatory intent motivating the passage of the 1952 INA. Moreover, the Court will not ignore that Congress in 1952 adopted the language of Section 1326 without substantially changing the law and without debate or discussion of the invidious racism that motivated the Act of 1929, only to make it more punitive.

Two district courts, however, have recently found that substantially similar evidence to that which the Court here considers is insufficient for a defendant to meet their burden. Ultimately, the Court disagrees.

In *United States v. Wence*, the District Court of the Virgin Islands applied *Arlington Heights* but found the defendant had not met his burden because "Wence has failed to provide any legislative history or other evidence suggestive of the motives of the 82nd Congress." *See* 2021 WL 2463567, at *7. After considering the "problematic rhetoric" surrounding the INA's passage, as well as the Truman veto statement and override, that court concluded "Wence has not cited any part of the legislative history which discloses any racial animus in the law against Latinx aliens" and "the legislative history for the 1952 and 1929 legislation does not reveal any discriminatory motive." *Id.* at *9. First, the Court disagrees with that conclusion—as explained above, the record demonstrates discriminatory motivations as to both statutes. But the Court further rejects the *Wence* court's conclusion because that court appeared to blur the defendant's burden under *Arlington Heights*, reasoning that alternative "valid immigration considerations," *id.*, balanced out the evident "issues" with the INA, *id.* at *8. *But see Arlington Heights*, 429 U.S. at 265 (explaining that a challenger need not "prove that the challenged action rested *solely* on a racially discriminatory purpose"). Moreover, the *Wence* court relies on *Hayden*, *Cotton*, and *Johnson* to support that deliberation of other sections of the INA is sufficient to cleanse the reenacted Section 1326 of its original discriminatory motivation,

AMERICAN OVERSIGHT

despite the fact that Section 1326 was neither specifically debated nor substantively changed. The Court is therefore unpersuaded by *Wence*.

In *Machic-Xiap*, the District Court for the District of Oregon considered a similar challenge to Section 1326 based on similar evidence as presented here. *See Machic-Xiap*, 2021 WL 3362738, at *12. The *Machic-Xiap* court detailed an extensive historical record, and found not only that the Act of 1929 served "racist purposes," *id.* at *12, but also that the defendant did provide some evidence of racial animus during the 1952 reenactment, *id.* at *12-14. But after concluding that the historical evidence of the Act of 1929 was "strong," *id.* at *12, the *Machic-Xiap* court carefully examined the remaining evidence and found that despite evidence of racist motivation, each piece of evidence should not be given significant or conclusive weight. *See id.* It is apparent that the *Machic-Xiap* court conducted a thorough and sensitive inquiry, and this Court agrees that any individual piece of evidence alone would likely be insufficient to demonstrate that racial animus was a motivating factor. But, as stated above, the Court views the evidence—of historical background, legislative history, sequence of events, and departure from normal deliberative process—under the totality of the circumstances. While each piece of evidence may be insufficient alone, together they show discriminatory intent on behalf of the 1952 Congress specifically, and with regards to Section 1326 specifically.

The *Machic-Xiap* court further limited its reliance on evidence from 1929 based on its application of *Abbott*. *See id.* at *14. While the Court agrees that racial animus from a prior enacting legislature cannot be necessarily imputed to a reenacting legislature, the Court reads *Abbott* to require that the reenacting legislature make some substantive change before known racial animus is cleansed. *See Abbott*, 138 S. Ct. at 2325. Although courts have an obligation to give a reenacting legislature the presumption of good faith,[35] that presumption is not insurmountable. Here, the 1929 provision and Section 1326 are nearly identical, the only change was not substantive, and that change was motivated by

[35] *See Machic-Xiap*, 2021 WL 3362738 at *15 (citing *Abbott* and *N.C. St. Conf. of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020)).

AMERICAN OVERSIGHT

the Ford Letter which sought to expand the enforceability of the 1929 provision while referring to Latinx people as "wetbacks." As explained above, *Abbott* does not shield the reenacting legislature from scrutiny in light of such evidence. The Court therefore disagrees with the conclusion of the *Machic-Xiap* court and finds that the evidence Carrillo-Lopez presents is sufficient to meet his burden under *Arlington Heights*.

The Court is aware that proving discriminatory intent motivated the passage of a specific statute is difficult—in fact, unprecedented.[36] But despite the high threshold, the Court cannot deny that when considered as a whole, the evidence indicates discriminatory intent on the part of the 1952 Congress.

C. The government has failed to show that Section 1326 would have been enacted absent the discriminatory motivation.

Having found that Carrillo-Lopez met his burden under *Arlington Heights,* the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n. 21. The government argues that it is "obvious and uncontroverted that valid, nondiscriminatory objectives motivated the passage of Section 1326 in 1952 and its later amendments." (ECF No. 51 at 11.) The government offers no independent evidence, but points instead to Carrillo-Lopez's own expert testimony to propose three allegedly permissible motivations: (1) a desire to protect American citizens from economic competition; (2) a need to maintain national security; and (3) a need to maintain foreign relations with international allies. (ECF No. 52 at 11.) As the Court explains below, the testimony does not support a conclusion that these alternative motivations can easily be separated from the demonstrated discriminatory intent.

The government advances two additional arguments that do not offer alternative motivations for the passage of Section 1326, but which it claims are sufficient to show that Section 1326 would have been enacted absent discriminatory intent. The government first argues the Ninth Circuit once found Section 1326 is "a necessary piece of the

[36] *See Machic-Xiap*, 2021 WL 3362738 at *1.

AMERICAN OVERSIGHT

immigration-regulation framework." (ECF No. 51 at 12 (citing *U.S. v. Hernandez-Guerrero,* 147 F.3d 1075, 1078 (9th Cir. 1998).) Second, the government argues that because Section 1326 has been passed "six times in various amended versions, all in the absence of any evidence of discriminatory intent, the Court need not engage in a counterfactual analysis to conclude that the law would pass absent discriminatory intent." (ECF No. 51 at 13.) The Court will also address these arguments after its evaluation of the proposed nondiscriminatory motivations.

1. Alternative Nondiscriminatory Motivations

The government has not met its burden under *Arlington Heights*. By failing to offer any independent evidence of "obvious and uncontroverted . . . nondiscriminatory objectives" motivating the passage of Section 1326, the government limits itself to relying solely on the testimony of defense experts and distinguishable case law. (ECF No. 51 at 11.) But the expert testimony from Professors Lytle Hernández and Gonzalez O'Brien does not support the government's proffered alternative reasons. Instead, that testimony convincingly demonstrates that the government's proffered reasons are so intertwined with racial animus such that they cannot successfully show that the "same decision would have resulted even had the impermissible purpose not been considered." *See Arlington Heights*, 429 U.S. at 270 n. 21. The Court will address each argument in turn.

a. Economic Competition

The government first argues that border enforcement was driven "by a desire to protect American citizens from economic competition," citing only to Professor Lytle Hernández's testimony to support this proposition. (ECF No. 51 at 11.) At the Hearing, Professor Lytle Hernández agrees with the government's claim that leaders of the Mexican-American middle class supported immigration enforcement because "they thought that increased border enforcement would improve job security" (ECF No. 49 at 42-43), but she goes on to explain that this economic competition was rooted in racialization and played up to "create the notion that they were in competition with each other." (ECF No. 49 at 42-43). Specifically, she notes:

AMERICAN OVERSIGHT

> There was a notion that there was a, sort of, zero sum game of jobs, right, and that people of Mexican descent, largely because of segregation in the United States and because of that racial subrogation, gave this notion that Mexican-origin folks had to fight for the same jobs as to opposed to having all jobs open to them, and that certainly helped to create this notion that they were in competition with each other.

(*Id.*)

Moreover, some economic programs like the Bracero program targeted non-white populations. Professor Lytle Hernández explains that targeting is a "key indicator[] of the dynamics at play, that it's not just labor, it's a racialized labor form." (ECF No. 49 at 75-76.) Bracero workers were "an exploited labor force," subjected to racialized stereotyping and inhumane treatment. She details in her testimony that Bracero workers were routinely gassed with DDT and subjected to invasive inspections. The workers were racially stereotyped as being "fit for agricultural labor," unlike their white immigrant or domestic counterparts. (*Id.* at 77-78.) Professor Lytle Hernández's testimony concludes that any stated desire to protect American citizens from economic competition cannot reasonably be divorced from the underlying racialization of Mexican migrant laborers.

The Court agrees that even—or in this case, especially—under the auspice of economic motivation, immigration is not intrinsically separate from racial animus. Without offering any additional evidence, the government fails show that economic competition was a potential motivating factor absent the impermissible motivation: racial animus.

b. National Security

The Court is similarly unpersuaded by the government's argument that Section 1326 was recodified due to "a need to maintain national security." (ECF No. 51 at 11.) Again, the government cites only to Professor Lytle Hernández's testimony[37] to suggest

[37]Professor Lytle Hernández further explains how the national security concerns of the period relevant to the INA's passage were motivated by racialized labor policies like the Bracero Program. "Q: So the start of the Bracero program happened roughly around the onset of World War II, correct? A: Yes. Post-U.S. entry into the war. Q: Right. And you wrote in Migra that this triggered increased national security and geopolitical concerns, given that the U.S. shared a 2000-mile border with Mexico, correct? A: Correct. Q: And you wrote that the U.S. State Department put pressure on the INS and Border Patrol to close the door to undocumented migrants during this time, correct? A: Correct.

AMERICAN OVERSIGHT

that Section 1326 was reenacted to maintain national security interests. (*Id.*) But, following the testimony cited in the government's brief, Professor Lytle-Hernández went on to say:

> I mean, all of this activity is happening, you know, I would argue, uh, yes, within foreign relations, with an (unintelligible) of foreign relations, with an integrated economy, around labor concerns, concerns about what's emerging as the Cold War. *Racial animus is also at play*. There is no way in which we can understand the politics of head shaving as something that would have been tolerable for other than Mexican immigrants in this time period. And the involvement of the Mexican government does not mean that racial animus is not at play. Mexico has a long and deep history of race and subrogation, especially for indigenous folks. So, the story of race transcends the border.

(ECF No. 49 at 53 (emphasis added).) When considered in the context that the government omits, Professor Lytle Hernández's testimony indicates that the desire to maintain national security cannot be viewed alone because it only offers an explanation in part. But her more complete answer turned on the conclusion that "racial animus is also at play."[38]

The Court cannot consider that Professor Lytle Hernández's testimony, standing alone, is sufficient to demonstrate that the need to maintain national security is an "obvious and uncontroverted . . . nondiscriminatory objective motivat[ing] the passage of Section 1326 in 1952" as the government argues. With no further evidence, the government has again failed to meet its burden.

c. Foreign Relations

Finally, the government fails to show that "a need to maintain foreign relations with international allies, including Mexico" was a motivating factor independent from the demonstrated racial animus. (ECF No. 51 at 11.) Again, the government relies solely on

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Q: In part, because of the national security concern presented by having a forced border during the world war, correct? A: In part, yeah." (ECF No. 49 at 50 (excerpts of government counsel's cross-examination of Professor Lytle Hernández).)

[38]In response to the government's prompting to restrict her testimony to the questions asked, Professor Lytle Hernández responded: "Well I just want to be full in my answers, so—everything is complicated so yes/no is not always the accurate answer. So when I think I need to give a little bit more context, I would like to be able to do that." (ECF No. 49 at 53-54.)

AMERICAN OVERSIGHT

Professor Lytle Hernández's testimony. (ECF Nos. 49 at 44-47; 51 at 11-12.) But contrary to the government's conclusions, Professor Lytle Hernández testified that a nuanced understanding of foreign relations shows the dynamic in 1952 was still grounded in racial animus. While Professor Lytle Hernández acknowledges there was a concern about maintaining foreign relations with Mexico, she again goes on to say, as quoted in full above, that "racial animus is also at play" when considering the United States' foreign policy with Mexico during that period, and "the involvement of the Mexican government does not mean that rational animus is not at play." (ECF No. 49 at 53.) She further explains that during this period, Mexico "is a junior partner" in the two countries' partnership and that "they're not dictating, by any means, to the Untied States Government about how this is going to go." (*Id.* at 47.) The government's selective citation ignores repeated testimony emphasizing the connection between foreign relations and racial animus, and Professor Lytle Hernández's qualification that the United States felt free to enact legislation it felt was appropriate. It is therefore not possible for the Court to conclude based upon the record before it that the need to maintain a relationship with the government of Mexico is a factor extricable from the demonstrated discriminatory motives of the period.

Without more, the government has failed to show that valid, nondiscriminatory objectives motivated the passage of 1326 and later amendments.

2. Inferred Nondiscriminatory Intent

The government argues that even absent a nondiscriminatory motive, the Court can infer that the 1952 Congress had a valid, nondiscriminatory objective in passing Section 1326. (ECF No. 51 at 11-12.) The Court finds the government's proffered alternative reasoning in support of Section 1326 nonresponsive and unpersuasive. The government's only proffered evidence is the Ninth Circuit's language in *United States v. Hernandez-Guerrero,* in which the court stated it is "plain" that Section 1326 "is a necessary piece of the immigration-regulation framework." 147 F.3d 1075, 1078 (9th Cir. 1998). But the issue before the court in *Hernandez-Guerrero* was whether Congress

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003111

exceeded the scope of its constitutional authority when enacting Section 1326, a criminal immigration statute. *See id.* The Ninth Circuit held that because Section 1326 was a piece of immigration regulation, Congress acted within its authority to enact the statute. *See id.*

But *Hernandez-Guerrero* has no bearing on this case because the limits of Congress' immigration powers are not at issue here. The question is not whether Congress *functionally* had the authority to pass a criminal immigration statute, but whether the motivation behind Section 1326's enactment was racially discriminatory in violation of the Equal Protection Clause. That issue was not raised or discussed in *Hernandez-Guerrero* and the Court accordingly finds its application of limited use.

Ultimately, the fact that Congress has the authority to pass immigration regulations like Section 1326 does not foreclose the possibility that such legislation was passed with discriminatory intent, nor does it preclude the Court from determining whether Section 1326 is unconstitutional on other grounds. The government's own briefing concedes that courts may infer that nondiscriminatory motivation sufficient to displace discriminatory motivation only absent evidence of discriminatory intent. (ECF No. 51 at 12.) But here, Carrillo-Lopez offers substantial evidence that improper discriminatory motives were at least a factor in Section 1326's passage. Accordingly, the Court declines to infer that Section 1326's utility to the overall immigration scheme justifies an inference of nondiscriminatory motive.

3. Repeated Amendment

Finally, the government argues that it has met its burden under the second prong of *Arlington Heights* "given that Section 1326 has been passed six times in various amended versions, all in the absence of any evidence of discriminatory intent . . ." (ECF No. 51 at 13.) The government relies on the Eleventh Circuit's reasoning in *Johnson v. Governor of State of Florida*, in which the court held that "the state met its burden as a matter of law by substantively reenacting the law for race-neutral reasons" because repassage of an amended version of the statute "conclusively demonstrates that the [legislature] would enact the provision without an impermissible motive." 405 F.3d 1214,

AMERICAN OVERSIGHT

1224 (11th Cir. 2005) (en banc). The Court finds *Johnson* is distinguishable and is unpersuaded that subsequent Congresses have cleansed § 1326 of its racial taint through amendment alone.

First, the Court does not agree that the subsequent amendments were "substantive." In addressing whether an 1868 felon disenfranchisement provision was alleviated of its racial taint by a subsequent 1968 reenactment, the *Johnson* court considered that the reenactment "narrowed the class of persons" to whom the disenfranchisement provision would be applicable. *See id.* Moreover, the Eleventh Circuit noted that the Florida legislature engaged in an extensive deliberative process in which many alternatives were considered to revise the 1868 law in conformance with modern goals. *See id.* at 1221-22.

But Section 1326's reenactment and subsequent amendments never substantively altered the original provision, making this case distinguishable from *Johnson*. Since 1952, Section 1326 has been amended five times—in 1988, 1990, 1994, and twice in 1996.[39] These amendments did not change the operation of Section 1326, but instead served to increase financial and carceral penalties. The 1988 amendments added increased imprisonment time for those with prior felony convictions.[40] The 1990 amendment removed the $1,000 cap on financial penalties.[41] The 1994 amendments increased the penalties for persons convicted of felonies from five years to 10, and for those convicted of aggravated felonies from 15 years to 20, while also drawing in additional penalties for persons with certain misdemeanor convictions.[42] And the 1996 amendments to §

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[39] *See* note 11.

[40] *See* Pub. L. 100-690, title VII § 7345(a), 102 Stat. 4471 (Nov. 18, 1988) (codified at 8 U.S.C. § 1326(b) (1988)).

[41] *See* Pub. L. 101-649, title V § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990).

[42] *See* Pub. L. 103-322, title XIII § 130001(b), 108 Stat. 2023 (Sept. 13, 1994) (codified at 8 U.S.C. § 1326 (1994)).

AMERICAN OVERSIGHT

1326(b)[43] again only added a penalty for those convicted of reentry while on parole, probation, or supervised release.[44] These amendments do not reflect any change of Congressional intent, policy, or reasoning, but merely work to increase Section 1326's deterrent value.

Second, there has been no attempt at any point to grapple with the racist history of Section 1326 or remove its influence on the legislation. The Supreme Court has noted in concurrences on two recent occasions that a legislature's failure to confront a provision's racist past may keep it "'[t]ethered' to its original 'bias.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here.").[45] This reasoning is

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[43]Carrillo-Lopez was charged only with violating §§ 1326(a) and (b), while the AEDPA amendments added §§ 1326(c) and (d), which deal with collateral habeas corpus relief. *See* Pub. L. 104-132, title IV §§ 401(c), 438(b), 441(a), 110 Stat. 1267-68, 1276, 1279 (Apr. 24, 1996) (codified at 8 U.S.C. § 1326 (2000)).Those provisions, too, function to add a 10 year sentence to a conviction.

[44]*See* Pub. L. 104-208, div. C title III §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324(a), 324(b); 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629 (Sept. 30, 1996).

[45]Other district courts in this circuit have rejected applying *Ramos* and *Espinoza* to similar challenges, but those cases are distinguishable. The clearest distinguishable reason is that other courts reject the relevancy of the 1929 legislative history absent something contemporaneous with the 1952 reenactment. *See United States v. Lazcano-Neria*, Case No. 3:20-mj-04538-AHG, 2020 WL 6363685, at *8 (S.D. Cal. Oct. 29, 2020) (rejecting the argument that § 1325 of the INA must reckon with the racist legislative history that happened "decades before" because the defendant did not supply an analysis of "relevant legislative history"); *see also United States v. Rios-Montano*, Case No. 19-CR-2123-GPC, 2020 WL 7226441, at *3 (S.D. Cal. Dec. 8, 2020) (same); *United State v. Lucas-Hernandez*, Case No. 19MJ24522-LL, 2020 WL 6161150, at *3 (S.D. Cal. Oct. 21, 2020) (same); *United States v. Ruiz-Rivera*, Case No. 3:20-mj-20306-AHG2020 WL 5230519, at *3 (S.D. Cal. Sept. 2, 2020) (same).

In *United States v. Gutierrez-Barba*, the district court declined to apply *Ramos* and *Espinoza* because it found the statute had been cleansed by a later amendment. *See* Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *3-4 (D. Ariz. May 25, 2021). But that court addressed only the discriminatory intent of the Act of 1929 and did not consider evidence that the 1952 reenactment was also motivated by

AMERICAN OVERSIGHT

not binding precedent, nor does the fact that a prior iteration of a statute was tainted by racial animus necessarily mean that every subsequent reenactment will be. *See, e.g.*, *Abbott*, 138 S. Ct. at 2325 (confirming that, while past discrimination does not "flip[] the evidentiary burden on its head," the historical background of legislative enactment is "relevant to the question of intent"). But this reasoning is instructive and, here, persuasive.

Carrillo-Lopez has established, and the government concedes, that the Act of 1929 was motivated by racial animus. The government does not assert the 1952 Congress addressed that history when it reenacted Section 1326. Moreover, the government fails to demonstrate how any subsequent amending Congress addressed either the racism that initially motivated the Act of 1929 or the discriminatory intent that was contemporaneous with the 1952 reenactment. The record before the Court reflects that at no point has Congress confronted the racist, nativist roots of Section 1326. Instead, the amendments to Section 1326 over the past ninety years have not changed its function but have simply made the provision more punitive and broadened its reach. Accordingly, the Court cannot find that subsequent amendments somehow cleansed the statute of its history while retaining the language and functional operation of the original statute.

In conclusion, the government has failed to establish that a nondiscriminatory motivation existed in 1952 for reenacting Section 1326 that exists independently from the discriminatory motivations, in either 1929 or 1952. Moreover, the government's alternative arguments—that a nondiscriminatory motive was "plain" or that subsequent amendments somehow imply the racial taint was cleansed—are not supported by caselaw nor borne out by the evidentiary record. In sum, on the record before the Court, the Court can only conclude that the government has not met its burden. Because Section 1326 violates the

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contemporaneous discriminatory intent. Moreover, the Court disagrees with that court's conclusion that Section 1326 was ultimately cleansed of any racial animus by a 1965 amendment elsewhere in the INA which purported to prohibit discrimination on the basis of race, sex, nationality, place of birth, or place of residence. *See id.* at *4 (referencing Pub. L. No. 89-236, 66 Stat. 175, 911 (Oct. 3, 1965)). That amendment was added to 8 U.S.C. § 1152, a subsection that prohibited discrimination between members of "any single foreign state." The Court will not extend this provision, which does not even address discrimination between immigrants from different countries, to a criminal statute with demonstrated racist origins in a separate section of the subchapter.

AMERICAN OVERSIGHT

Equal Protection Clause of the Fifth Amendment, the Court will grant Carrillo-Lopez's Motion.

III. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motions before the Court.

It is therefore ordered that Carrillo-Lopez's motion to dismiss (ECF No. 26) is granted.

It is further ordered that Carrillo-Lopez's indictment (ECF No. 1) is dismissed.

The Clerk of Court is directed to enter judgment accordingly and close the case.

DATED THIS 18th Day of August 2021.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

AMERICAN OVERSIGHT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA Plaintiff, v. GUSTAVO CARRILLO-LOPEZ, Defendant.	Case No. 3:20-cr-00026-MMD-WGC ORDER

I. SUMMARY

On June 25, 2020, Defendant Gustavo Carrillo-Lopez was indicted on one count of deported alien found in the United States in violation of 8 U.S.C. § 1326(a) & (b) ("Section 1326"). (ECF No. 1.) Before the Court is Carrillo-Lopez's motion to dismiss the indictment (the "Motion") on the grounds that Section 1326 violates the equal protection guarantee of the Fifth Amendment under the standard articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).[1] (ECF No. 26.) On January 22, 2021, the Court heard oral argument on the Motion (ECF No. 39 ("Oral Argument")), and on February 2, 2021, the Court held an evidentiary hearing (ECF Nos. 48, 49 (the "Hearing").[2] Because Carrillo-Lopez has established that Section 1326 was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx persons, and the government fails to show that Section 1326 would have been enacted absent racial animus—and as further discussed below—the Court will grant the Motion.

[1]The government responds. (ECF No. 29.) Carrillo-Lopez replies. (ECF No. 30.) Carrillo-Lopez filed two supplements to the Motion. (ECF Nos. 31, 33.)

[2]At the Hearing, Carrillo-Lopez called two defense experts: Professor Kelly Lytle Hernández and Professor Benjamin Gonzalez O'Brien. The Court ordered both parties to file post-hearing briefs. (ECF Nos. 50 (Carrillo-Lopez brief); 51 (government brief).)

AMERICAN OVERSIGHT

II. DISCUSSION

Having considered the briefing, arguments of counsel, and expert testimony of Professors Benjamin Gonzalez O'Brien and Kelly Lytle Hernández, the Court ultimately grants the Motion. First, the Court will explain the applicable standard of review: the test outlined in *Arlington Heights*. Next, the Court will determine whether Carrillo-Lopez has met his burden. Because Carrillo-Lopez has demonstrated that Section 1326 disparately impacts Latinx people and that the statute was motivated, at least in part, by discriminatory intent, the Court finds that he has. Finally, the Court reviews whether the government has shown that Section 1326 would have been enacted absent discriminatory intent. Because the government fails to so demonstrate, the Court finds its burden has not been met and that, consequently, Section 1326 violates the Equal Protection Clause of the Fifth Amendment.

A. *Arlington Heights* applies to Section 1326.

As a preliminary matter, the Court must determine which standard to apply. The parties dispute, but the Court finds that the test outlined in *Arlington Heights* applies to criminal immigration laws such as Section 1326.

Under the Fifth Amendment's equal protection guarantee, a law can violate equal protection in three ways: (1) a law can discriminate on its face (*see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967)); (2) authorities can apply a facially neutral law in a discriminatory manner (*see, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); or (3) a legislature may enact a facially neutral law with a discriminatory purpose in a way that disparately impacts a specific group (*see, e.g.*, *Arlington Heights*, 429 U.S. at 265-68).

Carrillo-Lopez argues that Section 1326 violates his right to equal protection, specifically as articulated in *Arlington Heights.* The government counters that the statute should not be assessed under an equal protection framework because Congress' plenary power over immigration subjects immigration laws such as Section 1326 to a highly deferential standard of review. (ECF No. 29 at 7-11 (citing *Kleindienst v. Mandel*, 408

AMERICAN OVERSIGHT

U.S. 753, 765 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).)[3] The government asserts that criminal immigration laws are to receive the same deferential review, or rational bias review. (*Id.* at 10-11 (citing *U.S. v. Hernandez-Guerrero,* 147 F.3d 1075, 1078 (9th Cir. 1998); *U.S. v. Ruiz-Chairez,* 493 F.3d 1089 (9th Cir. 2007); *U.S. v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995)).)

Arlington Heights applies here. As an initial matter, the Supreme Court has held that greater protections under the Fifth Amendment necessarily apply when the government seeks to "punish[] by deprivation of liberty and property." *Wong Wing v. United States,* 163 U.S. 228, 237 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). The Court is unpersuaded that a criminal law enacted by Congress is free from constitutional equal protection constraints, even if the offense relates to immigration.

The federal government's plenary power over immigration does not give it license to enact racially discriminatory statutes in violation of equal protection. The Ninth Circuit Court of Appeals and a plurality of the United States Supreme Court declined to adopt the standard advanced by the government in race-based equal protection challenges of immigration decisions by the executive, and instead applied *Arlington Heights*. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.,* 908 F.3d 476, 518-20 (9th Cir. 2018), *rev'd in part, vacated in part sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891 (2020));[4] *see also Ramos v. Wolf*, 975 F.3d 872, 896-99 (9th Cir. 2020) (declining to apply a more deferential standard in favor of *Arlington Heights*). In both *Regents* and *Wolf,* the Ninth Circuit distinguished *Trump v. Hawaii,* 138

[3]The government describes at length how the "facially legitimate and bona fide" test initially laid out in *Mandel* and *Fiallo* was later held to be equivalent to the rational basis test, arguing that rational basis applies here. (*Id.* at 9 (citing *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995)).)

[4]On review, a plurality of the Supreme Court agreed with the Ninth Circuit that *Arlington Heights* applied. *See Dep't of Homeland Sec.* 140 S. Ct. at 1915-16. Ultimately, the plaintiff's claims were rejected on other grounds. *Id.*

AMERICAN OVERSIGHT

S. Ct. 2392 (2019), where the Court applied a more deferential standard to an establishment clause challenge of an executive order concerning immigration. Specifically, the Ninth Circuit found that the standard applied in *Trump* did not similarly apply to equal protection challenges because it differed "in several potentially important respects, including the physical location of the plaintiffs within the geographic United States, the lack of national security justification for the challenged government action, and the nature of the constitutional claim raised." *Regents*, 908 F.3d at 520; *see also Wolf*, 975 F.3d at 895 ("[T]he deferential standard of review applied in *Trump v. Hawaii* turned primarily on the Court's recognition of the fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference.").

The government's counterargument is not persuasive. The Ninth Circuit recognized a difference between situations that invoke the President's expansive executive authority "to respond to changing world conditions" in matters of national security and the Court's mandate to ensure all people are afforded equal protection under the law. *See Wolf*, 975 F.3d at 896 (quoting *Trump*, 138 S. Ct. at 2419). That Carrillo-Lopez challenges a criminal law—which goes to the "nature" of the Fifth Amendment's protective concern—applicable to those within the United States, rather than an immigration policy addressing national security concerns of those not within the United States, is further evidence that his equal protection challenge should be reviewed under a more heightened standard than the rational-basis standard that the government proposed.[5]

Moreover, the three Ninth Circuit cases the government relies on to argue that immigration laws are subject to rational-basis review despite "§1326's criminal character"

[5]If anything, the Supreme Court's justification in *Trump v. Hawaii* for increased deference is inapplicable to Congressional action, as the Court's review does not directly implicate the executive's core function. *See Ramos*, 975 F.3d at 895 ("[T]he deferential standard of review applied in *Trump v. Hawaii* turned primarily on the Court's recognition of the fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference.").

AMERICAN OVERSIGHT

fail to support such an argument. (ECF No. 30 at 10.) First, *Hernandez-Guerrero* establishes only that Congress did not exceed its constitutional authority under its immigration powers when it enacted Section 1326. *See* 147 F.3d at 1078. The Ninth Circuit did not hear or address an equal protection challenge to Section 1326 in *Hernandez-Guerrero*, much less determine which standard of review applies. Moreover, both *Lopez-Flores,* 63 F.3d at 1475, and *Ruiz-Chairez*, 493 F.3d at 1091, simply establish that a challenged alienage classification qualifies for rational-basis review. But here, race and national origin, not alienage, is the classification in dispute.

Finally, the Court finds persuasive the fact that several district courts have similarly applied *Arlington Heights* to race-based immigration challenges brought by individuals residing in the United States,[6] including when reviewing equal protection challenges to Section 1326.[7]

Considering the above, the Court finds that Section 1326 must be reviewed under the *Arlington Heights* equal protection framework.

B. Carrillo-Lopez has met his burden under *Arlington Heights.*

Having found that *Arlington Heights* applies, the Court must now determine whether Carrillo-Lopez has met his burden. The Court finds that he has.

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[6] *See, e.g.*, *La Clinica de la Raza v. Trump*, -- F. Supp. 3d --, Case No. 19-cv-04980-PJH, 2020 WL 6940934, at *17 (N.D. Cal. Nov. 25, 2020); *California v. U.S. Dep't of Homeland Sec.*, 476 F. Supp. 3d 994, 1022-23 (N.D. Cal. 2020); *Cook Cnty., Illinois v. Wolf*, 461 F. Supp. 3d 779, 788-89 (N.D. Ill. 2020); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018); *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018).

[7] *See United States v. Machic-Xiap*, --F. Supp. 3d. --, Case No. 3:19-cr-407-SI, 2021 WL 3362738, at *10-16 (D. Or. Aug. 3, 2021) (applying *Arlington Heights* to an equal protection challenge to § 1326); *United States v. Wence*, Case No. 3:20-cr-0027, 2021 WL 2463567, at *2-4 (D.V.I. Jun. 16, 2021) (same). *But see United States v. Gutierrez-Barba*, Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *5 (D. Ariz. May 25, 2021) (applying rational-basis review after construing defendant's challenge as relating to alienage).

AMERICAN OVERSIGHT

Under *Arlington Heights*, the moving party has the burden of demonstrating: (1) disparate impact;[8] and (2) that "racially discriminatory intent or purpose" was a "motivating factor in the decision." 429 U.S. at 265-68. Determining discriminatory intent requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including, but not limited to: "[t]he historical background of the decision"; "[t]he legislative or administrative history"; "[t]he specific sequence of events leading to the challenged action"; "[d]epartures from normal procedural sequence"; or whether the impact of the law "bears more heavily on one race than another." *Id.* at 266-68. If the movant demonstrates that a racially discriminatory intent or purposes was a motivating factor in the challenged decision, the burden then shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n. 21.

Before Section 1326 was enacted in 1952, Congress first criminalized unlawful reentry in 1929 as part of the Undesirable Aliens Act ("the Act of 1929").[9] *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, ch. 690, 70 Congress, 45 Stat. 1551 (1929). The Immigration and Nationality Act of 1952 ("INA"), often referred to as The McCarran-Walter Act ("McCarran-Walter Act"), again codified the unlawful reentry provision first passed in 1929 under Title 8 of the United States Code, at 8 U.S.C.A. § 1326.[10] Section 1326 was

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[8]The Court opined that "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* (quoting *Washington v. Davis,* 426 U.S. 229, 242 (1976)).

[9]In relevant part, the statute reads: "That (a) if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after the enactment of this act, and if he enters or attempts to enter the United States after the expiration of sixty days after the enactment of this act, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than $1,000 or by both such fine and imprisonment." Undesirable Aliens Act, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (1929).

[10]The recodified statute reads: "Any alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at

AMERICAN OVERSIGHT

subsequently amended in 1988, 1990, 1994, and 1996, always to increase its deterrent value.[11]

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any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both." Immigration and Nationality Act, Pub. L. No. 82-414, § 276, 66 Stat. 229 (codified at 8 U.S.C. § 1326 (1952)).

[11]Section 1326 was first amended in the Anti-Drug Abuse Act of 1988 by adding subsection (b) which created increased penalties for those with prior felony convictions. *See* Pub. L. 100-690, title VII § 7345(a), 102 Stat. 4471 (Nov. 18, 1988) (codified at 8 U.S.C. § 1326 (1988)). The new Section 1326(b) provided that a person with a prior felony conviction who reenters may be imprisoned up to five years, and a person with an aggravated felony conviction may be imprisoned up to 15 years.

In 1990, the Immigration Act of 1990 removed the $1,000 cap and authorized greater fines under Title 18. *See* Pub. L. 101-649, title V § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990).

In 1994, the Violent Crime Control and Law Enforcement Act of 1994 again increased penalties for violating Section 1326 and included those with misdemeanor convictions in the heightened penalty category. *See* Pub. L. 103-322, title XIII § 130001(b), 108 Stat. 2023 (Sept. 13, 1994) (codified at 8 U.S.C. § 1326 (1994)). Specifically, the 1994 Amendments increased the imprisonment time for those with a prior felony conviction from up to five years to up to 10 years, and for those with a prior aggravated felony conviction from up to 15 years to up to 20 years. The amendment also included persons with "three or more misdemeanors involving drugs, crimes against the person, or both" in the group with the penalty of up to 10 years imprisonment. Finally, the amendment broadened the definition of 'deportation' to include "any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law." *Id.*

In 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") again amended Section 1326. Pub. L. 104-132, title IV §§ 401(c), 438(b), 441(a), 110 Stat. 1267-68, 1276, 1279 (Apr. 24, 1996) (codified at 8 U.S.C. § 1326 (2000)). AEDPA added subsections (c) and (d) to Section 1326. Subsection (c) mandates incarceration for any person who reenters after they were deported by judicial order, and subsection (d) limits collateral attack of the underlying deportation order. The AEDPA amendments also added § 1326(b)(3), which allowed persons excluded from entry under § 1225(c) to be imprisoned for a period of 10 years, which may not be served concurrently with any other sentence.

Again in 1996, as part of the Omnibus Consolidated Appropriations Act of 1997, Congress added a fourth paragraph to § 1326(b). *See* Pub. L. 104-208, div. C title III §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324(a), 324(b); 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629 (Sept. 30, 1996). Section 1326(b)(4) added a penalty for persons convicted of nonviolent offenses who had been removed while on parole, supervised release, or probation, who then reenter. The penalty is up to 10 years'

AMERICAN OVERSIGHT

Carrillo-Lopez relies on the *Arlington Heights* factors to argue that racial animus—as evidenced through the historical background, legislative history, sequence of events leading up to passage—was, at minimum, a motivating factor in the passage of Section 1326 that disparately impacts Mexican and Latinx individuals. That racial animus would make Section 1326 presumptively unconstitutional under *Arlington Heights.* (ECF No. 26 at 2.) The government responds that "even assuming Congress's 1929 illegal reentry law was wholly the result of impermissible racial animus, well-established doctrine holds that such legislative history would have no bearing on the law enacted by a subsequent Congress in 1952." (ECF No. 29 at 2.)

First, the Court finds that Section 1326 does indeed disparately impact Mexican and Latinx individuals. The Court further finds, as other district courts have, that discriminatory intent motivated the criminal unlawful reentry statute in 1929.[12] But the Court further concludes the evidence Carrillo-Lopez provides demonstrating the animus which tainted the Act of 1929, along with other proffered evidence contemporaneous with the INA's enactment in 1952, is sufficient for Carrillo-Lopez to meet his burden that discriminatory intent was a motivating factor of both the 1929 and 1952 enactments.

Because the Court finds Carrillo-Lopez has met his burden under *Arlington Heights*, the burden shifts to the government to prove that the statute would have passed even if the impermissible purpose had not been considered. Because the government fails to provide sufficient evidence to meet its burden, the Court will grant the Motion.

1. Disparate Impact on Latinx Individuals

The Court determines first that Section 1326 disparately impacts Latinx individuals. In some "rare" instances, there is a "clear pattern unexplainable on grounds other than

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imprisonment and a fine. These amendments also further broadened the scope of persons to which Section 1326 applied by replacing the 1994 definition of deportation with 'removal,' which "includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under with Federal or State law." *Id.*

[12]*See, e.g.*, *Machic-Xiap*, 2021 WL 3362738 at *1 ("[T]he Court finds that racism has permeated the official congressional debate over United States immigration laws since the late 19th and early 20th centuries, including the 1929 Act.")

AMERICAN OVERSIGHT

race" that a statute would affect some groups and not others, but "absent a pattern [of disparate impact] as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other factors." 429 U.S. 252 at 266. Carrillo-Lopez acknowledges, and in fact does not contend, that disparate impact alone in this case is enough to meet his burden. Rather, he proffers evidence of both disparate impact and discriminatory intent to meet his burden under *Arlington Heights.* The Court finds he has met his burden as to both.

Carrillo-Lopez argues, convincingly, that Section 1326 disparately impacts Mexican and Latinx defendants. (ECF No. 26 at 20.) While no publicly available data exists as to the national origin of those prosecuted under Section 1326, over 97% of persons apprehended at the border in 2000 were of Mexican decent, 86% in 2005, and 87% in 2010. (*Id.* (citing *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, 2007-2019* (URL omitted).) In lieu of prosecution data, Carrillo-Lopez argues that immigration policy under President Trump and Department of Justice directives to prosecuting attorneys demonstrate that many, if not all, apprehensions are ultimately prosecuted.[13] Carrillo-Lopez then compares the data to other successful challenges under *Arlington Heights* to show that they meet the necessary standard of disproportionality. (*Id.*)

Importantly, the government does not dispute that Section 1326 bears more heavily on Mexican and Latinx individuals. Instead, the government attributes that impact to other causes—geography and proportionality. Specifically, the government argues that the stated impact is "a product of geography, not discrimination"[14] and the statistics are

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[13]"The Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. And the Department of Justice will take up those cases." (ECF No. 26 at 20-21 (citing U.S. Dep't of Justice, Statements of AG Sessions (Apr. 6, 2018) (URL omitted)).)

[14]"Those numbers are neither surprising nor illuminating of Congress's motives in the 1920s. Indeed, if it were enough to state an equal protection claim that a broad-scale immigration law disparately affected individuals of any particular ethnicity—including those from a country sharing 1,954 miles of border with the United States—virtually any

AMERICAN OVERSIGHT

rather "a feature of Mexico's proximity to the United States, the history of Mexican employment patterns, and other socio-political and economic factors that drive migration from Mexico to the United States–not discrimination." (ECF No. 29 at 13, 25 (citing *Regents,* 140 S. Ct. at 1915-16).) As to "proportionality" it argues that "it makes sense that Mexican citizens comprised a high percentage of illegal entry defendants, given the suggestion that they made up a disproportionately high percentage of the overall illegal alien population." (ECF No. 29 at 14.) The Court is not persuaded.

First, the test for disparate impact only requires evidence that Section 1326 "bears more heavily on one race than another," a much less stringent standard than the government suggests. (ECF No. 30 at 12 (citing *Arlington Heights,* 429 U.S. at 266).) Carrillo-Lopez has met this standard by showing that Section 1326 bears more heavily on Mexican and Latinx individuals. From 1929 to 1939, the number of border crossing crimes increased substantially, making up anywhere from 84% to 99% of defendants." (ECF No. 26 at 17.) Over the course of a decade, well over 80% of border crossing apprehensions were those of Mexican or Latinx heritage.[15] These numbers are in line with other successful *Arlington Heights* challenges. *See Ave. 6E Investments, LLC v. City of Yuma, Ariz.,* 818 F.3d 493, 505-06 (finding disparate impact where a concentration of most low-income housing is in neighborhoods that are 75% Hispanic); *Arce v. Douglas,* 793 F.3d 968, 977 (9th Cir. 2015) (finding disparate impact where 90% of enrollees at a targeted program were of Mexican or Hispanic origin); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 704 (9th Cir. 2009) (finding disparate impact where 71% of Latino areas were excluded from benefits while extending benefits to areas that were only 48% Latino).

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such law could be challenged on that ground." (ECF No. 29 at 13 (citing *Regents,* 140 S. Ct. at 1915-16).)

[15]And as noted, those apprehensions are being prosecuted. *See* U.S. Dep't of Justice, Statements of AG Sessions (Apr. 6, 2018) (URL omitted) ("The Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. And the Department of Justice will take up those cases.").

AMERICAN OVERSIGHT

The government also attempts to use the Supreme Court's reasoning in *Regents* to support its proportionality argument, but that reliance is misplaced.[16] In *Regents,* the Court found that disparate impact *alone* had not been demonstrated. But, as discussed above, Carrillo-Lopez does not attempt to meet his burden on disparate impact alone, but through a showing of disparate impact coupled with intent. Because the Court in *Regents* found that the plaintiffs had failed to demonstrate discriminatory intent, whereas this Court ultimately finds that Carrillo-Lopez has demonstrated both a disparate impact along with discriminatory intent, *Regents* is inapposite.

Second, the Court is unpersuaded by the government's argument that geography explains disparate impact. As Carrillo-Lopez notes (ECF No. 30 at 13-14), the Ninth Circuit has previously found disparate impact in situations where "geography" might arguably explain the disparity. *See Comm. Improvement,* 583 F.3d at 704-06 (finding that planning decisions made with racist purpose in predominantly Latino neighborhoods disparately impacts Latino people); *Arce,* 793 F.3d at 978 (finding that education decisions with racist purpose in Latino city has disparate impact on Latino students); *D.N.C. v. Hobbs,* 948 F.3d 989, 1004-06 (9th Cir. 2020) (en banc) (finding that voting decisions with racist purpose in state where American Indian, Latino, and Black neighborhoods have limited transit and mail access disparately impacts those communities). Moreover, the government's argument is circular and inconclusive. It cannot be the case that the mere over-policing of certain locations—here the Southern border as opposed to the Northern border—prevents a specific group from raising equal protection challenges. Or that because Mexican citizens will likely make up more unlawful reentries because they are a higher percentage of the overall illegal alien population, they cannot raise equal protection challenges. Ultimately, the law still bears more heavily on

[16] In *Regents*, the Court reasoned that "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds." 140 S. Ct. at 1915.

AMERICAN OVERSIGHT

those individuals than others, which is the standard that Carrillo-Lopez has met here. The Court accordingly finds that Section 1326 disparately impacts Latinx individuals.

2. The Act of 1929 was first enacted with a racially discriminatory purpose.

In his Motion and at the subsequent Oral Argument and Hearing, Carrillo-Lopez submitted significant evidence of the non-exhaustive factors outlined in *Arlington Heights* to argue that the Act of 1929 was passed with discriminatory intent. The government ultimately conceded that discriminatory intent motivated the passage of the Act of 1929.[17] But because the background of the Act of 1929 is relevant to the eventual passage of Section 1326 in 1952, and because the 1952 Congress adopts language from the Act of 1929 almost word for word, the Court will address each of the proffered *Arlington Heights* factors as they relate to the 1929 statute. The Court concludes, as did both parties, that Carrillo-Lopez presents sufficient evidence to demonstrate the Act of 1929 was motivated by racial animus.

a. Historical Background

Arlington Heights permits courts to consider "the historical background of the decision." 429 U.S. at 265-68. Carrillo-Lopez first explains how immigration legislation and racism were intimately entwined in the 1920s. Kelly Lytle Hernández, Professor of History at the University of California, Los Angeles, gives context to that history through a sworn declaration in which she testifies that "the criminalization of unauthorized entry was a racially motivated act." (ECF Nos. 26-2 at 2; 49). Professor Lytle Hernández provided context for the passage of the Act of 1929, explaining that the legislation came on the heels of the National Origins Act of 1924 which "narrow[ed] the pathways of legal immigration" by reserving 96 percent of all quota slots for European immigrants. (ECF

[17]At Oral Argument, the government's counsel stated: "I would say that, yes, the statements from those legislators would be sufficient were we considering the 1929 law, but we're not." (ECF No. 47 at 38.) The Court asked for confirmation—"so you agree that they've offered enough evidence to demonstrate that the 1929 enactment stems from racial animus under *Arlington Heights*"—to which the government's counsel responded, "Yes, your Honor." (*Id.* at 38-39.)

AMERICAN OVERSIGHT

No. 26-2 at 4.) But the National Origins Act exempted immigrants from the Western Hemisphere, in part due to pressures from American industry who relied on Mexican labor. (*Id.*) Nativists and proponents of eugenics argued against this exemption.

At the Hearing, Professor Lytle Hernández emphasized how racial animus "bec[am]e more intense" heading into the 1920s, a period referred to as the "Tribal Twenties," when nativism and eugenics became more widely accepted and began to impact Congressional immigration proposals. (ECF Nos. 49 at 27-28; 26-2 at 5 ("[T]he Nativists in Congress never gave up their quest to end Mexican immigration to the United States. After the passage of the 1924 Immigration Act, they proposed bill after bill attempting to add Mexico to the quota system. Between 1926 and 1930, Congress repeatedly debated the future of Mexican immigration into the United States.").) Additionally, and among other things, Professor Lytle Hernández also addressed the "Juan Crow regime" that developed in the 1920s, "a racialized subjugation system in place that mirrors what [was] happening in the American South." (ECF No. 49 at 32.)

b. Sequence of Events and Legislative History

Courts may also consider "the specific sequence of events leading to the challenged action." *Arlington Heights,* 429 U.S. at 265-68. Professor Lytle Hernández again provided insight into the events surrounding the passage of the Act of 1929, notably the National Origins Act of 1924 which established a quota system based on national origin that specifically exempted immigrants from the Western Hemisphere, including Mexicans. (ECF No. 49 at 27-28.) This exemption resulted in a "pretty rapid turn to focusing on getting Mexican immigrants included on the quota," with two major pieces of legislation attempted in 1926 and 1928, but both protested by "major employers and industries across the west" who were "concerned that they w[ould] be cut off from access to Mexican workers." (*Id.* at 28-30.) Professor Lytle Hernández explained that while employment lobbies won initially, "the nativists [were] furious in Congress . . . so [sought] to pursue this through other means" which ultimately led to the Act of 1929 which criminalizes unlawful entry and reentry." (*Id.* at 28-29.) She concludes that it is her

AMERICAN OVERSIGHT

"professional opinion" that "the illegal reentry provision of the 1929 law was intended to target Latinos." (ECF No. 49 at 34.)

Relatedly, the Court may consider "the relevant legislative or administrative history." 429 U.S. at 265-68. Here, Carrillo-Lopez argues that legislative history "easily clears the low threshold of showing that racism and eugenics were a 'motivating factor' . . ." (ECF No. 26 at 15.) While there was little discussion or debate prior to the Senate's passage of the Act of 1929, the bill was introduced after prior attempts failed. Carrillo-Lopez argues these prior failed attempts clearly indicate racial animus. For example, a House Committee on Immigration and Naturalization hearing on "The Eugenical Aspects of Deportation" included testimony from principal witness Dr. Harry H. Laughlin, a well-known eugenicist who suggested that "immigration control is the greatest instrument which the Federal Government can use in promoting race conservation of the Nation" (ECF No. 26-3 at 11, 19), and compared drafters of deportation laws to "successful breeders of thoroughbred horses" (*id.* at 44). Chairman of the House Immigration and Naturalization Committee, Representative Albert Johnson, then advocated for Congress's use of "the principle of applied eugenics" to reduce crime by "debarring and deporting" people. (*Id.* at 25.) These remarks and earlier debates were essentially incorporated into the 1929 discussion because after the initial legislation failed, a compromise was brokered with the agricultural industry and the bill was resubmitted and quickly passed from the Senate to the House. (ECF Nos. 26 at 14; 26-9 at 2-3; 26-10 at 2 (passed full Senate with relatively little debate, but when presented, Senator Blease remarks that he was "asked to get the measures over to the house [within two days] if I possibly could"); 26-11 at 2-3 (report submitted from the Committee of Immigration and Naturalization to the full House, reading: "the hearings in the Sixty-ninth Congress on the subject matter contained in the bill were exhaustive. Much important testimony was developed.") During debate on the bill in the House, representatives made similar racist remarks, including testimony from Representative Fitzgerald who argued that Mexicans

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003130

were "poisoning the American citizen" because they were of a "very undesirable" class. (ECF No. 26-4 at 8.)

c. Departure from Normal Substantive Considerations

The next *Arlington Height's* factor a court can consider is "the legislature's departure[] from normal procedures or substantive conclusions." 429 U.S. at 265-68. Here, Carrillo-Lopez argues that the "1920s was the first and only era in which Congress openly relied on the now discredited theory of eugenics to enact immigration legislation," with illegal reentry laws as one of "few laws still in effect from that era." (ECF No. 26 at 16.) Further, the discussions departed from typical conclusions underlying immigration law because the "racial vitriol expressed during the debates was directed almost exclusively at Mexicans—even though Canadians were also entering the United States in record numbers." (*Id.* (citing ECF No. 26-4 at 9.))

Taking these factors into account, the Court is persuaded that Carrillo-Lopez has proffered sufficient evidence under the *Arlington Heights* framework to demonstrate that racial animus was a strong motivating factor in the passage of the Act of 1929. The evidence clearly indicates, as both parties and other district courts agree, that the Act of 1929 was passed during a time when nativism and eugenics were widely accepted, both in the country at large and by Congress, and that these racist theories ultimately fueled the Act's passage.

3. The 1952 reenactment did not cleanse Section 1326 of its racist origins and was also motivated by discriminatory intent.

The government argues that evidence relating to the Act of 1929 has "no bearing on the passage of the law [Carrillo-Lopez] actually challenges."[18] (ECF No. 29 at 15.) Instead, the government argues that reenactment of an existing law, in the absence of

[18]The original briefs on the Motion focused on the Act of 1929. (ECF Nos. 26, 29, 30.) Following the Hearing, the Court ordered post-hearing briefing specifically addressing the question of whether the racial animus motivating the Act of 1929 tainted the statute's reenactment in 1952 through the INA. (ECF Nos. 50, 51.)

AMERICAN OVERSIGHT

discriminatory intent, cleanses the law of prior discriminatory motivation.[19] (ECF No. 51 at 4-5.) The government there argues that the history of 1929 is therefore irrelevant to the Court's inquiry under *Arlington Heights* and the Court must limit its attention to the passage of the INA in 1952.

Carrillo-Lopez counters that "the absence of any repudiation of the racial animus that led to the adoption of the statute in 1929 should be construed as the defendant meeting his burden."[20] (ECF No. 50 at 5.) But in the alternative, Carrillo-Lopez argues that he exceeds his burden by further demonstrating that the 1952 Congress not only remained silent, but repeatedly recodified Section 1326 with more punitive measures with knowledge of the law's disparate impact, over a presidential veto addressing the bill's racism, and at a moment in history when Congress was simultaneously passing other legislation disparately impacting Latinx migrants. (ECF No. 50 at 1-2.) The Court will therefore consider whether the racial animus exhibited in the Act of 1929's passage can and did infect Section 1326's enactment in 1952.

While the Court might be persuaded that the 1952 Congress' silence alone is evidence of a failure to repudiate a racially discriminatory taint, the Court need not decide that issue. Instead, the Court finds the evidence that racial animus motivated the Act of 1929 is relevant to the 1952 *Arlington Heights* inquiry in two ways. First, evidence from the 1929 Congress is relevant as historical background for the passage of the INA in 1952. *See Machic-Xiap*, 2021 WL 2021 WL 3362738 at *12 (finding the history of the 1929 statute "strong" historical background evidence). The Court incorporates by reference this prior evidence as evidence of the historical background motivating the passage of Section 1326 in 1952. The Court will further explain below how the other

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[19]The government relies specifically on the Supreme Court's decision in *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and three circuit courts of appeals decisions, *see Hayden v. Paterson,* 594 F.3d 150, 164-68 (2d Cir. 2010); *Johnson v. Governor of State of Florida,* 405 F.3d 1214, 1223-26 (11th Cir. 2005) (en banc*); Cotton v. Fordice,* 157 F.3d 388, 391-92 (5th Cir. 1998).

[20]Specifically, codifications are "either responsive, i.e. reverse[] a prior piece of legislation, or [are] extensive, that is, passed in the context of knowing what the existing statute means and is intended to do, and builds on that." (*Id.*)

AMERICAN OVERSIGHT

Arlington Heights factors also support the finding that Section 1326's enactment was motivated at least in part by discriminatory intent.

But second, the Court finds the government is incorrect in its reliance on *Abbott*, because a prior version of a statute known to be motivated by racial animus may be considered as infecting its present iteration if it was not, in fact, substantially altered. *See Hunter*, 471 U.S. 222, 232-33 (1985) (finding that when a statute's original enactment was clearly motivated by racial animus, later amendments did not "legitimate[]" the provision); *see also Abbott*, 138 S. Ct. at 2324-25 (distinguishing its holding from *Hunter* because the statute in *Abbott* was substantially different from its predecessor and there was no evidence that the reenacting legislature "carried forward the effects of any discriminatory intent"). After the Court addresses the 1952-specific evidence, the Court will explain why the 1952 Congress cannot be presumed to have cured the animus present in 1929.

In light of these reasons, the Court considers that the totality of the evidence demonstrates racial animus motivated the 1952 enactment of Section 1326, regardless of whether silence alone would have been sufficient to demonstrate discriminatory intent.[21]

a. The 1952 enactment of Section 1326 was also motivated by discriminatory intent.

The Court does not rely solely on the evidence from 1929, but also considers contemporaneous evidence from 1952. In evaluating that evidence, the Court looks at the interplay between legislative history and relevant historical evidence. Specifically, the

[21]The Court notes that the authority the government relies upon specifies that courts must presume legislatures act in good faith in redistricting cases. *See Abbott*, 138 S. Ct. at 2324 ("'[I]n assessing the sufficiency of a challenge *to a districting plan*,' a court 'must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus . . . [a]nd the 'good faith of [the] state legislature must be presumed.'") (citing *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995)). Both *Miller* and *Abbott* emphasize the complexity of redistricting in the need for presumption of legislative good faith. The Court is not convinced that reasoning is analogous to this comparatively less complex statutory scheme, especially when animus has been demonstrated and the reenacted statute is nearly identical to its improper predecessor.

AMERICAN OVERSIGHT

Court considers: a relative lack of discussion compared to robust Congressional debate regarding other provisions of the INA; explicit, recorded use of the derogatory term "wetback" by supporters of Section 1326; Congressional silence while increasingly making the provision more punitive; Congress' failure to revise in the face of President Truman's veto statement calling for a reimagination of immigration policy; knowledge of the disparate impact of Section 1326 on Mexican and Latinx people; and passage of the so-called "Wetback Bill" by the same Congress only months prior. The Court recognizes that this evidence is circumstantial, and that each instance may not be as probative when considered alone. But in its totality, the cited evidence is sufficient to demonstrate that racial animus was at least one motivating factor behind the enactment of Section 1326.[22] The evidence specific to the 1952 enactment will be discussed in turn.

i. Silence Compared to Robust Debate on Other Provisions

As stated above, the Court does not now determine if silence alone is enough for Carrillo-Lopez to meet his burden. But the Court does consider whether a lack of debate regarding recodification of Section 1326 in 1952, when other provisions of the INA were debated and discussed, supports Carrillo-Lopez's argument that discriminatory intent was a motivating factor in its reenactment in 1952. The Court finds that it does.

Defense expert Professor Gonzalez O'Brien testified that the contrast between extensive congressional debate about other national origin provisions and the comparative lack thereof around Section 1326 suggests an acceptance of its history. (ECF No. 49 at 181.) Other instances of discriminatory immigration policy, Professor Gonzalez O'Brien notes, prompted the Congress to debate about what was deemed a problematic aspect of the original enactment—including during the 1952 enactment of the

[22]The Court notes that a recent district court decision from this circuit disagrees. *See Machic-Xiap*, 2021 WL 3362738 at *11-14. After considering the same evidence that is now before the Court—Truman's veto statement, the letter from DAG Ford, testimony from Professors Gonzalez O'Brien and Lytle Hernández—the court in that case found that the legislative history of Section 1326 is "inconclusive." *Id.* at *13. But this Court cannot agree that the evidence, when viewed in its totality, is insufficient to demonstrate that racial animus was at least one motivating factor for the passage of Section 1326. The Court explains its reasoning more fully below.

AMERICAN OVERSIGHT

INA.[23] (*Id.* at 180.) Professor Gonzalez O'Brien concludes "that's one of the reasons that I'm willing to say that this is a demonstration of racial—of continued racial animus, is that you're acknowledging in the debate over the McCarran-Walter Act, members of Congress are acknowledging that there are problematic racial aspects to the 1924 Johnson-Reed Act, which comes five years before the Undesirable Aliens Act, and yet they choose to not only recodify the 1326, but to recodify it[] without any examination." (ECF No. 49 at 180-81.)

Professor Gonzalez O'Brien's testimony depicts a Congress that was more concerned with which racial and ethnic groups warranted continued discriminatory exclusion, rather than any desire to confront or revise the nativism reflected in the Act of 1929. As a matter of logic, the 1952 Congress could have either examined that history or ignored it. If the 1952 Congress ignored the express nativist intent behind the Act of 1929, there is no reason to assume that the later enactment arose from some wholly unrelated motivation cleansed from discriminatory intent. If it did not ignore the Act of 1929's history, there was opportunity to either adopt its racial animus or refute its improper motivation and clarify a purpose for the statute that did not violate the Equal Protection Clause. Here, the 1952 Congress remained silent, even when other provisions of the law were being debated. When considered in comparison with the express debate over other racially problematic predecessor statutes, Congress' silence here weighs in favor of establishing Carrillo-Lopez meets his burden.

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[23]In particular, Professor Gonzalez O'Brien notes the continued debate over the use (and allocation) of quotas in the immigration scheme: "we see that debate with the McCarran-Walter Act, I mean the debate over national origins, and the kind of racial aspects of the, of the limits placed on quotas for southern and eastern Europeans. . . you see the continuation of that with the McCarran-Walter Act, and the insertion of tables during committee testimony, the insertion of tables showing that the largest quotas will still go to northern and western Europeans." (ECF No. 49 at 180.) He goes on to note that "in 1965 with debate over the Hart-Celler Act, and the elimination of national quotas and the acknowledgement that the national quota system had been one that was very clearly and explicitly meant to privilege certain groups based on perceptions of superiority and inferiority, particularly—you know, especially with 1924." (*Id.*)

AMERICAN OVERSIGHT

ii. President Truman's Veto

The Court also considers that Congress declined to comment on the racist forebears of Section 1326, even in the face of President Truman's veto of the INA. On June 25, 1952, President Truman vetoed INA, and included a veto statement. (ECF No. 44-1.) President Truman condemned the INA as "legislation which would perpetuate injustices of long standing against many other nations of the world" and "intensify the repressive and inhumane aspects of our immigration procedures." (*Id.* at 3.) Finding that the positive aspects of the INA were "heavily outweighed" by other provisions, President Truman expressed dismay that so much of the INA "would continue, practically without change" discriminatory practices first enacted in 1924 and 1929. (*Id.* at 4.)

On June 27, Congress overrode President Truman's veto and passed the INA. (*Id.*) Carrillo-Lopez argues that Congress' decision to pass the INA over a presidential veto that "explicitly called out the law for its racism" is evidence of racial animus. (ECF No. 50 at 5-6.) While President Truman did not explicitly address racism as to Mexican or Latinx individuals, he commented on the negative implications of expanding the grounds for deportation,[24] and implored Congress to reconsider the INA's passage: "Should we not undertake a reassessment of our immigration policies and practices in the light of the conditions that face us in the second half of the twentieth century? . . . I hope the Congress will agree to a careful reexamination of this entire matter." (ECF No. 44-1 at 10.) President Truman clearly wanted Congress to review the INA and reconsider its objectives, admonishing it was "the time to shake off this dead weight of past mistakes . . . time to develop a decent policy of immigration—a fitting instrument for our foreign policy and a

[24]President Truman specifically criticized the "unnecessarily severe" and inflexible penalties for deportation. (*Id.* at 8.) He continued, "[t]he bill would sharply restrict the present opportunity of citizens and alien residents to save family members from deportation. Under the procedures of present law, the Attorney General can exercise his discretion to suspend deportation in meritorious cases. In each such case, at the present time, the exercise of administrative discretion is subject to the scrutiny and approval of the Congress. Nevertheless, the bill would prevent this discretion from being used in many cases where it is now available and would narrow the circle of those who can obtain relief from the letter of the law. This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief." (*Id.* at 9.)

AMERICAN OVERSIGHT

true reflection of the ideals we stand for, at home and abroad . . .” (*Id.* at 6.) Professor Gonzalez O’Brien confirms that despite the fact that the INA is “sometimes characterized as racially progressive,” President Truman’s veto “explicitly notes” the INA was unnecessarily punitive, and inequitably so. (ECF No. 49 at 116-117).

As another court noted, the veto statement largely objected to the national origin quota system, not Section 1326. *See Machic-Xiap*, 2021 WL 3362738, at *13. But although President Truman did not address Section 1326 specifically, the veto statement represents in no uncertain terms a contemporary admonishment of an overly punitive and discriminatory immigration policy. Truman expressly drew the INA into dialogue with prior immigration legislation, from both 1924 and 1929, which were concededly racist. But the 1952 Congress rejected that call and overrode the veto. The Court finds that Congress’ failure to heed President Truman’s call to “reimagine” immigration while simultaneously making the INA, and particularly Section 1326, more punitive in nature, is evidence of at least indifference to the nativist motivations of the statute’s predecessor. The Court accordingly finds that Congress’ decision to proceed with the INA that President Truman denounced as discriminatory contributes to its finding that Carrillo-Lopez has met his burden.

iii. Deputy Attorney General Peyton Ford Letter

The Court considers additional legislative history—a letter of support from Deputy Attorney General Peyton Ford, which includes use of the racially derogatory word “wetback” as well as testimony in support of expanding the grounds for prosecution and conviction of unlawful reentry under Section 1326. On May 14, 1951, Attorney General Ford wrote to Pat McCarran, Chairman of the Committee on the Judiciary, in “response to [McCarran’s] request for the views of the Department of Justice relative to the bill (S. 716) to revise the laws relating to immigration, naturalization, and nationality; and for other purposes . . .” (ECF No. 44-2.) Congress’ decision to adopt this recommendation, the only substantive change made to Section 1326 in 1952, in light of its silence regarding all other aspects of the provision, is further evidence of racial animus.

AMERICAN OVERSIGHT

First, Attorney General Ford's letter expressly includes the racial slur "wetback." The letter specifically quotes from the report of the President's Commission on Migratory Labor, Migratory Labor in American Agriculture, March 26, 1951, which says: "Statutory clarification on the above points will aid in taking action against the conveyors and receivers of the *wetback*. These clarifications of the statute, together with increased funds and personnel for enforcement, are possibly all that are needed to deal effectively with the smuggler and the intermediary." (ECF No. 44-2 at 9 (emphasis added).) Common sense dictates, and many courts have acknowledged, that the term "wetback" is racist.[25] *See, e.g.*, *Machic-Xiap*, 2021 WL 3362738, at *13 ("Again, 'wetback' is a racial epithet."). Its use in testimony from a supporter of the bill is significant here. First, it evidences the racial environment and rhetoric in 1952, even among high-ranking government officials and committees, specifically with regard to Mexican and Latinx people. But it is also significant considering that Ford's recommendation was the only recommendation adopted by Congress as to Section 1326. Not only does Ford's letter employ racially derogatory language, but it advises Congress to expand the grounds for deportation. Specifically, the letter recommended amendments to the bill including clarifying the "found in" clause in Section 276 by:

> add[ing] to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. This change would overcome the inadequacies in existing law which have been observed in those cases in which it is not possible for the Immigration and Naturalization Service to establish the place of reentry, and hence the proper venue, arising in prosecutions against a deported alien under the 1929 act.

[25]Professor Gonzalez O'Brien goes on to explain that "the term with 'wetback' comes from the idea that individuals who are entering without inspection have to do so at an area where there is no bridge over the Rio Grande River and, therefore, they get wet and, therefore, the term wetback. But across the period of the 1940s and 1950s, this term has—is associated, and almost synonymous with Mexicans. And in addition to being synonymous with Mexicans and racialized in much the same way, it also has the attribution of a lot of the negative stereotypes that were associated with Mexican immigrants in the push, or [sic] quotas to be applied to immigration from Mexico and south of the Rio Grande, as well as during debate over the Undesirable Aliens Act." (ECF No. 49 at 89-90.)

AMERICAN OVERSIGHT

(ECF No. 44-2 at 7.)

At the Hearing, Professor Gonzalez O'Brien explained that this amendment was incorporated "explicitly to make it easier to enforce the 1929 law, by allowing prosecution of immigrants wherever they were found, even if you couldn't establish where they crossed." (ECF No. 49 at 184-85). This legislative history confirms, as Carrillo-Lopez argues, that the only substantive change made to Section 1326 in 1952 was this amendment which expanded the government's authority to enforce the original 1929 provision, thereby making Section 1326 more punitive in nature. Attorney General Ford's recommendation, conveyed to Congress along with racial slurs, was adopted by the 1952 Congress and became a part of Section 1326.

Again, while Attorney General Ford's recommendation alone may not be enough to prove discriminatory intent, the Court considers this evidence in context. The only significant alteration between the unlawful reentry provision in the Act of 1929 and Section 1326 was this one, recommended by Ford.[26] The 1952 Congress' silence does not evince a neutral viewpoint, but worked to expand the enforceability of an admittedly racist law. The Court therefore finds that this evidence contributes to its finding that Carrillo-Lopez meets his burden.

iv. Wetback Bill

The Court further considers the passage of the so-called "Wetback Bill" as evidence of historical background. The bill's passage is particularly probative because it was "passed by the same congress during the same time frame and with the same express aim as illegal reentry . . ." (ECF No. 50 at 10.) Senate Bill 1851, nicknamed the "Wetback Bill," was passed March 20, 1952, just a few months before the INA. *See* United Statutes at Large, 82 Cong. ch. 108, 66 Stat. 26 (March 20, 1952). The bill's stated aim was to "assist in preventing aliens from entering or remaining in the United States illegally." *Id.* Yet, as Carrillo-Lopez argues, the bill was reflective of Congress' racially

[26] *See* notes 9 & 10.

AMERICAN OVERSIGHT

discriminatory motivations, not only because of the nickname of the bill but also by the way it sought to achieve its stated aim.

First, the Wetback Bill evidences discriminatory motive simply in its use of the racial epithet "wetback." As Professor Gonzalez O'Brien testified: "In 1952, prior to the passage of the McCarran-Walter Act, you have a Bill that is introduced and passed on March 20th that is nicknamed the Wetback Bill. And this is a piece of anti-harboring legislature where, throughout the debate, Mexican undocumented entrants are regularly referenced as wetbacks. And Senator McFarland [of Arizona], during the debate over the Act of March 20th, 1952, notes that Senate Bill 1851, a Bill known as the Wetback Bill, was going to be debated. Initially, this legislation was aimed strictly at Mexicans." (ECF No. 49 at 97-98.)[27]

Aside from the use of derogatory language, the incongruities between the stated intent of the bill and the actual language of the bill demonstrate the Congress' racist motives and intent. While the stated aim of the bill was to prevent "aliens from entering or remaining in the United States illegally", as Carrillo-Lopez argues, it actually "illustrates the intent of congress to preserve the influx of cheap and exploitable labor, while simultaneously marginalizing those workers and excluding them from full participation in American life." (ECF No. 50 at 10.) By failing to punish employers who hired illegal immigrants and instead only punishing the laborers themselves, the "1952 and 1929 congresses were both balancing the hunger of the agricultural industry for exploitable labor and the desire to keep America's identity white." (*Id.*)

The Court agrees that the "context in which [] Mexican immigration was being discussed at that historical moment" is illustrative of the 1952 Congress' intent. (ECF No. 49 at 129-30.) Despite the lack of official debate surrounding the enactment of Section 1326, Professor Gonzalez O'Brien connects the Ford letter with the Wetback Bill to give a more nuanced understanding of the 1952 Congress' approach:

> what you do have is that you do have this note that's entered in the support for 1326 by the Department of Justice, and it's a letter from the Deputy Attorney General, Peyton Ford . . .So, again, you have the use of this

[27]Relatedly, Professor Gonzalez O'Brien notes that this "debate around wetbacks is—also enters into the McCarran-Walter Act." (ECF No. 49 at 99-100.)

AMERICAN OVERSIGHT

> racialized term to describe Mexican immigrants, even though you don't have debate around Mexican immigration in the McCarran-Walter Act itself, or during debate for the McCarran-Walter Act, in part, because you have this Bill that precedes it by two months, where much of the debate is how do we limit the number of Mexican immigrants and the trafficking of undocumented Mexican immigrants into the United States? And that Bill also contained the Texas proviso, which gave workers the kind of loophole of, you know, if you're employing undocumented laborers, it doesn't constitute harboring.

(ECF No. 49 at 129-30.) Professor Gonzalez O'Brien notably concludes that "understanding the recodification under McCarran-Walter, it has to be done in the context both of what came before it, but also what was occurring at that historical moment, and at that moment in time." (*Id.*)[28]

This context assists the Court in its "sensitive" inquiry demanded by *Arlington Heights*. *See* 429 U.S. at 564. In short, both the derogatory nickname of the Wetback Bill and its criminalization of Mexican immigrant laborers while shielding employers evidences the racially discriminatory motives and intent of the same Congress who enacted Section 1326 only two months later.

v. Congressional Awareness of Disparate Impact

Finally, the Court considers Congress' silence in light of their knowledge that Section 1326 disparately impacts Latinx people as further evidence of continued racial animus. Professor Lytle Hernández outlined the disparate impact of the criminal unlawful reentry statute over the 23 years between the law's enactment 1929 and reenactment in 1952. (ECF No. 26-1.) She specifically highlighted that "some years, Mexicans comprised 99 percent of immigration offenders" and by the 1930s "tens of thousands of Mexicans had been arrested, charged, prosecuted, and imprisoned for unlawfully entering the United States." (*Id.*)

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[28]"Q: And part of the legislative background also is the Wetback Bill that occurred two months earlier. Is that fair? A: That is fair. Q: And the Wetback Bill explicitly carved out from the harboring of aliens [sic] employers? A: That is correct. Q: And that tension between employers and the utilization of south of the border migrants was the same sort of tension that we see animating that debate in 1929. Is that fair? A: That's fair." (ECF No. 49 at 184-86 (excerpts of Professor O'Brien's testimony under defense counsel's examination.)

AMERICAN OVERSIGHT

Congress' knowledge that Section 1326 continued to disparately impact Mexican and Latinx people is evidenced by criticism from President Truman in his veto statement when he specifically critiqued the INA for expanding grounds for deportation[29] and from testimony provided by enforcers of the law—the Immigration and Naturalization Service. The Immigration and Naturalization Service testified regarding the "difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area" because many violators of immigration law "are not prosecuted or, if prosecuted, get off with suspended sentences or probation." (ECF No. 45 at 2.) Congress' silence about the prior racist iterations of this bill coupled with its decision to expand the grounds for deportation and carceral punishment, despite its knowledge of the disparate impact of this provision on Mexican and Latinx people, is some evidence that racial animus was a motivating factor.

When these factors are considered together, the Court finds there is sufficient evidence to conclude that racial animus continued to be a motivating factor in the recodification of 1952. As Professor Gonzalez O'Brien testified:

> if you look at all of those things, including the racial animus that was demonstrated in the McCarran-Walter Act itself . . . then I think all of those things suggest that the decision to pass this without debate, was largely driven by the same things that drove the original codification of 1326; and that was, in part, a desire to control access to Mexican labor, and also a tendency to view Mexicans, individuals from south of the Rio Grande, and at least in the terms of the 1950s, the wetback, as a problematic population. And you don't see any significant debate over – you have a stretch between 1959 and 1952, where you have 1326 in effect, and you don't see any debate over that policy on its merits. We've been doing this for over 20 years by that point. What are the merits of 1326? . . . You don't have debate over that in 1952.

(ECF No. 49 at 129-30.)

The totality of evidence shows that the same factors motivating the passage of Section 1326 in 1929 were present in 1952. Not only did Congress fail to repudiate the racial animus clearly present in 1929, but it expanded the government's power to enforce unlawful reentry, despite President Truman's call to reimagine immigration laws. The

[29] *See* note 24.

AMERICAN OVERSIGHT

1952 Congress incorporated the advice of supporters of the bill who used racial epithets in official documents, while contemporaneously passing another bill targeting "wetbacks." Although it is "not easy" to prove that racism motivated the passage of a particular statute, the Court reasons that it cannot be impossible, or *Arlington Heights* would stand for nothing.[30]

The Court therefore finds that Carrillo-Lopez has met his burden.

b. The authority cited by the government does not preclude consideration of the Act of 1929.

Essential to the government's position is its proposition that improper motivations infecting prior versions of legislation do not carry over to reenacted versions of a law. The government argues that the Supreme Court "ha[s] viewed variants of the 'taint argument' with equal skepticism," and several circuit and district courts have found that "the ultimate focus in subsequent litigation is the intent of the reenacting legislature, not the original one." (ECF No. 29 at 24.) As explained below, the Court finds these cases do not support the government's argument that a re-enacting Congress is always shielded from the legislation's prior motivations, and instead instruct the reviewing court to consider how much the reenacting Congress actually altered the legislation.

The government relies on *Abbott v. Perez* to argue that "the presumption of legislative good faith [is] not changed by a finding of past discrimination" nor can past discrimination "condemn governmental action that is not itself unlawful." (ECF No. 51 at 3-4.) In *Abbott*, electoral redistricting plans developed in 2011 were challenged as discriminatory. Responding to that concern, Texas adopted interim plans overseen by a federal district court that were later adopted by the 2013 Legislature. *See Abbott*, 138 S. Ct. at 2315. When reviewing the 2013 plans, the district court found discriminatory intent

[30] *Machic-Xiap*, 2021 WL 3362738 at *1. The *Machic-Xiap* court noted it was "unaware of any federal appellate decision holding that a facially neutral act passed by Congress was motivated by racial, ethnic, or religious animus." *Id.* When faced with the record before it and lacking clear guiding or distinguishing authority from federal appellate courts, this Court cannot ignore the extensive history—both from 1929 and contemporaneously in 1952—that suggests discrimination was in part motivating Congress' enactment of Section 1326.

AMERICAN OVERSIGHT

because the 2013 Legislature "failed to 'engage[] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* at 2318. The Supreme Court disagreed and ultimately upheld the 2013 districting plan because the "2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature." *Id.* at 2325. The Supreme Court reasoned that although a court had previously found that the 2011 Legislature "acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed." *Id.* Therefore "there can be no doubt about what matters: it is the intent of the 2013 Legislature." *Id.*

The facts here are distinguishable. Most importantly, here, the initial and recodified unlawful reentry statutes are nearly identical, with the exception of broader enforcement measures. In *Abbott,* the 2013 Legislature was not simply reenacting an earlier version of the districting plan, but an entirely new plan was implemented following a lower court's finding of discriminatory intent. In so doing, the new plan was explicitly created to "fix[] the problems identified," *id.* at 2329, or "cure[]" any prior discriminatory intent, *id.* at 2325. The holding in *Abbott* is based on the legislature's active response and engagement with the prior challenged statute. The Supreme Court in fact clarified:

> We do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, *both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature*. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

Id. at 2327 (emphasis added). The Court found the new legislature lacked discriminatory intent precisely because of the way that it responded to the challenged provision. Moreover, the Court expressly stated that how the reenacting legislature responds to a prior discriminatory statute is probative of the reenacting legislature's intent. Unlike in

AMERICAN OVERSIGHT

Abbott, the 1952 Congress adopted Section 1326 almost wholesale from the Act of 1929, revising it only to make it more punitive.[31]

The government's reliance on three circuit courts of appeals decisions is similarly unpersuasive. (ECF No. 51 at 4-5 (citing *Hayden v. Paterson,* 594 F.3d 150, 164-68 (2d Cir. 2010); *Cotton v. Fordice,* 157 F.3d 388, 391-92 (5th Cir. 1998); *Johnson v. Governor of State of Fla.,* 405 F.3d 1214, 1223-26 (11th Cir. 2005).) Contrary to the government's argument that re-enactment of an existing law "cleanses" it from "any discriminatory aspects of its history" (*id.* at 5), the Second Circuit in *Hayden* expressly warned against the possibility that a legislative body "might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose by (quietly) reenacting it without significant change." *Hayden*, 594 F.3d at 167 (reasoning that subsequent changes to legislation tainted by racial animus should "substantively change" the prior issue in a way that is "not inconsequential"). Clearly aware of this issue, the Fifth Circuit in *Cotton* and the Eleventh Circuit in *Johnson* also stress that the challenged amendments made substantive revisions to their racist predecessors which meaningfully impacted how they would be enforced.[32] The Second Circuit reasoned that its concerns were "ameliorated" because (i) there was no allegation of bad faith on the part of the re-enacting legislature, (ii) there was adequate deliberation that resulted in substantive changes when

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[31]The government further relies on the Supreme Court's decision in *McKlesky v. Kemp* to argue that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." 481 U.S. 279, 289 n.20 (1987). There, the Court looked at Georgia laws in force during and just after the Civil War, finding that "historical background of the decision is one evidentiary source" for proof of discrimination under *Arlington Heights*, but it has little probative value if it is not "reasonably contemporaneous" ultimately deciding that "although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent." *Id.* Here, the evidence offered and accepted by this Court regarding the 1952 reenactment was contemporaneous in time. Thus, *McKlesky* has no bearing on the Court's decision here.

[32]*See Cotton*, 157 F.3d at 391-92 (explaining that the amendment in question removed burglary, an offense commonly relied on to disenfranchise Black people, and broadened the applicability of the statute to include murder and rape to better fit the state's race-neutral disenfranchisement purposes); *Johnson*, 405 F.3d at 1223-24 (similarly reasoning that the specific amendment at issue went through multiple revisions and committee reviews with the purpose of removing the racial taint from a prior felon-disenfranchisement statute).

AMERICAN OVERSIGHT

the statute in question was reenacted, and (iii) there was no evidence of discriminatory intent of the reenacting legislature. *See Hayden*, 594 F.3d at 167.

Carrillo-Lopez's case is completely distinguishable. The legislatures in *Hayden*, *Cotton*, and *Johnson* substantively amended the prior iterations of the laws in question in an attempt to make them less racially targeted. But Section 1326 was not substantively changed, or even genuinely debated. Instead, the 1952 Congress sought only to ease law enforcement's burden in prosecuting those subject to Section 1326. While the *Hayden*, *Cotton*, and *Johnson* legislatures were expressly revising felon-disenfranchisement laws to make them more race-neutral, the 1952 Congress did not depart from the original enactment of Section 1326 and instead adopted it in its entirety into the INA. Moreover, that addition happened at a time that Congress did not appear to be overly concerned with its animus toward Mexican and Latinx people, but instead welcomed racist epithets. Carrillo-Lopez has demonstrated that the 1952 reenactment not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus and discriminatory intent. The Court therefore concludes that *Abbott*, *Hayden*, *Cotton*, and *Johnson* do not prohibit considering the motivations of the Act of 1929 when determining whether the 1952 Congress was motivated by a similar discriminatory intent.

4. The Court disagrees with the conclusions of other district courts that have addressed this issue.

The Court notes that Section 1326 has lately faced scrutiny in several district courts. The parties have routinely supplemented their briefing in response to these

AMERICAN OVERSIGHT

developments,[33] and the Court has worked to stay abreast of recent decisions.[34] As the Court understands the present status, no court that has addressed this issue has found that Section 1326 is unconstitutional under *Arlington Heights*. The Court will therefore explain its reasons for departing from the holdings of its sister courts.

The two cases cited by the government, *Medina-Zepeda* and *Palacios-Arias*, are distinguishable because they considered solely evidence from the 1952 reenactment. (ECF Nos. 43-1, 29-1.) Unlike in those cases, the Court here considers the surrounding legislative history and context of both the Act of 1929 and 1952 INA. The Central District of California reasoned in *Medina-Zepeda* that dicta in *Ramos v. Louisiana*, 140 S. Ct. 1390 2020), and *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020), was insufficient authority to justify relying solely on legislative history from the 1920s. (ECF No. 43-1 at 6 ("Defendant provides no authority or basis for the court to evaluate the 1952 statute solely on the basis of the legislative history relating to the Undesirable Aliens Act of 1929.").) The Court agrees with that reasoning. However, the Court here does not only consider historical background from the 1920s. *Medina-Zepeda* therefore cannot guide the Court's determination of whether Carrillo-Lopez has met his burden under *Arlington Heights*.

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[33]The parties supplemented their briefing with the following cases: *United States v. Palacios-Arias*, Case No. 3:20-cr-62-JAG (E.D. Va. Oct. 13, 2020) (ECF No. 29-1); *United States v. Rios-Montano*, Case No. 19-cr-2123 (S.D. Cal. Dec. 8, 2020) (ECF No. 31-1); *United States v. Medina-Zepeda*, Case No. CR 20-0057 (C.D. Cal. Jan. 5, 2021) (ECF No. 43-1). The government additionally cites to *United States v. Morales-Roblero*, 2020 WL 5517594 (S.D. Cal. Sept. 14, 2020) (ECF No. 29 at 6 n.6) and *United States v. Ruiz-Rivera*, Case No. 20-mj-20306-AHG (S.D. Cal. Sept. 2, 2020) (ECF No. 29 at 22 n.13) in its opposition brief. *Palacios-Arias* and *Medina-Zepeda* address the constitutionality of Section 1326, and will be discussed below. *Rios-Montano*, *Morales-Roblero*, and *Ruiz-Rivera* address the constitutionality of Section 1325, which is also part of the INA but has a separate legislative history. Accordingly, the Court will focus on cases that challenge Section 1326 specifically.

[34]In addition to the parties' briefing, the Court notes that several courts have lately ruled on this issue. *See United States v. Machic-Xiap*, Case No. 3:19-cr-407-SI, 2021 WL 3362738 (D. Or. Aug. 3, 2021); *United States v. Wence*, Case No. 3:20-cr-0027, 2021 WL 2463567 (D.V.I. Jun. 16, 2021); *United States v. Gutierrez-Barba*, Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801 (D. Ariz. May 25, 2021). The Court will address the arguments in *Machic-Xiap* and *Wence* below. However, the Court will not address *Gutierrez-Barba*, which applied a deferential rational-basis review instead of *Arlington Heights*, and is therefore unhelpful to the Court's analysis. *See* 2021 WL 2138801 at *5.

AMERICAN OVERSIGHT

The Court similarly finds *Palacios-Arias* distinguishable. (ECF No. 29-1.) The Eastern District of Virginia reasoned that evidence of animus from the 70th Congress cannot necessarily be imputed to the 82nd Congress. Again, the Court agrees. But Carrillo-Lopez has provided evidence of contemporaneous discriminatory intent motivating the passage of the 1952 INA. Moreover, the Court will not ignore that Congress in 1952 adopted the language of Section 1326 without substantially changing the law and without debate or discussion of the invidious racism that motivated the Act of 1929, only to make it more punitive.

Two district courts, however, have recently found that substantially similar evidence to that which the Court here considers is insufficient for a defendant to meet their burden. Ultimately, the Court disagrees.

In *United States v. Wence*, the District Court of the Virgin Islands applied *Arlington Heights* but found the defendant had not met his burden because "Wence has failed to provide any legislative history or other evidence suggestive of the motives of the 82nd Congress." *See* 2021 WL 2463567, at *7. After considering the "problematic rhetoric" surrounding the INA's passage, as well as the Truman veto statement and override, that court concluded "Wence has not cited any part of the legislative history which discloses any racial animus in the law against Latinx aliens" and "the legislative history for the 1952 and 1929 legislation does not reveal any discriminatory motive." *Id.* at *9. First, the Court disagrees with that conclusion—as explained above, the record demonstrates discriminatory motivations as to both statutes. But the Court further rejects the *Wence* court's conclusion because that court appeared to blur the defendant's burden under *Arlington Heights*, reasoning that alternative "valid immigration considerations," *id.*, balanced out the evident "issues" with the INA, *id.* at *8. *But see Arlington Heights*, 429 U.S. at 265 (explaining that a challenger need not "prove that the challenged action rested *solely* on a racially discriminatory purpose"). Moreover, the *Wence* court relies on *Hayden*, *Cotton*, and *Johnson* to support that deliberation of other sections of the INA is sufficient to cleanse the reenacted Section 1326 of its original discriminatory motivation,

AMERICAN OVERSIGHT

despite the fact that Section 1326 was neither specifically debated nor substantively changed. The Court is therefore unpersuaded by *Wence*.

In *Machic-Xiap*, the District Court for the District of Oregon considered a similar challenge to Section 1326 based on similar evidence as presented here. *See Machic-Xiap*, 2021 WL 3362738, at *12. The *Machic-Xiap* court detailed an extensive historical record, and found not only that the Act of 1929 served "racist purposes," *id.* at *12, but also that the defendant did provide some evidence of racial animus during the 1952 reenactment, *id.* at *12-14. But after concluding that the historical evidence of the Act of 1929 was "strong," *id.* at *12, the *Machic-Xiap* court carefully examined the remaining evidence and found that despite evidence of racist motivation, each piece of evidence should not be given significant or conclusive weight. *See id.* It is apparent that the *Machic-Xiap* court conducted a thorough and sensitive inquiry, and this Court agrees that any individual piece of evidence alone would likely be insufficient to demonstrate that racial animus was a motivating factor. But, as stated above, the Court views the evidence—of historical background, legislative history, sequence of events, and departure from normal deliberative process—under the totality of the circumstances. While each piece of evidence may be insufficient alone, together they show discriminatory intent on behalf of the 1952 Congress specifically, and with regards to Section 1326 specifically.

The *Machic-Xiap* court further limited its reliance on evidence from 1929 based on its application of *Abbott*. *See id.* at *14. While the Court agrees that racial animus from a prior enacting legislature cannot be necessarily imputed to a reenacting legislature, the Court reads *Abbott* to require that the reenacting legislature make some substantive change before known racial animus is cleansed. *See Abbott*, 138 S. Ct. at 2325. Although courts have an obligation to give a reenacting legislature the presumption of good faith,[35] that presumption is not insurmountable. Here, the 1929 provision and Section 1326 are nearly identical, the only change was not substantive, and that change was motivated by

[35] *See Machic-Xiap*, 2021 WL 3362738 at *15 (citing *Abbott* and *N.C. St. Conf. of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020)).

AMERICAN OVERSIGHT

the Ford Letter which sought to expand the enforceability of the 1929 provision while referring to Latinx people as "wetbacks." As explained above, *Abbott* does not shield the reenacting legislature from scrutiny in light of such evidence. The Court therefore disagrees with the conclusion of the *Machic-Xiap* court and finds that the evidence Carrillo-Lopez presents is sufficient to meet his burden under *Arlington Heights*.

The Court is aware that proving discriminatory intent motivated the passage of a specific statute is difficult—in fact, unprecedented.[36] But despite the high threshold, the Court cannot deny that when considered as a whole, the evidence indicates discriminatory intent on the part of the 1952 Congress.

C. The government has failed to show that Section 1326 would have been enacted absent the discriminatory motivation.

Having found that Carrillo-Lopez met his burden under *Arlington Heights,* the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n. 21. The government argues that it is "obvious and uncontroverted that valid, nondiscriminatory objectives motivated the passage of Section 1326 in 1952 and its later amendments." (ECF No. 51 at 11.) The government offers no independent evidence, but points instead to Carrillo-Lopez's own expert testimony to propose three allegedly permissible motivations: (1) a desire to protect American citizens from economic competition; (2) a need to maintain national security; and (3) a need to maintain foreign relations with international allies. (ECF No. 52 at 11.) As the Court explains below, the testimony does not support a conclusion that these alternative motivations can easily be separated from the demonstrated discriminatory intent.

The government advances two additional arguments that do not offer alternative motivations for the passage of Section 1326, but which it claims are sufficient to show that Section 1326 would have been enacted absent discriminatory intent. The government first argues the Ninth Circuit once found Section 1326 is "a necessary piece of the

[36] *See Machic-Xiap*, 2021 WL 3362738 at *1.

AMERICAN OVERSIGHT

immigration-regulation framework." (ECF No. 51 at 12 (citing *U.S. v. Hernandez-Guerrero,* 147 F.3d 1075, 1078 (9th Cir. 1998).) Second, the government argues that because Section 1326 has been passed "six times in various amended versions, all in the absence of any evidence of discriminatory intent, the Court need not engage in a counterfactual analysis to conclude that the law would pass absent discriminatory intent." (ECF No. 51 at 13.) The Court will also address these arguments after its evaluation of the proposed nondiscriminatory motivations.

1. Alternative Nondiscriminatory Motivations

The government has not met its burden under *Arlington Heights*. By failing to offer any independent evidence of "obvious and uncontroverted . . . nondiscriminatory objectives" motivating the passage of Section 1326, the government limits itself to relying solely on the testimony of defense experts and distinguishable case law. (ECF No. 51 at 11.) But the expert testimony from Professors Lytle Hernández and Gonzalez O'Brien does not support the government's proffered alternative reasons. Instead, that testimony convincingly demonstrates that the government's proffered reasons are so intertwined with racial animus such that they cannot successfully show that the "same decision would have resulted even had the impermissible purpose not been considered." *See Arlington Heights*, 429 U.S. at 270 n. 21. The Court will address each argument in turn.

a. Economic Competition

The government first argues that border enforcement was driven "by a desire to protect American citizens from economic competition," citing only to Professor Lytle Hernández's testimony to support this proposition. (ECF No. 51 at 11.) At the Hearing, Professor Lytle Hernández agrees with the government's claim that leaders of the Mexican-American middle class supported immigration enforcement because "they thought that increased border enforcement would improve job security" (ECF No. 49 at 42-43), but she goes on to explain that this economic competition was rooted in racialization and played up to "create the notion that they were in competition with each other." (ECF No. 49 at 42-43). Specifically, she notes:

AMERICAN OVERSIGHT

> There was a notion that there was a, sort of, zero sum game of jobs, right, and that people of Mexican descent, largely because of segregation in the United States and because of that racial subrogation, gave this notion that Mexican-origin folks had to fight for the same jobs as to opposed to having all jobs open to them, and that certainly helped to create this notion that they were in competition with each other.

(*Id.*)

Moreover, some economic programs like the Bracero program targeted non-white populations. Professor Lytle Hernández explains that targeting is a "key indicator[] of the dynamics at play, that it's not just labor, it's a racialized labor form." (ECF No. 49 at 75-76.) Bracero workers were "an exploited labor force," subjected to racialized stereotyping and inhumane treatment. She details in her testimony that Bracero workers were routinely gassed with DDT and subjected to invasive inspections. The workers were racially stereotyped as being "fit for agricultural labor," unlike their white immigrant or domestic counterparts. (*Id.* at 77-78.) Professor Lytle Hernández's testimony concludes that any stated desire to protect American citizens from economic competition cannot reasonably be divorced from the underlying racialization of Mexican migrant laborers.

The Court agrees that even—or in this case, especially—under the auspice of economic motivation, immigration is not intrinsically separate from racial animus. Without offering any additional evidence, the government fails show that economic competition was a potential motivating factor absent the impermissible motivation: racial animus.

b. National Security

The Court is similarly unpersuaded by the government's argument that Section 1326 was recodified due to "a need to maintain national security." (ECF No. 51 at 11.) Again, the government cites only to Professor Lytle Hernández's testimony[37] to suggest

[37]Professor Lytle Hernández further explains how the national security concerns of the period relevant to the INA's passage were motivated by racialized labor policies like the Bracero Program. "Q: So the start of the Bracero program happened roughly around the onset of World War II, correct? A: Yes. Post-U.S. entry into the war. Q: Right. And you wrote in Migra that this triggered increased national security and geopolitical concerns, given that the U.S. shared a 2000-mile border with Mexico, correct? A: Correct. Q: And you wrote that the U.S. State Department put pressure on the INS and Border Patrol to close the door to undocumented migrants during this time, correct? A: Correct.

AMERICAN OVERSIGHT

that Section 1326 was reenacted to maintain national security interests. (*Id.*) But, following the testimony cited in the government's brief, Professor Lytle-Hernández went on to say:

> I mean, all of this activity is happening, you know, I would argue, uh, yes, within foreign relations, with an (unintelligible) of foreign relations, with an integrated economy, around labor concerns, concerns about what's emerging as the Cold War. *Racial animus is also at play*. There is no way in which we can understand the politics of head shaving as something that would have been tolerable for other than Mexican immigrants in this time period. And the involvement of the Mexican government does not mean that racial animus is not at play. Mexico has a long and deep history of race and subrogation, especially for indigenous folks. So, the story of race transcends the border.

(ECF No. 49 at 53 (emphasis added).) When considered in the context that the government omits, Professor Lytle Hernández's testimony indicates that the desire to maintain national security cannot be viewed alone because it only offers an explanation in part. But her more complete answer turned on the conclusion that "racial animus is also at play."[38]

The Court cannot consider that Professor Lytle Hernández's testimony, standing alone, is sufficient to demonstrate that the need to maintain national security is an "obvious and uncontroverted . . . nondiscriminatory objective motivat[ing] the passage of Section 1326 in 1952" as the government argues. With no further evidence, the government has again failed to meet its burden.

c. Foreign Relations

Finally, the government fails to show that "a need to maintain foreign relations with international allies, including Mexico" was a motivating factor independent from the demonstrated racial animus. (ECF No. 51 at 11.) Again, the government relies solely on

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Q: In part, because of the national security concern presented by having a forced border during the world war, correct? A: In part, yeah." (ECF No. 49 at 50 (excerpts of government counsel's cross-examination of Professor Lytle Hernández).)

[38]In response to the government's prompting to restrict her testimony to the questions asked, Professor Lytle Hernández responded: "Well I just want to be full in my answers, so—everything is complicated so yes/no is not always the accurate answer. So when I think I need to give a little bit more context, I would like to be able to do that." (ECF No. 49 at 53-54.)

AMERICAN OVERSIGHT

Professor Lytle Hernández's testimony. (ECF Nos. 49 at 44-47; 51 at 11-12.) But contrary to the government's conclusions, Professor Lytle Hernández testified that a nuanced understanding of foreign relations shows the dynamic in 1952 was still grounded in racial animus. While Professor Lytle Hernández acknowledges there was a concern about maintaining foreign relations with Mexico, she again goes on to say, as quoted in full above, that "racial animus is also at play" when considering the United States' foreign policy with Mexico during that period, and "the involvement of the Mexican government does not mean that rational animus is not at play." (ECF No. 49 at 53.) She further explains that during this period, Mexico "is a junior partner" in the two countries' partnership and that "they're not dictating, by any means, to the Untied States Government about how this is going to go." (*Id.* at 47.) The government's selective citation ignores repeated testimony emphasizing the connection between foreign relations and racial animus, and Professor Lytle Hernández's qualification that the United States felt free to enact legislation it felt was appropriate. It is therefore not possible for the Court to conclude based upon the record before it that the need to maintain a relationship with the government of Mexico is a factor extricable from the demonstrated discriminatory motives of the period.

Without more, the government has failed to show that valid, nondiscriminatory objectives motivated the passage of 1326 and later amendments.

2. Inferred Nondiscriminatory Intent

The government argues that even absent a nondiscriminatory motive, the Court can infer that the 1952 Congress had a valid, nondiscriminatory objective in passing Section 1326. (ECF No. 51 at 11-12.) The Court finds the government's proffered alternative reasoning in support of Section 1326 nonresponsive and unpersuasive. The government's only proffered evidence is the Ninth Circuit's language in *United States v. Hernandez-Guerrero,* in which the court stated it is "plain" that Section 1326 "is a necessary piece of the immigration-regulation framework." 147 F.3d 1075, 1078 (9th Cir. 1998). But the issue before the court in *Hernandez-Guerrero* was whether Congress

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003154

exceeded the scope of its constitutional authority when enacting Section 1326, a criminal immigration statute. *See id.* The Ninth Circuit held that because Section 1326 was a piece of immigration regulation, Congress acted within its authority to enact the statute. *See id.*

But *Hernandez-Guerrero* has no bearing on this case because the limits of Congress' immigration powers are not at issue here. The question is not whether Congress *functionally* had the authority to pass a criminal immigration statute, but whether the motivation behind Section 1326's enactment was racially discriminatory in violation of the Equal Protection Clause. That issue was not raised or discussed in *Hernandez-Guerrero* and the Court accordingly finds its application of limited use.

Ultimately, the fact that Congress has the authority to pass immigration regulations like Section 1326 does not foreclose the possibility that such legislation was passed with discriminatory intent, nor does it preclude the Court from determining whether Section 1326 is unconstitutional on other grounds. The government's own briefing concedes that courts may infer that nondiscriminatory motivation sufficient to displace discriminatory motivation only absent evidence of discriminatory intent. (ECF No. 51 at 12.) But here, Carrillo-Lopez offers substantial evidence that improper discriminatory motives were at least a factor in Section 1326's passage. Accordingly, the Court declines to infer that Section 1326's utility to the overall immigration scheme justifies an inference of nondiscriminatory motive.

3. Repeated Amendment

Finally, the government argues that it has met its burden under the second prong of *Arlington Heights* "given that Section 1326 has been passed six times in various amended versions, all in the absence of any evidence of discriminatory intent . . ." (ECF No. 51 at 13.) The government relies on the Eleventh Circuit's reasoning in *Johnson v. Governor of State of Florida*, in which the court held that "the state met its burden as a matter of law by substantively reenacting the law for race-neutral reasons" because repassage of an amended version of the statute "conclusively demonstrates that the [legislature] would enact the provision without an impermissible motive." 405 F.3d 1214,

AMERICAN OVERSIGHT

1224 (11th Cir. 2005) (en banc). The Court finds *Johnson* is distinguishable and is unpersuaded that subsequent Congresses have cleansed § 1326 of its racial taint through amendment alone.

First, the Court does not agree that the subsequent amendments were "substantive." In addressing whether an 1868 felon disenfranchisement provision was alleviated of its racial taint by a subsequent 1968 reenactment, the *Johnson* court considered that the reenactment "narrowed the class of persons" to whom the disenfranchisement provision would be applicable. *See id.* Moreover, the Eleventh Circuit noted that the Florida legislature engaged in an extensive deliberative process in which many alternatives were considered to revise the 1868 law in conformance with modern goals. *See id.* at 1221-22.

But Section 1326's reenactment and subsequent amendments never substantively altered the original provision, making this case distinguishable from *Johnson*. Since 1952, Section 1326 has been amended five times—in 1988, 1990, 1994, and twice in 1996.[39] These amendments did not change the operation of Section 1326, but instead served to increase financial and carceral penalties. The 1988 amendments added increased imprisonment time for those with prior felony convictions.[40] The 1990 amendment removed the $1,000 cap on financial penalties.[41] The 1994 amendments increased the penalties for persons convicted of felonies from five years to 10, and for those convicted of aggravated felonies from 15 years to 20, while also drawing in additional penalties for persons with certain misdemeanor convictions.[42] And the 1996 amendments to §

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[39] *See* note 11.

[40] *See* Pub. L. 100-690, title VII § 7345(a), 102 Stat. 4471 (Nov. 18, 1988) (codified at 8 U.S.C. § 1326(b) (1988)).

[41] *See* Pub. L. 101-649, title V § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990).

[42] *See* Pub. L. 103-322, title XIII § 130001(b), 108 Stat. 2023 (Sept. 13, 1994) (codified at 8 U.S.C. § 1326 (1994)).

AMERICAN OVERSIGHT

1326(b)[43] again only added a penalty for those convicted of reentry while on parole, probation, or supervised release.[44] These amendments do not reflect any change of Congressional intent, policy, or reasoning, but merely work to increase Section 1326's deterrent value.

Second, there has been no attempt at any point to grapple with the racist history of Section 1326 or remove its influence on the legislation. The Supreme Court has noted in concurrences on two recent occasions that a legislature's failure to confront a provision's racist past may keep it "'[t]ethered' to its original 'bias.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here.").[45] This reasoning is

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[43]Carrillo-Lopez was charged only with violating §§ 1326(a) and (b), while the AEDPA amendments added §§ 1326(c) and (d), which deal with collateral habeas corpus relief. *See* Pub. L. 104-132, title IV §§ 401(c), 438(b), 441(a), 110 Stat. 1267-68, 1276, 1279 (Apr. 24, 1996) (codified at 8 U.S.C. § 1326 (2000)).Those provisions, too, function to add a 10 year sentence to a conviction.

[44]*See* Pub. L. 104-208, div. C title III §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324(a), 324(b); 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629 (Sept. 30, 1996).

[45]Other district courts in this circuit have rejected applying *Ramos* and *Espinoza* to similar challenges, but those cases are distinguishable. The clearest distinguishable reason is that other courts reject the relevancy of the 1929 legislative history absent something contemporaneous with the 1952 reenactment. *See United States v. Lazcano-Neria*, Case No. 3:20-mj-04538-AHG, 2020 WL 6363685, at *8 (S.D. Cal. Oct. 29, 2020) (rejecting the argument that § 1325 of the INA must reckon with the racist legislative history that happened "decades before" because the defendant did not supply an analysis of "relevant legislative history"); *see also United States v. Rios-Montano*, Case No. 19-CR-2123-GPC, 2020 WL 7226441, at *3 (S.D. Cal. Dec. 8, 2020) (same); *United State v. Lucas-Hernandez*, Case No. 19MJ24522-LL, 2020 WL 6161150, at *3 (S.D. Cal. Oct. 21, 2020) (same); *United States v. Ruiz-Rivera*, Case No. 3:20-mj-20306-AHG2020 WL 5230519, at *3 (S.D. Cal. Sept. 2, 2020) (same).

In *United States v. Gutierrez-Barba*, the district court declined to apply *Ramos* and *Espinoza* because it found the statute had been cleansed by a later amendment. *See* Case No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *3-4 (D. Ariz. May 25, 2021). But that court addressed only the discriminatory intent of the Act of 1929 and did not consider evidence that the 1952 reenactment was also motivated by

AMERICAN OVERSIGHT

not binding precedent, nor does the fact that a prior iteration of a statute was tainted by racial animus necessarily mean that every subsequent reenactment will be. *See, e.g.*, *Abbott*, 138 S. Ct. at 2325 (confirming that, while past discrimination does not "flip[] the evidentiary burden on its head," the historical background of legislative enactment is "relevant to the question of intent"). But this reasoning is instructive and, here, persuasive.

Carrillo-Lopez has established, and the government concedes, that the Act of 1929 was motivated by racial animus. The government does not assert the 1952 Congress addressed that history when it reenacted Section 1326. Moreover, the government fails to demonstrate how any subsequent amending Congress addressed either the racism that initially motivated the Act of 1929 or the discriminatory intent that was contemporaneous with the 1952 reenactment. The record before the Court reflects that at no point has Congress confronted the racist, nativist roots of Section 1326. Instead, the amendments to Section 1326 over the past ninety years have not changed its function but have simply made the provision more punitive and broadened its reach. Accordingly, the Court cannot find that subsequent amendments somehow cleansed the statute of its history while retaining the language and functional operation of the original statute.

In conclusion, the government has failed to establish that a nondiscriminatory motivation existed in 1952 for reenacting Section 1326 that exists independently from the discriminatory motivations, in either 1929 or 1952. Moreover, the government's alternative arguments—that a nondiscriminatory motive was "plain" or that subsequent amendments somehow imply the racial taint was cleansed—are not supported by caselaw nor borne out by the evidentiary record. In sum, on the record before the Court, the Court can only conclude that the government has not met its burden. Because Section 1326 violates the

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contemporaneous discriminatory intent. Moreover, the Court disagrees with that court's conclusion that Section 1326 was ultimately cleansed of any racial animus by a 1965 amendment elsewhere in the INA which purported to prohibit discrimination on the basis of race, sex, nationality, place of birth, or place of residence. *See id.* at *4 (referencing Pub. L. No. 89-236, 66 Stat. 175, 911 (Oct. 3, 1965)). That amendment was added to 8 U.S.C. § 1152, a subsection that prohibited discrimination between members of "any single foreign state." The Court will not extend this provision, which does not even address discrimination between immigrants from different countries, to a criminal statute with demonstrated racist origins in a separate section of the subchapter.

AMERICAN OVERSIGHT

Equal Protection Clause of the Fifth Amendment, the Court will grant Carrillo-Lopez's Motion.

III. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motions before the Court.

It is therefore ordered that Carrillo-Lopez's motion to dismiss (ECF No. 26) is granted.

It is further ordered that Carrillo-Lopez's indictment (ECF No. 1) is dismissed.

The Clerk of Court is directed to enter judgment accordingly and close the case.

DATED THIS 18th Day of August 2021.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

AMERICAN OVERSIGHT

No. 21-10806

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF MISSOURI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas
No. 2:21-cv-00067-Z

AMICUS BRIEF OF INDIANA AND 14 OTHER STATES IN OPPOSITION TO THE MOTION FOR ADMINISTRATIVE STAY AND FOR STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI STATES 1

ARGUMENT 3

I. MPP is a Vital Tool to Combat Illegal Immigration 3

A. MPP promotes a fairer and more operationally effective immigration system 3

B. The Biden Administration's termination of MPP jeopardizes the interests of the States 4

II. The Memorandum Rescinding MPP Fails to Consider Important Aspects of the Policy Problem and Is Thus Arbitrary and Capricious under the APA 7

A. The Memorandum fails to consider alternatives 9

B. The Memorandum fails to consider reliance interests 12

CONCLUSION 15

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

CASES

Arizona v. United States,
567 U.S. 387 (2012) 6

Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020) ..... *passim*

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463 U.S. 29 (1983) 9

STATUTES

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-003162

INTEREST OF AMICI STATES

The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia respectfully submit this brief as *amici curiae* in opposition to the Motion for Administrative Stay and for Stay Pending Appeal. Illegal immigration across the southwest border levies significant costs on the States and their citizens. In recent years, States have borne billions of dollars in new expenses related to education, healthcare, and other government-assistance programs because of the rising influx of illegal aliens. AR 440, 442, 452, 555, 587–88. And this is more than a localized problem or limited to those States on our nation's southwest border; illegal immigration's effects are felt nationwide. Indeed, in many communities the costly upward trend in illegal entries at the border has been associated with a spike in violent crime—including predation on migrants by drug cartels and other bad actors. AR 406, 409–10, 418, 423.

In January 2019, in response to the historic surge in encounters of aliens at the southwest border, the Department of Homeland Security

AMERICAN OVERSIGHT

(DHS) issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols." AR 151. Exercising the agency's express authority under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, the Migrant Protection Protocols (MPP) requires aliens who have no legal entitlement to enter the United States but depart from a third country and transit through Mexico to be returned temporarily to Mexico while awaiting the outcome of their removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(C). DHS has now issued a seven-page Memorandum purporting to rescind MPP—a Memorandum the district court below found to be unlawfully deficient in multiple respects.

Amici States submit this brief to explain why this Court should leave the district court's order in place, for *Amici* States have a strong interest in ensuring that any decision lifting MPP is undertaken according to law and after consideration of the consequences for States and their citizens.

AMERICAN OVERSIGHT

ARGUMENT

I. MPP Is a Vital Tool to Combat Illegal Immigration

A. MPP promotes a fairer and more operationally effective immigration system

MPP has proven to be a vital tool in the fight against illegal immigration and has yielded both a fairer and more operationally effective means of processing aliens. Before its implementation, each year thousands of aliens were paroled in the United States while awaiting a hearing—a process that often took several years. *See* AR 684; Op. 17. And as the district court noted below, among those aliens referred to the Executive Office for Immigration Review, more than thirty percent failed to appear for their hearing and were ordered removed *in absentia*. *Id.* at 7–8. After the introduction of MPP, however, fewer aliens were paroled into the United States and pre-pandemic processing time was significantly diminished. *See id.* at 17; AR 555, 684.

MPP also likely led to an overall reduction of encounters at the border and likely encouraged many asylum seekers without meritorious claims to remain in or return to their country of origin. AR 555–56, 683–84. These positive changes have most certainly lessened the variety of costs imposed by illegal immigration on the States and their citizens.

AMERICAN OVERSIGHT

B. The Biden Administration's termination of MPP jeopardizes the interests of the States

The Biden Administration's termination of MPP has had the predictable effect of undermining the interests of the States and further taxing an immigration system still hampered by the COVID-19 pandemic.

The rescission is a long-promised goal of the new administration. In December 2019, more than a year before taking office, then-candidate Biden decried that "through his Migrant Protection Protocol policies, [President] Trump has effectively closed our country to asylum seekers, forcing them instead to choose between waiting in dangerous situations, vulnerable to exploitation by cartels and other bad actors, or taking a risk to try crossing between the ports of entry." *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, Biden Harris, https://joebiden.com/immigration/; *see also* @JoeBiden, Twitter (Dec. 11, 2019), https://twitter.com/JoeBiden/status/1204835741554987008. Biden pledged to "end [the Trump Administration's] policies, starting with Trump's Migrant Protection Protocols, and restore our asylum laws so that they do what they should be designed to do—protect people fleeing persecution and who cannot return home safely." *The Biden Plan for Securing Our Values as a Nation of Immigrants*, *supra*.

AMERICAN OVERSIGHT

As promised, on the first day of the new administration DHS Acting Secretary David Pekoske issued a one-page declaration announcing that MPP would be suspended pending further review. AR 581. Despite the evident time to plan such a move, however, DHS provided no reasoning for its decision. *Id.* And DHS offered no rationale at all until June 2021, when—after Texas and Missouri had brought this challenge to the suspension—the DHS Secretary issued a seven-page Memorandum announcing the immediate and permanent termination of MPP. AR 1–7.

The consequences of the Biden Administration's termination of MPP are both unsurprising and significant. Without MPP, thousands of illegal aliens—the vast majority of whom do not have any legal entitlement to remain in the United States, *see* AR 689—will be paroled in the United States while awaiting the outcome of their removal proceedings. This is certain to impose new, sweeping costs on the States in supporting the parolees during the pendency of their removal proceedings—not to mention the thousands who will fail to appear and instead choose to remain in the United States illegally.

This shift in policy also comes at a time when the number of encounters at the southwest border continues to rise and, due to the

AMERICAN OVERSIGHT

COVID-19 pandemic, DHS's capacity to process aliens has precipitously declined. For example, in May and June 2021, U.S. Customs and Border Protection recorded over 180,000 and 188,000 encounters, respectively, at the southwest border. *See Southwest Land Border Encounters*, U.S. Customs & Border Protection (Aug. 12, 2021), https://www.cbp.gov/news-room/stats/southwest-land-border-encounters. And in July 2021 the count soared to over 210,000. These constitute the highest numbers of monthly encounters recorded by United States Customs and Border Protection in more than twenty years—a period that includes several previous surges that took place at times when processing was not constrained by recent COVID-19 capacity considerations.

Ultimately, the States rely on the federal government to enforce immigration law and to protect their interests in this area. *See Arizona v. United States*, 567 U.S. 387, 394–400 (2012); *id.* at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."). Indeed, while "[t]he National Government has significant power to regulate immigration," the Supreme Court has made clear that "with [this] power comes responsibility." *Id.* at 416. The Biden Administration's efforts to eliminate MPP, without consideration

AMERICAN OVERSIGHT

of the States' significant vested interests and the litany of evident harms it would cause, is an abdication of that responsibility.

II. The Memorandum Rescinding MPP Fails to Consider Important Aspects of the Policy Problem and Is Thus Arbitrary and Capricious under the APA

The Biden Administration's refusal to consider the costs of rescinding MPP is not just bad policy. It is unlawful as well. The Administrative Procedure Act (APA) requires agencies to "'consider . . . important aspect[s] of the problem'" before them. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations in original); *see also* 5 U.S.C. § 706(2)(A). DHS has not done so.

Despite MPP's evident benefits and the corresponding costs of revoking the policy, DHS suspended MPP in January via a three-line, two-sentence declaration announcing—without any explanation whatever—that DHS would be suspending new enrollments in MPP "pending further review of the program." AR 581. This unreasoned change in policy plainly violated the APA: It lacked consideration of *any* aspects of the problems confronting American immigration policy.

AMERICAN OVERSIGHT

More than four months after DHS suspended MPP—and several weeks after Texas and Missouri filed this lawsuit challenging this unreasoned change in policy—the DHS Secretary issued the Memorandum at issue here, which "direct[s] DHS personnel to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives or policy guidance issued to implement the program." AR 2. And while this Memorandum contains *some* explanation, it too violates the APA for failing to consider all aspects of the problem.

Indeed, the Memorandum suffers—at the very least—from the same two deficiencies for which the Supreme Court invalidated the rescission of the Deferred Action for Childhood Arrivals (DACA) program in *Regents*: It fails to consider (1) "alternatives that are within the ambit of the existing policy" and (2) "whether there was legitimate reliance" on the existing MPP policy. *Regents*, 140 S. Ct. at 1913 (internal quotation marks, brackets, and citations omitted). And each of these failures are independently sufficient to render the Memorandum unlawful.

AMERICAN OVERSIGHT

A. The Memorandum fails to consider alternatives

The obligation of federal agencies to consider alternatives to their chosen policies was definitively established at least as far back as *State Farm*, but the Court's recent decision in *Regents* confirms just how significant and unwavering this obligation is: Agencies retain this obligation even if they *correctly* conclude that *some* change must be made to existing policy.

In *Regents*, DHS had rescinded DACA on the ground that the program was unlawful, and the Court expressly declined to "evaluate the claims challenging the explanation and correctness of th[at] illegality conclusion." *Id.* at 1910. Yet the Court nevertheless held that, even if that conclusion were correct, DHS could not completely rescind the program without giving meaningful consideration to alternative options—in particular, keeping elements of the program that may have been lawful. *See id.* at 1912 ("Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients . . . the DACA Memorandum could not be rescinded in full 'without any consideration whatsoever' of a forbearance-only policy." (quoting *State Farm*, 463 U.S. at 51)).

AMERICAN OVERSIGHT

Accordingly, it is not enough for DHS to provide sufficient policy reasons for discontinuing MPP—and it is far from clear the agency did so here in any case. *Regents* holds that even if the Memorandum clears that bar, it still must specifically identify—and explain why DHS rejected—alternatives to completely rescinding current policy.

The Memorandum fails to do so. While it claims DHS "considered various alternatives" to terminating MPP, the Memorandum's discussion of this aspect of the problem is limited to a single paragraph that neither identifies specific alternatives nor advances any rationale beyond conclusory assertions. AR 5.

Underscoring its all-or-nothing approach, the Memorandum's discussion of "alternatives" begins by noting that DHS could "maintain[] the status quo"—which, given its earlier suspension of MPP, would effectively amount to terminating the program—or it could keep MPP and "resum[e] new enrollments in the program." *Id.* Beyond this, the Memorandum does nothing more than briefly suggest that "the program could be modified in some fashion" without specifically identifying any such potential modifications. *Id.* The Memorandum thus fails to establish the agency considered any alternatives short of terminating the entire MPP

AMERICAN OVERSIGHT

program. It therefore violates the rule "that when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Regents*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51 (alterations in original)).

Further, in addition to not identifying alternatives, the Memorandum fails to provide any reasoned explanation for rejecting them. It simply asserts that preserving MPP "would not be consistent with this Administration's vision and values and would be a poor use of the Department's resources," and that modifying MPP "would require a total redesign that would involve significant additional investments in personnel and resources." AR 5. The APA demands more than such conclusory statements. Even if "there may be a valid reason" ultimately to reject a particular alternative policy, the APA requires the agency to "establish that DHS considered that option." *Regents*, 140 S. Ct. at 1913. The Memorandum here fails to do so, and that "omission alone renders . . . [the] decision arbitrary and capricious." *Id.*

AMERICAN OVERSIGHT

B. The Memorandum fails to consider reliance interests

Nor do the Memorandum's deficiencies stop there. It also "fail[s] to address whether there was 'legitimate reliance'" on the existing MPP policy. *Id.* (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). As the district court observed below, the Memorandum "fail[s] to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law." Op. 37. Indeed, "the agency did *not* consider the costs to the States *at all*." *Id.*

Notably, the United States scarcely challenges these observations. Its response on this point does not identify any discussion in the Memorandum of reliance interests that could be affected by terminating MPP, but merely quotes the Memorandum's assertion that DHS considered "'the impact such a decision could have on border management and border communities.'" Mot. 18 (quoting AR 5). Such an isolated suggestion obviously cannot constitute sufficient consideration of anything, and in any case there is nothing to suggest that this particular phrase has anything to do with reliance at all. This phrase does not mention reliance—on the part of States or anyone else—and is immediately followed by the puzzling announcement that the Secretary "considered the Department's

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003174

experience designing and operating a phased process, together with interagency and nongovernmental partners, to facilitate the safe and orderly entry into the United States of certain individuals who had been placed in MPP." AR 5. Whatever this means, it certainly does not have anything to do with States' reliance on MPP.

Left without any actual discussion of reliance interests in the Memorandum, the United States instead insists that DHS was not required to "consider State reliance interests" at all because "the States have no cognizable reliance interest in a *discretionary* program." Mot. 18. This argument, however, is squarely foreclosed by *Regents*. There the Court acknowledged that the DHS Secretary "plainly exercised such discretionary authority in winding down [DACA]," 140 S. Ct. at 1910, but it held that the Secretary was nevertheless obligated to "consider[] potential reliance interests," *id.* at 1913. Indeed, it reiterated that the Secretary was obligated to do so even though "the DACA Memorandum stated that the program 'conferred no substantive rights' and provided benefits only in two-year increments," and even though DHS—if it had addressed the issue—may have eventually concluded that "reliance interests in benefits that it views as unlawful are entitled to no or diminished weight." *Id.* at

AMERICAN OVERSIGHT

1913–14 (internal citation omitted). While such factors "are surely pertinent in considering the strength of any reliance interests," the APA still requires that such "consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Id.*

In rescinding MPP—as in rescinding DACA—DHS "was not writing on a blank slate," and it was therefore "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915 (internal quotation marks and citation omitted). Because this Memorandum fails to do so, it is arbitrary, capricious, and unlawful under the APA.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003176

CONCLUSION

The Court should deny the motion for administrative stay and for stay pending appeal.

Respectfully submitted,

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-003177

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003178

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,578 words as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: August 18, 2021

/s/ Thomas M. Fisher
Thomas M. Fisher

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003179

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas M. Fisher
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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003180

No. 21-10806

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, STATE OF MISSOURI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division

RESPONSE TO EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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AMERICAN OVERSIGHT

CERTIFICATE OF INTERESTED PERSONS

No. 21-10806

STATE OF TEXAS, STATE OF MISSOURI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

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

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

Certificate of Interested Persons i
Table of Contents ii
Table of Authorities iii
Introduction 1
Statement of Facts 2
I. The Border Crisis and Its Impact on the States 2
II. The Migrant Protection Protocols 3
III. Procedural History 4
Argument 5
I. Defendants Are Unlikely to Succeed on the Merits Because They Violated Federal Law 5
A. Defendants cannot escape judicial review of their unlawful agency action 6
B. The June 1 Memorandum was arbitrary and capricious. 10
C. The June 1 Memorandum caused systematic violations of Section 1225. 14
II. Defendants Cannot Satisfy the Remaining Factors. 17
A. Self-inflicted inconvenience is not irreparable harm. 17
B. The balance of equities and public interest favor enforcing federal law, not implementing an unlawful memorandum. 19
Conclusion 20
Certificate of Service 22
Certificate of Compliance 22

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Page(s)

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Al Otro Lado v. Wolf,
952 F.3d 999 (9th Cir. 2020) 18
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750 F.2d 1470 (9th Cir. 1985) 18
Arbid v. Holder,
700 F.3d 379 (9th Cir. 2012) (per curiam) 8
Arizona v. United States,
567 U.S. 387 (2012) 12
Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019) 9
DHS v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020) 8, 9, 10, 13
FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 14
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No. 2:13-bk-15130, 2013 WL 6906375 (Bankr. C.D. Cal. Nov. 15, 2013) 19
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924 F.3d 503 (9th Cir. 2019) 20
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543 U.S. 335 (2005) 9
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558 U.S. 233 (2010) 8
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838 F.3d 1 (D.C. Cir. 2016) 19
Merchants Fast Motor Lines, Inc. v. ICC,
5 F.3d 911 (5th Cir. 1993) 10
Michigan v. EPA,
576 U.S. 788 (1992) 10

AMERICAN OVERSIGHT

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 5
Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 12, 13
Nken v. Holder,
556 U.S. 418, 436 (2009) 20
Texas v. EEOC,
933 F.3d 433 (5th Cir. 2019) 10
Texas. v. United States,
787 F.3d 733 (5th Cir. 2015) 5, 6, 18, 20
Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 6
Texas v. United States,
809 F.3d 164 (5th Cir. 2015) 9, 18
Texas v. United States,
86 F. Supp. 3d 591 (S.D. Tex. 2015) 6
United States v. Escobar,
No. 2:17-CR-529, 2017 WL 5749620 (S.D. Tex. Nov. 28, 2017) 19
United Techs. Corp. v. U.S. Dep't of Def.,
601 F.3d 557 (D.C. Cir. 2010) 12
Washington v. Reno,
35 F.3d 1093 (6th Cir. 1994) 19
Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,
139 S. Ct. 361 (2018) 8
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140 S. Ct. 1564 (2020) 20
Wong Wing Hang v. INS,
360 F.2d 715 (2d Cir. 1966) 9
Zadvydas v. Davis,
533 U.S. 678 (2001) 8

Statutes and Rules:

5 U.S.C.:
§ 701(a)(2) 8
§ 706(2)(A) 8, 10
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AMERICAN OVERSIGHT

§ 1182(d)(5)(A) 15, 16, 17
§ 1225 ..... *passim*
§ 1225(b)(2)(C) 3, 9, 16
§ 1229a 3, 9
§ 1252(a)(2)(B)(ii) 7, 8
§ 1225(b)(1)(A)(iii)(I) 9
§ 1225(b)(1)(B)(ii) 15
§ 1225(b)(1)(B)(iii)(IV) 15
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U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP (Aug. 12, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters 4
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AMERICAN OVERSIGHT
MO-AG-22-0644-A-003187

INTRODUCTION

There is an "unsustainable" crisis on the southern border, one well-recognized by top leadership at DHS.[1] This crisis can be directly traced to DHS's arbitrary and capricious decision to terminate the Migrant Protection Protocols ("MPP")—a decision that the federal government has reportedly been reconsidering for "weeks."[2] And it harms Texas and Missouri in many ways ("Plaintiffs" or the "States")—including increases in various costs that the States cannot avoid.

Defendants ask this Court for an extraordinary stay of the district court's final judgment and injunction issued with a meticulous, 54-page opinion and after a full bench trial, where Defendants were entitled to introduce whatever evidence they chose. The trial court carefully set forth findings of fact and conclusions of law showing Defendants' June 1 Memorandum terminating the MPP was arbitrary and capricious and violated the Immigration and Nationality Act.

The district court got it right, and Defendants are entitled neither to an administrative stay nor to stay the injunction pending appeal. The June 1 Memorandum was arbitrary and capricious for failing to consider benefits of the MPP that DHS had itself previously identified, for arbitrarily considering factors related to the termination of the MPP, and for failing to consider that termination of the MPP leads to violations of DHS's statutory obligation to detain certain aliens entering the United

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[1] Emily Crane, *Mayorkas tells border agents US is 'going to lose': leaked audio*, N.Y. Post (Aug. 13, 2021), https://tinyurl.com/2z42md96

[2] Emily Green, *The Biden Admin Is Considering Reviving Trump's 'Remain in Mexico' Policy for Migrants*, Vice (Aug. 18, 2021), https://tinyurl.com/3pexcc4f.

AMERICAN OVERSIGHT

States. Viewing the statutory scheme—and DHS's obligation to detain certain aliens—as a whole, the district court also correctly concluded that the June 1 Memorandum caused Defendants to abandon those obligations.

Defendants' complaints of irreparable harm ring hollow. Public reports indicate that they "have privately discussed reviving the Trump-era policy Migrant Protection Protocols (MPP), colloquially known as "Remain in Mexico," in order to manage the number of migrants arriving at the border." Green, *supra* n.2.[3] Any harms Defendants claim to show arise from their decision to violate federal law—and so those harms are of their own making. This Court does not grant a stay under such circumstances, let alone on an emergency basis. *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). This Court should issue neither an administrative stay nor a stay pending appeal.

STATEMENT OF FACTS

I. The Border Crisis and Its Impact on the States

In 2018, an immigration surge caused a "humanitarian and border security crisis," with "severe impacts on U.S. border security and immigration operations." Op. 7. Many thousands of migrants came from Central American countries through Mexico and claimed asylum upon arrival. Most of these claims were without merit, as "only 14 percent of aliens who claimed credible fear of persecution or torture were

[3] Under Circuit Rule 27.3, Defendants must "[c]ertify that the facts supporting emergency consideration of the motion are true and complete." While Defendants insist that MPP's re-imposition would lead to a litany of irreparable harms, they did not disclose to the Court that they are considering re-implementing it, if true.

AMERICAN OVERSIGHT

granted asylum between Fiscal Year 2008 and Fiscal Year 2019." *Id.* Many "simply bec[a]me fugitives" after they "disappeared into the country before a judge denie[d] their claim." *Id.*

This influx of illegal aliens imposes non-recoverable costs on the States, including those associated with providing driver's licenses, public education, and healthcare. *Id.* at 18-19. It also increases law enforcement and correctional costs, the victimization of migrants by human traffickers, and resultant fiscal harms. *Id.* at 20.

II. The Migrant Protection Protocols

In response, on December 20, 2018, the Trump Administration implemented MPP. *Id.* at 8. Relying on the federal government's authority under 8 U.S.C. § 1225(b)(2)(C), under MPP, DHS began to return to Mexico certain aliens who were not nationals or citizens of Mexico, but who arrived in the United States from Mexico, for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* The same day, the United States obtained Mexico's agreement to permit entry of MPP enrollees back into Mexico. *Id.* The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country," only to "fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." *Id.*

On October 28, 2019, DHS assessed MPP and found "a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." Op. 10 (quoting AR 683). It

AMERICAN OVERSIGHT

also found that "aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home." *Id.*

III. Procedural History

On January 20, 2021, the Biden Administration suspended further enrollments in MPP in a three-line memorandum. Enforcement encounters on the southwest border immediately skyrocketed: encounters jumped from 75,000 in January, to 173,000 in April, to nearly 189,000 in June, Op. 17 (citing AR 670), to 212,000 in July. U.S. Customs and Border Protection, *Southwest Land Border Encounters*, CBP (Aug. 12, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters. This amplified the ongoing border crisis into an outright disaster, emboldening criminal cartels and human traffickers who prey on vulnerable migrants.

On April 20, Texas and Missouri challenged DHS's suspension of MPP, alleging that the suspension of the program violated the Administrative Procedure Act and the INA, 8 U.S.C § 1225. Op. 1-2. Plaintiffs moved for a preliminary injunction, but before briefing was concluded, DHS issued a new memorandum (the "June 1 Memorandum") that permanently terminated MPP. *Id.* The June 1 Memorandum failed to consider MPP's role in discouraging illegal border crossings, DHS's own favorable 2019 assessment of MPP, the States' reliance interests, or any alternatives less burdensome on the States other than terminating MPP altogether. *Id.* at 36-38.

Plaintiffs promptly amended their complaint to challenge the June 1 Memorandum. *Id.* at 2. The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3. After a bench trial, the district court concluded that Plaintiffs "are entitled to

AMERICAN OVERSIGHT

relief on their APA and statutory claims against Defendants," and vacated the June 1 Memorandum. *Id.* at 1. The district court also "craft[ed] injunctive relief to ensure Plaintiffs receive a full remedy" because an injunction would have "meaningful practical effect independent of . . . vacatur." *Id.* at 1, 51-52 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)).

ARGUMENT

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

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

Defendants are not entitled to a stay because they cannot make "a strong showing that [they are] likely to succeed on the merits." *Texas*, 787 F.3d at 746. This "strong showing" requires the government to demonstrate that the district court abused its discretion by entering an injunction. *Id.* at 747. Legal issues are "reviewed *de novo*," but "findings of fact are reviewed for clear error." *Id.* Defendants categorically ignore this deferential standard of review. *Cf.* Mot. 7.

AMERICAN OVERSIGHT

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

Defendants provide (at 7-11) a laundry list of reasons for the Court to avoid reaching the merits of Plaintiffs' claims, but the district court correctly rejected each argument. Op. 21-34.

1. Plaintiffs have standing.

Defendants' standing argument ignores the district court's fact findings supporting standing. *Compare* Mot. 7-8, *with* Op. 17-20.

Evidence before the district court supports its conclusion that both Texas and Missouri had standing based on costs associated with (1) driver's licenses, (2) education, (3) healthcare, and (4) law enforcement and corrections. Op. 18-20. Defendants mention only one of these: "the driver's-license rationale," which this Court approved in the DAPA case. *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015). That ruling compels the conclusion that Plaintiffs have standing here because the relevant evidence in the two cases was indistinguishable. *Compare id.* at 748, *and Texas v. United States*, 86 F. Supp. 3d 591, 616-17 (S.D. Tex. 2015), *with* Op. 18-19, *and* ECF 54-2, Ex. F (App. 425-29). And in any event, Defendants provide no basis for this Court to conclude that the district court clearly erred in these findings.

Defendants dispute redressability (at 8) "because MPP did not require that" any particular alien remain in Mexico. True, MPP gave immigration officers some discretion, but when they exercised that discretion, they ordered more than 68,000 aliens to remain in Mexico, ECF 61 at AR555, including more than 50,000 aliens on the Texas border, ECF 11 at 2. Reinstating MPP would allow immigration officers to

AMERICAN OVERSIGHT

make similar choices, thereby redressing the States' harms stemming from the presence of too many illegal aliens. Op. 23.

Next, Defendants challenge redressability (at 8) on the theory that aliens cannot "be returned pursuant to MPP without Mexico's agreement." But they cite no record evidence for this claim. To the contrary, the record supports the district court's conclusion that the federal government could initiate—and had initiated—MPP unilaterally. Op. 49 n.15 (citing ECF 54-2 at App.303, App.307). As the district court explained, "even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing to admit asylum applicants at ports of entry in the first place—before they ever enter the United States." *Id.* To the contrary, DHS's regulations provide that the federal government "may require" any apparently inadmissible alien "who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing." 8 C.F.R. § 235.3(d).

2. The June 1 Memorandum is reviewable.

Defendants next insist (at 8-10) that the termination of MPP is unreviewable. Wrong again—for three reasons. *First*, Defendants rely (at 8) on 8 U.S.C. § 1252(a)(2)(B)(ii), but four courts have rejected this argument in cases about MPP. *See* Op. at 29-30 (collecting cases). Defendants cite no precedent showing that a statute barring aliens' challenges to certain "[d]enials of discretionary relief" prevents States from challenging the termination of an entire program. 8 U.S.C. § 1252(a)(2)(B).

AMERICAN OVERSIGHT

Section 1252(a)(2)(B)(ii) prevents aliens from challenging the federal government's refusal to grant discretionary relief "as a matter of grace." *Kucana v. Holder*, 558 U.S. 233, 247-48 (2010); *see* ECF 67 at 17-19. It does not apply when a plaintiff "challenge[s] the extent of the [official's] authority" because "authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Merely labeling a federal official's decision "discretionary" does not "trigger[] § (a)(2)(B)(ii)'s discretionary review bar." *Arbid v. Holder*, 700 F.3d 379, 384 (9th Cir. 2012) (per curiam).

Second, Defendants argue (at 8) that terminating MPP was committed to agency discretion by law under 5 U.S.C. § 701(a)(2). This ignores the APA's "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). "To honor the presumption of review," the Supreme Court has read "§ 701(a)(2) quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.*

Terminating MPP is not one of "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Defendants lack discretion in these circumstances because the June 1 Memorandum violates mandatory duties under Section 1225. *See infra* Part I.C.

Moreover, Defendants conflate the exercise of ordinary discretion—which can be "aside" if "abuse[d]," 5 U.S.C. § 706(2)(A)—with unreviewable agency action "committed to agency discretion by law." *Id.* § 701(a)(2); *see Weyerhaeuser*, 139 S.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003195

Ct. at 370. When Congress wants to grant "sole and unreviewable discretion," it knows how, as it did elsewhere in Section 1225. 8 U.S.C. § 1225(b)(1)(A)(iii)(I). But when Congress grants only ordinary discretion, as through the use of "may" in Section 1225(b)(2)(C), agency action can be set aside "if it [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966). The mere presence of some discretion does not render decisions unreviewable. *E.g.*, *Regents*, 140 S. Ct. at 1905-07 (holding the rescission of DACA was reviewable even though "DHS may rescind DACA"). Even if the statute "leave[s] much to the Secretary's discretion," it "do[es] not leave his discretion unbounded." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019).

Defendants' authority (at 8-9) is not to the contrary. Most either rejected their reviewability arguments or did not consider APA reviewability. *Texas*, 809 F.3d at 164, 168; *Jama v. ICE*, 543 U.S. 335, 346 (2005). The remainder address straightforward non-enforcement policies, but the district court correctly found that terminating MPP is more than a non-enforcement policy: by increasing the use of parole, DHS "create[s] affirmative benefits for aliens such as work authorization." Op. at 31. "Moreover, the MPP program is not about enforcement proceedings *at all*" because "[a]ny alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a." *Id.* at 32.

3. The June 1 Memorandum is final agency action.

Defendants' remaining argument (at 10-11) that terminating MPP was not final agency action because it did not "produce 'legal consequences'" is equally wrong.

AMERICAN OVERSIGHT

The June 1 Memorandum indisputably "direct[ed] DHS personnel, effective immediately." ECF 61 at AR 007. "That the agency's action binds its staff demonstrates that legal consequences flow from it." *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019). Defendants cannot avoid that conclusion by asserting (at 10-11) that the June 1 Memorandum was a mere policy statement: in this Circuit, a "policy statement" can be "'final agency action' within the meaning of" the APA. *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919-20 (5th Cir. 1993). The district court therefore correctly found the June 1 Memorandum reviewable.

B. The June 1 Memorandum was arbitrary and capricious.

The district court correctly found the Memorandum unlawful. "The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Regents*, 140 S. Ct. at 1905 (cleaned up). Among other things, it prohibits agency actions that are arbitrary and capricious, 5 U.S.C. § 706(2)(A), and requires agencies to engage in "reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 788, 796 (1992).

The district court concluded that the Secretary's June 1 Memorandum was arbitrary and capricious for numerous reasons, including because the agency failed to consider the benefits of MPP, relied on reasons for terminating MPP that were arbitrary, and failed to consider the effect terminating MPP would have on DHS's ability to detain aliens subject to mandatory detention. Op. 34-42. Any of these failures would be fatal to the June 1 Memorandum.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003197

1. The district court correctly concluded that the June 1 Memorandum improperly failed to consider the MPP's benefits.

The June 1 Memorandum is unlawful because it failed to consider key parts of the record on MPP. *First*, as DHS concluded in October 2019, asylum applicants "with non-meritorious claims often remain in the country for lengthy periods of time," creating "perverse incentives." Op. 12 (citing AR 687). After implementing the MPP, DHS found "'aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." Op. 36 (citing AR 684). "The June 1 Memorandum never once mentions these benefits." *Id. Second*, "the Secretary failed to consider the warnings by career DHS personnel that 'the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally cross the border.'" *Id.* at 37. *Third*, "[t]he Secretary failed to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law" and "the ongoing implementation of the MPP." *Id. Fourth*, "the Secretary also failed to meaningfully consider more limited policies than the total termination of the MPP." *Id.* at 38.

Defendants insist (at 15) that none of this is right because "the Secretary evaluated all 'prior DHS assessments of the program,' and the 'anticipated benefits and goals articulated at the outset of the program and over its course.'" Besides the Secretary's *ipse dixit*, the record does not support this claim. The June 1 Memorandum does not show that DHS actually *identified* those benefits, let alone *evaluated* them or *explained* why they are outweighed by MPP's costs. This contravenes the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003198

Supreme Court's instruction that DHS must "supply a reasoned analysis for [its] change" in position. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Defendant's talismanic "stat[ement] that a factor was considered" cannot suffice. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010).

Defendants' four specific objections also lack merit. *First*, Defendants concede (at 7) that the June 1 Memorandum fails to consider warnings by career DHS personnel, complaining that those warnings are not in the administrative record. That is a confession not a defense: if these warnings—credited by the district court—were not in the administrative record, the June 1 Memorandum could not have considered them. Together with the increase in border encounters after MPP's termination, this shows that the June 1 Memorandum unlawfully failed to consider the relevant facts and data. *State Farm*, 463 U.S. at 43.

Second, defendants challenge (at 18) as unsupported the conclusion that the June 1 Memorandum failed to consider costs to States. But the Supreme Court has recognized that States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). As discussed above, the record supports the district court's standing finding because costs for States did increase—and again, Defendants have not even attempted to show clear error.

Third, Defendants erroneously contend (Mot. 18) that the States have no reliance interests. But this contradicts the Supreme Court's decision in *Regents*, where the Court considered loss of tax revenue to State governments. 140 S. Ct. at 1914.

AMERICAN OVERSIGHT

Fourth, Defendants object (at 18-19) to the district court's conclusion that the June 1 Memorandum fails to consider more limited policies than MPP's termination. Defendants attack a straw man, arguing that the district court required DHS to set out examples of alternate versions of the MPP. The district court actually concluded that the agency's cursory analysis meant that it had failed to meaningfully *consider* alternatives, noting that the "entirety of the Secretary's reasoning in not modifying the MPP is contained" in one sentence. Op. 38. The Secretary "should have considered those matters" but did not. *Regents*, 140 S. Ct. 1915.

2. The district court correctly concluded that the June 1 Memorandum reached arbitrary conclusions.

The district court also concluded DHS arbitrarily justified terminating MPP based on the "high percentage of cases completed through the entry of *in absentia* removal orders"—specifically, 44%. Op. 38-40 (quoting AR 4). The district court noted two defects in this analysis. *First*, the district court concluded that this analysis reaches no policy conclusion at all. *Id.* at 39 (quoting *State Farm*, 463 U.S. at 52). *Second*, the district court concluded that DHS's own data suggest comparable in absentia removal rates before MPP's implementation. Thus, the June 1 Memorandum did not conclude that 44 percent was a high rate of in absentia removal, whether MPP was the cause, and if so whether that meant the MPP performed as intended. *Id.* at 40-41. The evidence supports each conclusion.

Defendants contend only (at 19) that the Secretary found that the MPP "did not adequately 'ensure that conditions in Mexico enabled migrants to attend their proceedings.'" Even if true, that is beside the point because the June 1 Memorandum

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003200

reaches no conclusion concerning that number, only observes that it "raises questions." AR 4. At a minimum, the Secretary needed to explain why his conclusion was contrary to DHS's previous conclusion that MPP caused aliens to abandon meritless asylum claims. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

The district court further concluded that reliance on COVID-19 court closures was arbitrary and capricious because immigration courts reopened before the program was cancelled. Op. 41. Defendants' footnote response states that "infrastructure used for MPP remains shuttered." Mot. 19 n. 4. But the evidence Defendants point to does not suggest that infrastructure remains closed for any reason other than that Defendants themselves have declined to reopen it. *See* ECF 98-2, ¶¶10-11.

3. The district court correctly concluded that the June 1 Memorandum was arbitrary and capricious because it failed to consider the effect on compliance with section 1225.

Finally, the district court correctly concluded that the June 1 Memorandum was arbitrary and capricious because it failed to consider DHS's mandatory detention obligations. Op. 41-42. Defendants' primary contention (at 20) that DHS has no mandatory detention obligation contravenes the INA.

C. The June 1 Memorandum caused systematic violations of Section 1225.

The district court concluded that, "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory"; "[f]ailing to detain or return aliens pending their immigration proceedings violates Section 1225." Op. 43. Because "[u]nder *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003201

MPP necessarily leads to the systemic violation of Section 1225." *Id.* at 44. Put simply, "aliens are released into the United States because Defendants are unable to detain them." *Id.* Parole is an alternative, but only on a "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* (quoting 8 U.S.C. § 1182(d)(5)(A)).

Defendants contend (at 11) that the district court "misconceived the statutory scheme." But the district court's ruling follows the plain statutory text. If an alien subject to expedited removal lacks credible fear of persecution, the alien can invoke further administrative proceedings but "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Even if the officer determines that the "alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii).

For aliens not going through expedited removal (that is, aliens given a Notice to Appear), the INA typically mandates detention: "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for" removal proceedings. *Id.* § 1225(b)(2)(A). The INA *does* give the federal government an alternative choice if the alien "is arriving on land . . . from a foreign territory contiguous to the United States"—namely, the government "may return the alien to that territory pending" asylum proceedings. *Id.* § 1225(b)(2)(C). Thus, the government has two options for the default rule governing asylum seekers: (1) detention or (2) return to a contiguous

AMERICAN OVERSIGHT

territory (as required by MPP). What the government *cannot* do is release them into the interior (as required by the June 1 Memorandum).

The States do not, and have never, contended that this scheme mandates MPP. The second option is *optional. See* 8 U.S.C. § 1225(b)(2)(C) (providing that the federal government "may return the alien to that territory"). The federal government can always choose the first option: detention. And the States recognize that Defendants may grant parole, but only "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit," and not on a class-wide basis. 8 U.S.C. § 1182(d)(5)(A).

But Defendants are not paroling individuals for the reasons specified by statute. Instead, "[t]he number of asylum seekers who will remain in potentially indefinite detention pending disposition of their cases will be almost entirely a question of DHS's detention capacity, and not whether the individual circumstances of individual cases warrant release or detention." OP. 43 n.11 (citing AR 184). "DHS has the discretion to parole people who are not eligible for bond and frequently does so due to insufficient detention space or other humanitarian reasons." AR 183. Thus, after a "preliminary finding" of "credible fear," Defendants are "convert[ing]" an alien's status from "Expedited Removal" to "Notice to Appear" and then allowing the alien to be "released on recognizance." ECF 54-2, App.330 n.7.

According to Defendants, the aliens' "[l]egal status while out of custody is parole until asylum is granted." *Id.* They claim to be doing so because "[c]ontinued detention of a migrant who has more likely than not demonstrated credible fear is

AMERICAN OVERSIGHT

not in the interest of resource allocation or justice." *Id.* But this class-based determination is not the "case-by-case" determination required by section 1182(d)(5)(A).

Put differently, the reason there are so many aliens requiring detention (or, purportedly, in need of parole) is Defendants' suspension of MPP. Thus, the district court properly found that Defendants' suspension of MPP is causing their ongoing violation of Section 1225, Op. 42-43, and Defendants cannot show the remaining factor in the stay test—a likelihood of success on the merits.

II. Defendants Cannot Satisfy the Remaining Factors.

Defendants cannot satisfy the remaining stay factors because whatever harm they may suffer is self-inflicted, and while there is a public interest in enforcing immigration laws, there is neither a public interest in failing to enforce them nor in unlawful agency action.

A. Self-inflicted inconvenience is not irreparable harm.

The Court considers whether the government will be "irreparably injured absent a stay." *Texas*, 787 F.3d at 746-47. The government merely offers (at 7), in conclusory fashion, that it "will be severely and irreparably harmed without a stay[.]" But such conclusory allegations of irreparable injury are insufficient. *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). And it was Plaintiffs—not Defendants—who during trial "show[ed] that they are suffering ongoing and future injuries as a result of the termination of MPP." Ex. [x] at 49.

Defendants counter (at 20-23) that the district court's injunction will be disruptive. The district court rejected such "problems [as] entirely self-inflicted." Op. 46-

AMERICAN OVERSIGHT

47. "That the government's asserted harm is largely self-inflicted 'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020); *see also* 11A Wright & Miller, *Federal Practice and Procedure* § 2948.1 (3d ed.). Defendants "could have avoided" these problems "by delaying preparatory work until the litigation was resolved." Op. 46-47 (quoting *Texas*, 809 F.3d at 187). Or Defendants "'could have avoided' any disruptions by informing Mexico that termination of MPP would be subject to judicial review 'until the litigation was resolved.'" *Id.* at 47 (quoting *Texas*, 809 F.3d at 187). And "Mexico is capable of understanding that [Defendants are] required to follow the laws of the United States which includes the APA and INA." *Id.*

Insofar as Defendants' claim disruption because "MPP had been in the process of termination for *months*[,]" that establishes only that the June 1 Memorandum was a "*post hoc*" rationalization "for a decision that was already made," which does not reflect good faith (and would itself be arbitrary and capricious under the APA). *Id.* at 48. Such inequitable conduct is "sufficient to deny" Defendants' request for an equitable stay pending appeal. *In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26-*27 (Bankr. C.D. Cal. Nov. 15, 2013).

Defendants claim (at 20) that they "cannot restart MPP without . . . cooperation from Mexico." Again, "MPP was adopted and launched unilaterally, just as it was later terminated unilaterally." Op. 49 n.15. "And even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing to admit asylum applicants at ports of entry in the first place—before they ever enter the United States." *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003205

B. The balance of equities and public interest favor enforcing federal law, not implementing an unlawful memorandum.

The district court also correctly found that "Defendants have no 'interest in the perpetuation of unlawful agency action." Op. 50 (quoting *League of Women Voters of United States, v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). "Rather, there is a 'public interest in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id.* (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). Moreover, "the public has an 'interest in stemming the flow of illegal immigration.'" *Id.* at 50 (citing *United States v. Escobar*, No. 2:17-CR-529, 2017 WL 5749620 at *2 (S.D. Tex. Nov. 28, 2017)). "And the public has interest in the enforcement of immigration laws, including Section 1225." *Id.* Defendants' arguments to the contrary lack merit.

First, Defendants suggest (at 20) that the balance of harms always favors the federal government in immigration cases. Not so. Texas and other States successfully challenged DAPA, and this Court properly refused to stay Judge Hanen's injunction. *See Texas*, 787 F.3d at 769. To be sure, when a federal court prevents the Executive Branch from *enforcing* the nation's immigration laws, a stay may be appropriate. For instance, "[t]here is always a public interest in prompt execution of removal orders." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Thus, courts often stay injunctions that would have prevented the enforcement of immigration restrictions. *See, e.g.*, *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020); *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). But here, the federal government is violating, not enforcing, federal immigration law. *E.g.* Op. 42-44. "There is always a

AMERICAN OVERSIGHT

public interest in prompt" enforcement of the immigration laws. *Nken*, 556 U.S. at 436. But there is no public interest in abdicating statutory obligations. *See Texas*, 787 F.3d at 768.

Second, Defendants suggest that the district court's permanent injunction threatens the separation of powers, but the court simply ordered the relief authorized by Congress. *See, e.g.*, *id.* at 45. In any event, the Executive Branch's "claims that the injunction offends separation of powers" goes to "the resolution of the case on the merits, not whether the injunction is stayed pending appeal." *Texas*, 787 F.3d at 767-68.

CONCLUSION

The Court should deny Defendants' motion.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003207

Respectfully submitted.

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-003208

Certificate of Service

On August 18, 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.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,144 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003209

Message

From: Weaks, Timothy [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9796F42AC2B149A99DC0B8F288ADF9F3-WEAKS, TIMOTHY]
Sent: 8/19/2021 2:38:35 PM
To: SL-Staff [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a37cdd3e5b6d4c6798cbc5a5d58de75e-SL-Staff]
CC: Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Stevens, Cris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=521151f1306d4ea2ae0c6fa08b7a6293-Stevens, Cris]; Nuelle, Chris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5f087eebfbb34d7e8854e258b6fd403b-Nuelle, Chris]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Deal, Marianna [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=968ddb64a1194ac4af691d6e90762ec4-Deal, Marianna]; Estep, Robert [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e44f6ef0bb24ecd81753eb8613699d8-Estep, Robert]; Houser, Rachael [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=houser]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Lewis, Jason [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b5c0354b7d8f4ae4b03d7dd0d4144031-Lewis, Jason]; Haywood, Amy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=haywoa]; Foster, Josh [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30031dddc5fd40b0bc03e3a33d8d46b7-Foster, Josh]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

All,
Tomorrow evening, the Missouri Attorney General's Office will play in a round-robin softball tournament against the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office.

Unfortunately, I have received a large amount of cancellations this afternoon. So, in order to avoid having to forfeit, I am once again putting out a call for people to play.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing* and have not already responded to me today, please let me know. Please email me separately without replying all, as this is being sent to the entire St. Louis. If not, no need to send regrets. If any Section Chiefs are able to help recruit, I would greatly appreciate it.

If you have any questions, there are more details below, or feel free to contact me directly. Thank you!

AMERICAN OVERSIGHT

Tim

Timothy Weaks | Assistant Attorney General
Missouri Attorney General's Office
815 Olive St, Suite 200
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(314) 340-4748
Timothy.Weaks@ago.mo.gov

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:35 AM
To: SL-Staff
Cc: Krug, Christine ; Stevens, Cris ; Nuelle, Chris ; Atkins, Jay ; Ebert, Mik ; Deal, Marianna ; Estep, Robert ; Houser, Rachael ; Morgan, Jeremiah ; Lewis, Jason ; Haywood, Amy ; Foster, Josh
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Softball tournament tonight is postponed due to rain.

We will play next Friday, August 20th at 4:00pm at Wilmore Park

If you are now able or unable to play, please let me know as soon as possible so we can determine if we will have enough to play. Remember, we want to win, but all skill levels are welcome and we would love to have you come out.

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:05 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Happy Friday, everyone. A few updates. Apologies for all of the emails.

1. Softball Tournament is tentative at this point due to all of the rain and more expected this evening. The organizer is waiting to hear from the Parks Department as to whether we can play. I will send a follow-up email either way to let you all know. If we do play, please try to arrive by 4:00pm. We will have a first-round bye so I don't expect to play until 4:30pm, but there is a chance that some offices, perhaps those with a history of not showing up to court, may not show up to play, so we could play sooner.
2. If you ordered merchandise, it is available for pickup from Rachael Houser's office. Please go get it this morning or this afternoon.

Thanks!
Tim Weaks

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From: Weaks, Timothy
Sent: Thursday, August 12, 2021 11:38 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

All,
Tomorrow is the day! This casual event is open to both attorneys and support staff (so long as your schedule accommodates), and we would love to see as many people as possible come out. As of now, we have 11 people committed to playing, but we could definitely use more. So if you are on the fence, I urge you to come by even if you are in as bad of shape as I am currently. Especially if you identify as female, your presence would be greatly appreciated, as 4 females are required in the field at all times and the batting order must alternate men and women. If you have not already, please let me know if you are able to play!

If you have a ball glove or bat, please bring it with you. Parking is available in the park and also directly across Hampton on the side of Schnucks. I would encourage you to patronize the store if possible and put the receipt on your dashboard. Please do not park in the Walgreens lot.

If you ordered a t-shirt through the AGO Pop-Up Shop that Rachael Houser so graciously organized, those will arrive in the St. Louis office tomorrow morning after Rachael picks them up. If you did not order one, I would suggest wearing the blue AGO t-shirts we wore last time (pictured below) or any other shirt with a similar color.

There is a good possibility that it rains and storms tomorrow, unfortunately, so if the tournament is canceled, I will inform everyone as soon as I know, but I would still plan on playing at this point.

Any questions, please feel free to reach out!

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Thursday, July 22, 2021 4:09 PM
To: SL-Staff <SL-Staff@ago.mo.gov>
Subject: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

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Friday, August 13, 2021 at 4:00pm, Wilmore Park (Hampton & Gravois, STL City) - Following last year's cancellation due to COVID, the Missouri Attorney General's Office will fight to defend its title against the likes of the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office in a round-robin softball tournament.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing*, please let me know so that we can get a preliminary head count. Please email me separately without replying all, as this is being sent to the entire St. Louis Office. If not, no need to send regrets.

We will likely order new shirts this year featuring the logo above. More details to come about those from either myself or Rachael Houser, but please let either of us know if you are interested in one.

My apologies if you have already received an email about the tournament from either me or your section chief.

Thanks!

Tim Weaks

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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED109447

PATRICIA (PARRISH) OTWELL
Employee/Appellant

vs.

DAIMLER CHRYSLER
Employer (Settled)

and

MISSOURI STATE TREASURER AS
CUSTODIAN OF THE SECOND INJURY FUND
Additional Party/Respondent

APPELLANTS' BRIEF

CURTIS, HEINZ, GARRETT
& O'KEEFE, P.C.

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TABLE OF CONTENTS

Table of Authorities… iii

Jurisdictional Statement 1

Statement of Facts 2

Bilateral Carpal Tunnel and Medical Care 3

Prior Psychiatric Illness 7

Prior Relevant Medical History 10

Deposition of David Volarich, M.D. 11

Deposition of Adam Sky M.D. DFAPA 14

Timothy Lalk Vocational Rehabilitation Counselor 18

Administrative Law Judge's Award 20

Labor and Industrial Relations Commission Award 23

Points Relied On 26

Argument 31

Point I 31

Point II 35

Point III 39

Point IV 48

Point V 49

Conclusion 57

Rule 84.06 Certificate 60

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003215

Certificate of Service..... 61

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

TABLE OF AUTHORITIES

Cases **Page**

Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. Banc 1993)..... 28, 47

Angus v. Second Injury Fund, 328 S.W.3d 294, 300, 299–303 (Mo.App. W.D. 2010)..... 28, 46

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014).....26, 27, 28, 29, 31, 36, 29 48

Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund, 603 S.W.3d 719 (Mo.App.S.D. 2020)..... 28, 44

Bond v. Site Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010)..... 28, 47

Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo. App. 1996).....26, 32

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.ED 2008) 26, 27, 28, 29, 32, 36 39, 49

Cook v. Missouri Highway & Transp. Comm'n, 500 S.W.3d 917, 923 (Mo.App.S.D. 2016)..... 27, 38

Dehatre v. Smith & Nephew Equip. Grp., 892 S.W.2d 369, 371 (Mo.App.E,D. 1995) 30, 50

Elliott v. Kansas City, Mo., Sch Dist., 71 S.W.3d 652, 658 (Mo.App.W.D. 2002).... 28, 47

Garrett v. Treasurer, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007) 26, 34

George v. City of St. Louis, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005)..... 28, 40

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. Banc 2003) 28, 39, 40, 50

Hazeltine v. Second Injury Fund, 591 S.W.3d 45, 57 [fn.7] (Mo.App.E.D. 2019) 44

Highley v. Von Weise Gear, 247 S.W.3d 52, 55 (Mo.App.ED 2008) 30, 51

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003217

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012) 30, 50

Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo.App.E.D. 2000) 44

Hoven v. Treas. of State, Custodian of Second Injury Fund,
414 S.W.3d 676, 678 (Mo.App.E.D. 2013) 28, 40

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250

(Mo.App.ED 2010) 26, 27, 29, 31, 36, 39, 49

Leutzinger v. Treas of Mo, Custodian of Second Injury Fund,
895 S.W.2d 591, 592 (Mo.App. E.D. 1995). *30, 51*

Lewis v. Treasurer of Mo,.435 S.W.3d 144, 160 (Mo.App.E.D. 2014).... 29, 30, 49, 51, 53

Motton v. Outsource Intern., 77 S.W.3d 669, 672
(Mo.App.ED 2002) 26, 27, 29, 31, 36, 39, 48

Nichols v. Belleview R-IIII School District., 528 S.w.3d 918, 930
(Mo.App.S.D. 2017)..... 27, 30, 37, 50

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)..... 27, 29, 37

Pruett v. Fed Mogul Corp. 365 S.W.3d 296, 306 (Mo.App.S.D. 2012)..... 29, 46

Ricks v. H.K Porter, Inc, 439 S.W.164, 167 (Mo. 1969) 29, 47

Robinson v. Loxcreen Co., 571 S.W.3d 247, 249 (Mo.App.S.D. 2019)..... 30, 50

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682
(Mo.App.W.D. 2014) 26, 27, 29, 31, 36, 39, 48

Van Winkle v. Lewellens Prof'l Cleaning, Inc., 258 S.W.3d 889, 898
(Mo.App. 2008)..... 29, 47

West v. Posten Const. Co., 804 S.W.3d 743, 744
(Mo. Banc 1991) 26, 27, 29, 30, 31, 36, 39, 48

Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo.App.W.D. 1994) 29, 46, 47

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003218

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Constitutional Provisions

Article V. Section 3, Constitution of Missouri 1

Statutory Provisions

Section 287.190.6(2), RSMo. 20

Section 287.220, RSMo. (1998) 30

Section 287.220.1, RSMo. 29

Section 287.495.1, RSMo. 30, 50

Section 477.050, RSMo. 1

Section 490.065, RSMo. 34

Section 490.065.2, RSMo. 2017 42

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003219

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JURISDICTIONAL STATEMENT

This is an appeal in a workers' compensation case in which Patricia Otwell (hereinafter "Employee") settled her case with the Employer Chrysler and sought permanent total disability (hereinafter "PTD") from the Treasurer, State of Missouri, as Custodian of the Second Injury Fund (hereinafter "the Fund"). The claim arose when the Employee developed occupational injuries to her hands due to repetitive activity. The claim against the Employer Chrysler was settled. A hearing was held on March 6, 2019 with Administrative Law Judge (hereinafter "ALJ"), Joseph Denigan found in favor of Employee and against the Fund for Permanent Partial Disability (hereinafter "PPD") combining her hand injuries representing 33 per cent of a body, or 133.32 weeks with pre-existing conditions referable to incontinence of 2.5 percent of the body (10 weeks) and 15 percent of the right shoulder (34.8 weeks) on June 27, 2019. The Labor Industrial Relations Commission (hereinafter "Commission") affirmed the Award on December 30, 2020. Thereafter, Employee filed a Notice of Appeal on January 27, 2021.

The subject matter of this appeal does not concern any exclusive ground for jurisdiction with the Missouri Supreme Court in MO. Const. Art V, Section 3. The accident arose in Saint Louis County which lies within the territorial jurisdiction of this Court. Section 477.050 RSMo.

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STATEMENT OF FACTS

Employee was born on May 25, 1958 (Tr.3). On the date of the hearing, she was 60 years-old and married to Tony Otwell. She previously had been married and divorced four times (T.3). She attended school to the 8th grade and later obtained a GED (T.4). At the age of 14 she married and began work as a waitress, then worked at Ryder International from 1980 to 1984 (T.5-6 & 7). In 1984 she was hired by Chrysler in Alabama to assemble and pack parts (T.8). The repetitive nature of the work led to physical problems and work restrictions for her right hand and shoulder and other body parts in 2003, 2007 and 2008 (T.92).

On March 6, 2003 she was picking up junction blocks when she developed burning sensation in her right arm and shoulder. She was seen by an orthopedic, Dr. Miller who diagnosed right shoulder tendonitis and ordered work restrictions of no lifting greater than one (1) pound, overhead or repetitive use of her right arm from April 25, 2003 to May 19, 2003. When she was released from care, she was removed from that job (T.11 & 95).

In 2005, Chrysler sold the Alabama Parts Plant and she moved to Chrysler in St. Louis (T.6). She was assigned to the Paint Department. There she used a sander, which vibrated and irritated both hands due to a strong torque that jerked her wrists (T.18). The torque was so forceful that she tied it to her right hand and held it with her left hand to sand (T.19). On October 6, 2005, she went to the Chrysler Clinic (hereinafter Clinic) with complaints in both shoulders, arms and hand numbness and tingling. She was given wrist supports, and medications and a Nerve Conduction Test was suggested (T.95-96). The

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MO-AG-22-0644-A-003221

Claimant sought private treatment for her neck, bilateral shoulders, arms and wrist/hands with Traci Lepper DC from October 5, 2005 to September of 2006 (T.20-21 and T.113-118). The Employee reported repetitive hand use in multiple jobs, using tools, clamps, clippers, power screwdriver (T.23-24). She drove a forklift and worked underneath a van with a powerful metal Ergo arm that placed screws overhead in elevated trucks and vans. The Employee's short stature required her to be on her tiptoes, the Ergo would jerk her up and down as she guided the arm. (T.22-26). While operating the Ergo arm in March, 2008 she was injured. Attorney Susan Roach filed a claim for injuries to her bladder (T.77). She had a sling suspension for stress incontinence October 21, 2008 and was released back to work with restrictions of no lifting greater than 10 lbs. for one month (T.37, 103 and 156-157).

Bilateral Carpal Tunnel and Medical Care

On February 4, 2009 the Employee reported bilateral pain, numbness and weakness in her hands at the Clinic (T.103-105). Chrysler's Plant physician, Dr. Malik ordered thyroid and diabetic testing and a nerve conduction velocity test (hereinafter "NCV") (T.103-104). She also saw Elaine Toon, her therapist, with suicidal ideation (hereinafter "SI") but no plan, feeling physically unwell and spoke of applying for disability. She reported mental and verbal abuse from her husband (T.202). On February 12, 2009 she reported to Toon symptoms of depression, increase anxiety related to health and severe pain in hands and the closing of Chrysler Plant. Dr. Phillips preformed a nerve conduction study (hereinafter "NCS") on February 10, 2009 (T. 106). It showed moderate sensory median neuropathy on the right wrist and mild medium neuropathy on

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Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

the left wrist (T. 106 and 227- 229). On February 16, 2009 was seen for bilateral hand/wrist pain and had concerns about over the counter medication to control symptoms (T.106). She reported difficulty sleeping and taking Effexor and Wellbutrin for depression (T.106). She was started on Neurontin 300 mg. and Relafen 750 mg. and made aware that Neurontin could have a side effect of increasing depression (T.106). On February 18, 2009, the lab testing for thyroid and diabetic conditions were negative (T.107). She reported to Toon depression with SI, resulting from physical problems especially pain in her abdomen, hands and wrists (T.202). On February 23, 2009, Neurontin and Relafen were discontinued and she was prescribed Ultram 5 g. (T.107). Dr. Malik explained he could not take her off work for her carpal tunnel syndrome (hereinafter "CTS") and she should see her doctor for adjustment of hormonal therapy. He noted her complaints of hot flashes and an emotional demeanor (T.107).

On February 25, 2009, the Employee was admitted to Chrysler's Partial Day Hospital Program[1] (T.203). On March 4, 2009 Dr. German diagnosed bilateral carpal tunnel syndrome and gave her injections in both wrists. He suggested surgery if her symptoms did not improve (T.207).

Due to increase symptoms of depression, SI with a plan and homicide ideation (hereinafter "HI"), she was admitted March 23 to 27, 2009 to the hospital by psychiatrist Dr. Chilikamarri (T. 246-250). She was diagnosed with Major Depression, recurrent, severe without psychosis, PTSD and panic disorder. It was noted she had thoughts to

[1] Chrysler's Partial Day Hospital Program was solely for Chrysler Employees who attended daily from 9:00 a.m. to 3:00 p.m. for mental health problems instead of working (T.32- 36).

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Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

shoot her boss, divorce issues and recurrent flashbacks of childhood physical abuse (T.306-310, 316-319). The Admission noted a history of prior suicide attempt at age 13 by overdosing with pills, and SI for many years (T.317).

Dr. German operated on her right wrist on April 4, 2009 and the left on April 17, 2009 (T.208, 217-218, 224-225). She was prescribed physical therapy on April 9, 2009 for 12 visits (T.221).

She saw Dr. Malik on April 9, 2009 reporting she was on sick leave for depression (T.108). Malik advised a job was available for her if she were not on sick leave (T.107).

Gary E. Meier P.T. exam on April 9, 2009 noted strength in her right wrist flexion, extensors and radial deviators was 3/5 and 3/5 at the ulnar deviators (T.213). Grip strength on the right was 4 lbs. and not tested on the left hand (T. 214).

Dr. German saw her on April 22, 2009, and deferred to Dr. Malik on work restrictions (T.216).

On May 1, 2009 Malik felt she had excellent healing and could be assigned to full duty work but for her sick leave status for mental health issues (T.108).

On May 20, 2009, PT Meier noted tenderness at the wrist and hypo-thenar eminence, decrease range of motion and weakness in her right wrist of 4/5 and left wrist 3/5 for flexors, extensors, ulnar and radial deviators. Her grip strength on the right was 22 lbs. and left 11 lbs. (T.213- 214).

On May 27, 2009, she complained of burning sensation and tingling radiating into her shoulder to German (T.208-209). He felt that her symptoms may relate to a hypersensitive nerve and should settle down. She told him she was moving back to

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AMERICAN OVERSIGHT

Alabama where she has a good support system. She was to continue anti-inflammatories and gentle exercises (T.209). She saw Toon on May 27, 2009 for depression and anxiety arising from temporary housing and Chrysler closing down both plants and freezing all sick leaves (T.203). German saw her on June 24, 2009 and noted continued numbness and tingling in her palms, aching with cold weather, waking at night, increased symptoms when talking on phone, and inability to push a granddaughter on a swing (T.209). On exam he recorded 2-point sensation in left wrist of 4 mm, on right 5 mm. Her grip on left was 22 pounds and right 30 pounds.[2] (T.209). He advised her that despite the cold sensitivity, she did not yet have reflex dystrophy. He stated she was a stoic and very nervous person who had been through a lot. He encouraged her to use her hands as much as possible and take anti-inflammatories (T.209). He commented that she had a history of panic attacks and was essentially a nervous person (T.209).

She saw therapist Toon on June 24, 2009, and was depressed with SI and anxious about her future and application for disability as she felt she was unable to work. Toon noted that she was dealing with many past issues with soon to be ex-husband and daughter (T.203). She last saw Toon for depression and SI due to stress with changes in her life and inability to work (T.204).

[2] The following are grip strength norms for females, measured in pounds for women ages 50-54: Right 53.9-77.4; Left 46.6-68 as published by Archives of Physical Medicine and Rehabilitation 66(2):69-74 March 1985.

AMERICAN OVERSIGHT

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German last saw her on September 14, 2009. She was still symptomatic with numbness and tingling. He did not test her grip strength. He wanted her to return in three (3) months, but since she had returned to live in Alabama, he released her (T.210).

At the hearing, Employee testified she was on medical leave for mental conditions beginning February 26 and attended Chrysler's stress day program. She did not recall returning to work at the plant except possibly a day or two (T.41). She felt she unable to work and accepted an offer to retire as the Plant was closing (T.6, 43). She has not worked since her retirement with the Employer, stating she had no qualifications for most jobs and could not use her hands (T.44). She applied for social security disability benefits (T.43). She testified that she had abdominal surgery to remove mesh following her retirement and this relieved some symptoms except incontinence (T.45).

Prior Psychiatric Illness

The Employee testified to symptoms of depression and anxiety dating from childhood from an abusive parent (T.5, 16). She testified that she was treated for "nerves" and severe depression by Dr. Cometa, PhD, and Drs. Isenberg and Calhoun (T.12, 15). Cometa took her off work on March 19-26, 2002, following a car accident that triggered an increase in symptoms (T.93, 110). The Employee kept copies of two letters given to her by Cometa (T.13). The Chrysler Clinic (hereinafter "Clinic") documents receipt of the letters from Cometa concerning her off work status (T.93). The Clinic records also note Employee was off work from March 15, 2002 to March 26, 2002 for depression (T.93).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The Employee testified to great difficulty performing her job due to physical problem causing her to be slow and anxious about her performance. She was referred to the Chrysler Stress Program and attended the 9:00 a.m. to 3:00 p.m. program daily instead of working (T.31-32). She first was admitted to the program on October 29 to November 20, 2007 (T.22, 98). Upon release, she continued with mental difficulties. Her supervisor, Tom Weston, sent her to the Clinic to be checked on her ability to work, as she was crying. At the Clinic she reported severe depression and anxiety stating she had been released from the stress program too soon and needed more treatment. She was driving a fork truck and stated "I am slow" (T.22, 31, 98).

At the Stress Program she came under the care of Dr. Chilikamarri and therapist Toon, LCS (T.34 and 36). She began treating privately with Toon on November 22, 2008 (T.195). She began treating privately with Chilikamarri upon admission to the Hospital on March 23, 2009.

The Employee participated in the Stress Program February 26, 2009 to March 23, 2009 (T.34–35, 98, 203). She was admitted to the Hospital on March 23, 2009 to March 27, 2009 for psychosis, SI with a plan, HI and severe depression (T.319, 338). Chilikamarri's admission notes reported a prior suicide attempt with overdose of pills at age 13 (T.304).

The Employee treated with therapist Toon, privately from December 15, 2007 to July 31, 2009 (T.35, 194-204). Toon's records reflect a lifelong depression, anxiety, daily SI, childhood neglect and abuse. Toon's diagnosis: Major Depression, recurrent, PTSD and Generalized Anxiety Disorder with gambling addiction (T.195). Toon documents the

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Employee's SI in 11 out of 19 visits, prior to the primary claim (T.196-202). On December 6, 2008 and January 8 and 9 of 2009, Toon notes severe depression, anxiety with SI related to her health and her husband's mental/verbal abuse and suggests a Partial Day Hospital program. The Employee declined (T.201-202). She eventually enters the Partial Day program on February 25, 2009 (T.203).

The Employee treated with her primary care physician, Dr. Pope on October 16, 2007:

> … reports also s/a. Physical/emotional abuse as a child. Raised in very abusive environment, was in counseling on Paxil, took Wellbutrin, Paxil and Klonopin…. Depressed, transient thoughts of self-harm, husband is ETOH abuser" (T.133).

His records also reflect problems with sleeping, migraine headaches, depression/mood changes, chronic stress, moderate anxiety (T.45-46, 121, 125, 133). On January 12, 2008 she was stable and her depression was chronic and moderate in severity (T.129 -130).

At the Hearing, the Employee became upset twice :

> It did begin in my childhood because I did not have a normal childhood at all. I – there was always fear and dread. I never knew what was going to happen to me. As a small child, at 13, I was sleeping on the back porch, it was screened in. And in the middle of the night, daddy woke me up dragging mother in there and saying, look at you whore, look at you whore. I didn't know what a whore was. And he drugged me out of the bed and beat me. There was days we did not have food. One time, all we had was some flour and the weasels had gotten in it and mother, mother strained

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

it and we – that's what we had. And I always wanted to work because I knew I had to – and I had my children. And I wanted them to be able to have a better life. I tried my best to raise them right. I'm sorry, it's just real painful.

Q. No, it's fine. I don't want to get you too upset. We'll kind of, just going to switch gears a little bit. I just want to get – take your time.

A. It just hurts me to go through it and talk about it. It's like I relive it. (T.16-17)

Later in the hearing while speaking about her difficulty working, she stated she felt like she was having a panic attack (T.22).

Prior Relevant Medical History

Following the injury to her bladder in March of 2008, Dr. Hugge suggested surgery (T.158, 160). She also was found to have a hernia (T.133-135, 137- 39, 150). She underwent a sling bladder surgery and hernia repair on October 21, 2008 (T.188-192). Following surgery, she was restricted to no lifting, pushing or pulling greater than 10 pounds (T.103). Post -surgery she continued to have pain, bleeding and incontinence (T.382). She was laid off October 31, 2008 to January 20, 2009 (T.103). She underwent removal of infected mesh with Dr. Veronikis on July 20, 2009 (T.44-45, 384). Her bleeding and pain stopped, but she continued to have incontinence (T.45). She felt her supervisors were irritated with her because she was too short, slow, weak and cried, which slowed the lines down (T.47).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Deposition of David Volarich, D.O.

Dr. Volarich is board certified in nuclear medicine (diagnostic imaging), occupational medicine, and independent medical examiner (T.485). Volarich examined the Employee on September 13, 2018 (T.487). She reported the 2008 injuries of repetitive pulling and pushing caused ongoing incontinence and genitourinary pain requiring her to use the restroom frequently (T.503). She reported extreme weakness in her hands and diminished sensation which caused great difficulty caring for her hair, manipulating buttons and zippers, driving, food preparation, and various household chores (T.503, 505). She reported persistent symptoms from her right shoulder strain injury in 2004 that caused limitations and pain with reaching, lifting, pushing and pulling. She reported these problems slowed down her work pace and she took Tylenol for pain (T.505-506).

On exam of her shoulder there was a 10% loss of motion, moderately positive impingement, trace crepitus with abduction and 1/5 atrophy or mild atrophy of the deltoid nerve to the cuff (T.506). On the hand/wrists exam, she had a positive Compression Provocative test over both carpal tunnels and a three-centimeter scar at each wrist. She was not able to grab the grip on the Jaymar device of the left hand at all. On the right hand she barely registered 3-foot pounds at setting number two, and 2-foot pounds at setting number 3, which represented very poor strength (T.508-509). He found the pinch testing was 4, 3 and 3 on the right, and all 4s on the left. The 2-point discrimination normally should be 4 mm or less, 5 mm is a gray zone and 6 or more is abnormal. His examination of Ms. Otwell showed on the right hand 2-point discrimination from thumb

AMERICAN OVERSIGHT

to little finger was 8, 7, 5, 5 and 6, on the left hand it was 6, 5, 5 and 4. She also had sensory loss on the right hand, severe, and the left hand, moderate (T.509).

Volarich diagnosed 1) stress incontinence; 2) occupational conditions of overuse syndrome of right and left upper extremity causing median nerve entrapment at the wrist or carpal tunnel syndrome, status post open carpal tunnel release (T.509-510). He also found pre-existing conditions due to right shoulder sprain/strain with residual rotator cuff tendonitis and shoulder bursitis (T.510). He felt the stress incontinence resulted in 2.5 percent permanent partial disability (hereafter "PPD") to the body as a whole and 20 PPD disability for both wrists, due continued discomfort, paresthesia and weakness (T.512-513). He did not perform a mental examination (T.510).

Volarich stated the 20% PPD of the right shoulder was due to chronic strain syndrome, rotator cuff tendinitis and bursitis which caused loss of motion, crepitus and difficulties using her right arm away from her body and overhead. He found her incontinence, right shoulder and bilateral hand/wrist conditions created hindrances and obstacles to employment or re-employment (T.514). He also testified as to the synergistic combination between the right shoulder symptoms and the residual carpal tunnel syndrome problems. He noted that he discussed this with the Claimant who reported manipulating objects with her hands were more difficult, especially if she was working overhead or had to manipulate objects away from her body. The interplay between her injuries and medical conditions made it more difficult for her to function sufficiently at work and home. She had not described synergy because of the urinary incontinence, other

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003231

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

than the fact that she had to go to the bathroom frequently which interrupted the work production (T.515-516).

He testified that the disabilities arising from her hands, incontinence and shoulder combined, and a loading factor should be considered. He reviewed both vocational expert Lalk's and Dr. Sky's reports (T.499). He reviewed medical records from her psychiatrist Chilikamarri, and Dr. Pope, noting her medications for psychiatric conditions of Cymbalta and Klonopin (T.510-511). He concluded, based on his evaluation of the medical records, his exam and findings and Lalk's vocational assessment, that he could not identify a job for which she could return to work (T.499). He found she was permanently and totally disabled primarily because of the combined pre-existing physical and psychiatric disorders and the conditions of her hands (T.517). Dr. Volarich felt she had a psychiatric condition, but deferred to psychiatry for that assessment (T.514-515). He restricted her to minor repetitive gripping, pinching, squeezing, pulling, pushing, twisting and rotating motions and similar tasks as needed, recommended she avoid impact vibratory trauma to the arms and use appropriate braces, anti-vibration gloves and support straps, and not handle weights greater than two to three pounds with either upper extremity. He thought she could handle weights to tolerance with her arms close to her body, but recommended no more than 10 lbs. He deferred to a urologist or gynecologist for limitations from the incontinence. On cross examination he was asked if he relied on the reports of Dr. Poetz and Dr. Shuter, both deceased, at the time of his examination, in coming to his conclusions regarding her disability. He testified he did not rely on opinions from Poetz or Shuter (T.520-521). He noted that the Employee had difficulty

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

communicating due to psychiatric problems that interfered with her train of thought conveying incomplete and conflicting information (T.504).

Deposition of Adam Sky M.D. DFAPA

Dr. Adam Sky is a medical doctor and board-certified in Psychiatry and Neurology with added qualification in Geriatric Psychiatry (T.459). No objections were made at the time of the hearing to admission of the Deposition and Exhibits 1 – 4 into evidence (T.52). Dr. Sky examined the Employee on May 15, 2017 (T.403, 464). She reported both physical and mental problems (T.406-407). She gave a history of past medical treatment for mental illness, describing a long history of depression going back to when she was a child. He noted that she reported a suicide attempt when she was 13 (documented by Dr. Chilikamarri in the admission records). She sought mental health treatment with Dr. Cometa and a psychiatrist, Dr. Calhoun, in Alabama beginning in 1990 (T.407). In St. Louis, she began seeing Dr. Chilikamarri through the Chrysler's Stress Day Program who treated while in the program beginning in 2007. She came to St. Louis in 2005 (T.407-408). Dr. Sky knew Dr. Chilikamarri and commented that his notes are difficult to read. Chilikamarri notes suggested she had a diagnosis of depression and he had tried her on several antidepressants (T.408-409). He also reviewed Daimler-Chrysler Medical Clinic's and psychologist Elaine Toon's treatment records (T.409-410). On December 15, 2017 Elaine Toon diagnosed Ms. Otwell with major depression, anxiety, post-traumatic stress disorder, as well as a gambling condition (T.195, 410). Dr. Sky noted Ms. Otwell's current medication included a very high dose of the antidepressant Cymbalta, and Rexulti, a mood stabilizer, used to augment the effects of

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003233
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

the antidepressant. Other medications were for high blood pressure, glaucoma, and chronic headaches (T.411). She gave a history of a difficult childhood, the middle of five (5) children. Her family was poor, and her father was both physically and verbally abusive (T.412). She declined discussing past sexual abuse. Dr. Sky commented that this was not an uncommon response to a first-time interview. As a result of the difficulties at home, she had a suicide attempt at age 13. She did not run away, but she ended up getting married and dropping out of school after 8th grade at the age of 14 (T.412). She had a series of marriages that ended in divorce. The final marriage lasted barely a year. One of the gentlemen she married was an alcoholic, mean and abusive (T.413).

Dr. Sky reported her history of working at Chrysler and the various jobs she had as well as physical problems that interfered with her job from the need for a hysterectomy, urinary stress incontinence and her upper extremity problems, especially with her hands (T.414-415). Dr. Sky had many patients from the Chrysler plant and the plant physician invited him and others to tour the plant which he found very helpful providing insight into the different positions all the Employees had (T.414).

Dr. Sky conducted a mental status exam of the Employee (T.416). He felt she was alert, appeared her listed age, and was cooperative, but tearful throughout the interview (T.417). She did have symptoms of anhedonia, or the absence of pleasure, which he felt was the cardinal symptom of depression (T.417). She endorsed feelings of hopelessness and helplessness, consistent with a depression diagnosis. Reported poor sleep, waking early, consistent with depression. She had put on weight (T.418). She currently denied suicidal/homicidal ideation, but she had them previously. He tested her with the

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Montgomery-Asberg Depression Rating Scale which was consistent with moderate to severe depression and anxiety with the Hamilton Anxiety rating scale (HAM-A), which showed moderate to severe anxiety (T.418-419, 470- 473). Finally, he conducted screening for Post-Traumatic Stress Disorder, the PCL-5, for which she scored 47, consistent with severe Post-Traumatic Stress Disorder (T.420, 474-476). Dr. Sky diagnosed Major Depression Disorder, moderate to severe and recurrent (T.420); generalized anxiety disorder based on her symptoms of a lot of complaints, worries, anticipation of the worst, fearful anticipation, feelings of tension, startled response, restlessness, inability to relax (T.423); and Post-Traumatic Stress Disorder he related to her childhood experiences which continued to produce symptoms (T.424). He concluded there was a lot of overlap between Depression, Anxiety and Post-Traumatic Stress Disorder from her childhood abuse (T.424). He felt the gambling addiction was no longer a factor (T.424-425).

He testified that based on the records he had reviewed and the mental evaluation he conducted, her pre-existing psychiatric disability represented a 35% permanent partial disability based on the body as a whole. This pre-existing mental disability combined and synergistically worsened with the occupational conditions to her hands, making her permanently totally disabled and unable to compete in the open labor market (100%) (T.426-427). He testified the Employee would not be capable of working in any job that required focus, concentration or pace, with special concern on her ability to follow safety guidelines and with production quotas (T.431-432). Sky further concluded her pre-

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

existing mental conditions combined with the problems from incontinence and her bilateral carpal tunnel, to render her unable to compete in the open labor market (T.434).

Sky testify that he regularly treats people who are working and provides restrictions on work activities (T.428-429). Sky concluded that Employee's pre-existing psychiatric condition was a significant hindrance to gainful employment prior to the primary claim. He found that the combination of her mental and difficulties with her hands created a complete obstacle and hindrance to gainful employment in the open labor market (T.468). He testified that someone with a history of depression, anxiety and PTSD, in a work environment where they are required to work with accuracy, with speed and where shutting down the line is a very big deal, would make the individual's anxiety and mental conditions worse. (T.432). Sky indicated that his review of the Clinic records supported the history of depression/anxiety prior to the primary claim (T.433, 434).

On cross examination, Sky agreed that he could not give an exact start date of when her symptoms of depression/anxiety occurred (T.439-440). On redirect, he agreed that the history he was given which coincided with the history that appeared in the medical records, was that it dates to childhood and was chronic (T.442). He reviewed the Clinic records showed a March 26, 2002 diagnosis of clinical depression and anxiety, as well as copious documentation that she was on antidepressants (T.443). He noted she had been on leave of absence/stress classes in 2007, and the records reflect that she was on a very substantial antidepressant, Venlafaxine, in 2007 (T.444). He found the 2007 records of Toon, the counselor, documented Employee's SI, feelings of overwhelmed anxiousness and attendance at a partial hospital day program sponsored by Chrysler prior

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003236

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

to the primary claim (T.446-449). He opined Employee's depression was tied into many things that happened dating back to her abusive childhood. (T.450) He noted that she had been on numerous anti depression medications for many years prior to the primary claim (T.451).

On re-cross Sky was asked about Employee's inconsistencies regarding doctors and dates (T.437). He found those were not significant a frequent issue with patients (T.452). Dr. Sky testified it was his conclusion Employee was not that he did not 100% disabled prior to the primary claim (T.453-454).

In a supplemental report dated November 16, 2018, Sky reviewed Lalk's August 4, 2017 report and found Lalk's conclusions on employability concurred with his conclusions (T.477). Sky also reviewed Clinic records, Cometa's two letters and Volarich's report, which did not change any of his prior conclusions regarding the Employee's mental evaluation as set forth in his report of May 15, 2018 (T.478).
He noted that a psychiatric condition could get worse over time and also could be made worse by an external event, like a physical injury or medical illness (T. 454).

Timothy Lalk Vocational Rehabilitation Counselor

Lalk, a certified vocational rehabilitation counselor, interviewed the Employee on July 15, 2014 at the request of Ms. Otwell's attorney Susan Roach, who was representing her in a 2008 claim for urinary incontinence (T.593). At the time of the request from Ms. Roach he was not provided with any information regarding injuries from work (T.594-595). He requested additional records from Ms. Roach following the interview, but never received the additional records (T.594). Additional records were provided to Mr. Lalk by

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003237
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Nancy Mogab, including reports of Dr. Volarich and Dr. Sky prior to the issuance of his report dated August 4, 2017 (T.641–642, 647).

During the Employee's interview, Mr. Lalk noted that she was cooperating, but did cry frequently and seemed quite distressed. He commented that her crying did interfere with her answering questions (T.596-597). He opined her ability to communicate, however was not because of reluctance to tell him things. He felt it was due to difficulty forming ideas, collecting thoughts and organizing her thoughts (T. 596-597). He gave her the Wide Range Achievement Test, Revision 3. Reading and arithmetic showed she was at fifth-grade level reading, and sixth grade in arithmetic. He noted the reading is scored only if the person correctly pronounces the word but does not evaluate comprehension of the words (T.626). The Adult Basic Learning Examination, Level 2, showed a post-high school level, indicating she could glean meaning by context in reading (T.626). Mr. Lalk concluded after his interview, testing and review of the medical evidence, that she was not able to compete, secure and maintain employment in the open labor market. He concluded she could do unskilled sedentary or near sedentary position with access to a restroom on an as needed basis (T.630). He felt the primary inability to work arose due to psychiatric conditions that involved contact with coworkers, supervisors and the public (T.629 -630, 651). He opined the psychiatric problems had prevented her from certain types of work in the past and currently and referenced medical records of depression and anxiety prior to her 2008 bladder incident (T.630-631). Her psychiatric symptoms were likely to increase during events and interfere with various kinds of work and social activities prior to both the 2008 bladder

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

injury, and the 2009 diagnosis of bilateral carpal tunnel syndrome, and after these claims (T.652). He opined that her ability to work in the future was dependent on whether her psychiatric symptoms changed (T.633). Lalk had unique experience working with adults suffering from mental conditions at the Independence Center, St. Louis (T.677).[3]

On cross, Lalk was asked if he "relied" on Dr Shuter's August 4, 2017 report (T.634 & 684). "Relied" was defined as "reviewed, read, looked at and then subsequently came to your conclusions because of the reviewing, reading and looking at those things" (T.634). Mr. Lalk answered yes, based on that definition. Lalk affirmed he did not have the start date of Employee's mental symptoms (T.639, 640).

On redirect, Lalk addressed Volarich's restrictions concluding the extreme weakness in the Employee's hands would prevent her from doing any kind of assembly work and packaging, leaving only jobs which would primarily require her to interact with customers, co-workers, etc. and for which due to her psychiatric problems, would not be able to perform (T.647-648).

ALJ's Award

The ALJ awarded PPD of 32.52 weeks against the Fund for a combination from her hands and pre-existing conditions right shoulder and incontinence (L.F.61). He found she was likely PTD only after considering unrelated post-primary injury progression of psychiatric conditions (L.F.61). The ALJ found that §287.190.6(2) RSMo. (2016) required Volarich or Sky to certify that the Employee is PTD (L.F.59). The ALJ cited

[3] The Independence Center is a 501(c)(3) rehabilitation program for adults with severe and persistent mental illnesses.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003239
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Volarich's failure to describe any combination of the Claimant's incontinence with her hands, and that he only found her PTD after considering Lalk's assessment (L.F.59).

The ALJ opined the primary settlement amount did not reflect a severe condition of PPD from which to find a PTD combination (L.F.59-60). He thought the medical records did not eliminate all employment, only those with heavy lifting or repetitive arm work (L.F.60). He felt Otwell could perform sedentary or retail work as she was ambulatory, could drive, manage her personal needs, had no domestic help. He concluded that this was substantial evidence that the Claimant's permanent injury is partial not total (L.F.60).

The ALJ found no evidence that her psychiatric disability was causally related to the work incident, as the claimant's appearance at trial was normal and lacking in any demeanor suggestive of anger or sadness (L.F.60). He further found no medical or lay evidence corroborated a severe depression or suicidal ideations prior to 2009 and she was not credible. Specifically, her single reference she felt suicidal "was not supported by any evidence that she had previously been hospitalized or treated for her assertion that she felt suicidal" (L.F.60). He found Sky's conclusions of a pre-existing psychiatric condition was based only on Otwell's anecdotal recollection or Dr. Chilikamarri's history, who treated her post injury" (L.F. 60). He found no objective pre-claim evidence of psychiatric disability, and Sky's analysis and testimony as simply unpersuasive and not enough to impose PTD liability against the SIF (L.F.61).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003240

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Fund introduced no evidence. The Fund objected to admissibility of Cometa's letters as they were not certified (L.F..50-51). The ALJ found the letters were not medical records, sustained the objection and excluded the letters (L.F. 57).

The Fund objected to Volarich's deposition, on the basis he relied on Dr. Shuter's report (L.F.52). The ALJ apparently overruled the objection on that basis.

The Fund objected to Lalk's deposition on the basis he relied on Shuter's report (L.F.53). The ALJ noted Lalk detailed Shuter's report twice and expressly admitted he relied on it in forming his own conclusions (L.F.56, T. 684, 696). Lalk did not have Poetz's report as evidenced by his testimony (T.642-643). The ALJ excluded Lalk's entire deposition testimony based on hearsay (L.F. 56).

The ALJ on his own, and without a raised objection by the Fund, excluded portions of Volarich's deposition that concurred with Lalk's assessment Employee was PTD because of her psychiatric disorders and combined hand injuries (L.F.57). The ALJ found that Volarich's report only mentioned Employee's chronic psychiatric illness once (L.F.57). He further found Volarich did not review any psychiatric medical records (L.F.56).

The ALJ highlighted, but did not overrule, a seven-day rule objection to Sky's testimony that incorporated Employee's incontinence as combining with other pre-existing conditions and the hand injuries to render the claimant PTD. The objection was not raised at the hearing by the Fund (T.52).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003241

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Labor and Industrial Relations Commission Award

In a 2-1 decision, the Commission affirmed the ALJ decision with a Supplemental Opinion. They corrected the ALJ's mistakes that the primary injury was to her hands and not her back and that the award for future medical was also a mistake (L.F.45). The Commission adopted the ALJ's evidentiary rulings and found no abuse of discretion (LF.45).

The Commission noted the ALJ's personal observations:

> Employee's demeanor as normal, not angry or sad; that she had domestic issues throughout adulthood which impacted her psychological condition; credibility was questioned as to a severe psychiatric condition, due to no records of hospitalization or treatment that corroborated her claim of suicidal thoughts predating the primary injury (LF.45).

The Commission agreed Employee chose to retire due to life factors impacting that decision aside from the level of disability she was experiencing (LF.47).

The Commission agreed Employee's psychological conditions were not proven as disabling at the time of the primary claim and felt she had post-injury worsening of her psychiatric and bladder conditions. (LF.48).

The Commission found Fund liability based on the synergistic effect of the pre-existing incontinence issue and the right shoulder injury with the primary carpal tunnel injuries amounting to 32.52 weeks of PPD based on the disability ratings found of the ALJ and his loading of a 33 1/3% load factor (L.F.48).

AMERICAN OVERSIGHT

Commissioner Curls filed a dissenting opinion that argued evidence supported a disabling pre-existing psychiatric condition that combined with the primary injury (L.F.49). She found the ALJ's decision to exclude of the entire deposition of Lalk was an abuse of discretion as Lalk examined many different admissible sources in coming to his conclusion (LF. 49).

She would admit the Cometa letters in conjunction with the Employee's testimony recalling her encounter with Cometa (LF. 50).

She would reverse the excluded portions of Volarich's testimony that referenced Lalk's testimony as he did not rely on Lalk's conclusions (L.F. 50).

She concluded that the ALJ's credibility finding to Sky's testimony regarding pre-existing psychiatric illness were not substantiated, and she would give greater weight to Sky's testimony (LF. 50)

Finally she finds that the records from the Clinic, Toon's records from 2007 to 2009, admissions to Chrysler's stress day program on multiple occasions prior to February 10, 2009, Sky's diagnosis of PTSD, major depressive disorder, recurrent and generalized anxiety disorder, support a finding of a pre-existing psychological disorder in the range of 20-35% body as a whole, which created an obstacle and hindrance to obtaining and maintaining employment which synergistically combined with her primary injury, right shoulder, incontinence to be greater than a 33 1/3% load, but short of permanent total disability (L.F. 51).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003243

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

She was not convinced of total disability as she felt that it was not clear as to the level of post-primary injury worsening of her psychiatric condition as Dr. Sky and Mr. Lalk examined her after the primary injury (L.F. 52).

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003244

POINTS RELIED ON

I.

The Commission misapplied the law when it ruled to exclude the entire deposition of Lalk based on a finding that the testimony relied on an inadmissible report of Dr. Shuter when substantial evidence shows that Shuter did not express an opinion on employability or PTD and exclusion of Lalk's testimony is an abuse of discretion when the testimony was unimpeached by contrary evidence from the Fund and does not demonstrate that Lalk was acting as a conduit for Shuter's conclusions on PTD as there is no evidence Shuter's report discussed PTD.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo.App. 1996)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Garrett v. Treasurer, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003245

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

II.

The Commission misapplied the law in excluding Dr. Volarich's testimony that concurred with Lalk's assessment that the Employee was PTD as there was no objection timely made on this issue, Volarich did not rely only stated they concurred on this issue, and Volarich did review psychiatric records so the exclusion of Volarich's conclusions on PTD is an abuse of discretion and should be reversed.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Cook v. Missouri Highway & Transp. Comm'n, 500 S.W.3d 917, 923 (Mo.App.S.D. 2016)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Nichols v. Belleview R-IIII School District, 528 S.W.3d 918, 930 (Mo.App.S.D. 2017)

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

III.

The Commission misapplied the law in finding require symptoms of psychiatric condition pre-existed and that there likely was only post injury worsening as psychiatric issues are complex and not within the understanding of lay understanding and here the Commission improperly disregarded competent, substantial and expert evidence and relied on lay conjecture and opinion unsupported by sufficient evidence and there is no requirement that a pre-existing condition be symptomatic.

Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. Banc 1993)

Angus v Second Injury Fund, 328 S.W.3d 294, 300)

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund, 603 S.W.3d 719 (Mo.App.S.D. 2020)

Bond v. Site Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Elliott v. Kansas City, Mo., Sch Dist., 71 S.W.3d 652, 658 (Mo.App.W.D. 2002)

George v. City of St. Louis, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005)

Hampton v. Big Boy Steel erection, 121 S.W.3d 220, 220-23 (Mo. Banc 2003)

Hoven v. Treas. of State, Custodian of Second Injury Fund, 414 S.W.3d 676, 678 (Mo.App.E.D. 2013)

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)

Pruett v. Fed Mogul Corp. 365 S.W.3d 296, 306 (Mo.App.S.D. 2012)

Ricks v. H.K Porter, Inc, 439 S.W.164, 167 (Mo. 1969)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

Van Winkle v. Lewellens Prof'l Cleaning, Inc., 258 S.W.3d 889, 898 (Mo.App. 2008)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo.App.W.D. 1994)

IV.

The Commission's misapplied the law in finding that the primary injury settlement for 16% of each wrist was so "modest" that it could not combine to make her totally disabled as §287.220.1 does not require a threshold on primary injury to combine with a pre-existing condition.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Lewis v. State, 435 S.W.3d 144, 160 (Mo.App.E.D. 2014)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

AMERICAN OVERSIGHT

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

§287.220.1

V.

The commission misapplied the law in not Awarding PTD or PPD for combined mental conditions, right shoulder, incontinence and her hand injuries against the Fund as the reasonable consideration of the evidence supports including the psychiatric condition as a pre-existing condition and the Award is against the overwhelming weight of the evidence.

Dehatre v. Smith & Nephew Equip. Grp., 892 S.W.2d 369, 371 (Mo.App.E.D. 1995)

Highley v. Von Weise Gear, 247 S.W.3d 52, 55 (Mo.App.E.D. 2008)

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012)

Lewis v. State, 435 S.W.3d 144, 160 (Mo.App.E.D. 2014)

Leutzinger v. Treas of Mo, Custodian of Second Injury Fund, 895 S.W.2d 591, 592 (Mo.App. E.D. 1995)

Nichols v. Belleview R-IIII School District, 528 S.W.3d 918, 930 (Mo.App.S.D. 2017)

Robinson v. Loxcreen Co., 571 S.W.3d 247, 249 (Mo.App.S.D. 2019)

Section 287.220, RSMo. Supp. 1993

Section 287.495.1(4), RSMo.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003249

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

ARGUMENT

I.

The Commission misapplied the law when it ruled to exclude the entire deposition of Lalk based on a finding that the testimony relied on an inadmissible report of Dr. Shuter when substantial evidence shows that Shuter did not express an opinion on employability or PTD and exclusion of Lalk's testimony is an abuse of discretion when the testimony was unimpeached by contrary evidence from the Fund and does not demonstrate that Lalk was acting as a conduit for Shuter's conclusions on PTD as there is no evidence Shuter's report discussed PTD.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ

AMERICAN OVERSIGHT

as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

Argument

Lalk examined Employee at the request of Susan Roach for her 2008 injury to her bladder July 15, 2014 (T.593-594). Following the evaluation, he contacted Roach for additional medical records but never received a response (T.595). Later Employee's current counsel, provided medical records to complete the evaluation.

At Lalk's deposition, the Fund asked if he "relied" on the summary of Shuter's March 3, 2012 in coming to his conclusions that Employee was PTD (T.634). Based on the Fund's definition of "rely," Lalk said yes.

The Commission found Lalk detailed Shuter's comprehensive rating report at two places in his "Review" portion and, later in the report, under "Functional Restrictions/Limitations" just preceding Summary and Conclusions (L.F. 56). He further found because, Lalk expressly admitted he relied on Shuter's findings in forming his own conclusions, he excluded the entire deposition from evidence based on hearsay. *Bruflat v. Mister Guy, Inc.,* 933 S.W.2d 829, 833 (Mo.App. 1996) (L.F. 22).

In the *Bruflat* case the Commission excluded portions of a medical expert testimony concerning disability that reflected reliance on an inadmissible report of a psychologist. The court noted that the testimony as to the amount of disability did not rely solely on facts outside the inadmissible opinion of the psychologist but instead totally deferred to the opinion of another expert as to disability. *Id* at 834. The court held that a testifying expert cannot be a mere conduit for another non-testifying expert and agreed that the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003251
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Commission's order to exclude that portion of the medical expert's opinion that parroted the inadmissible medical expert opinion was not an abuse of discretion.

A fair review of Lalk's testimony shows that it was Sky's limitations from her mental conditions that led to his conclusion that she was unable to compete in the open labor market and unemployable:

> .....Now what was important to me is a psychiatrist to comment about prognosis and/or any restrictions for the individual or at least a discussion of what he thought would be difficult for an individual to do, and he indicated that because of her psychiatric condition, that she would have poor focus, concentration and attention and would be very difficult for her to follow both simple as well as complex instructions. It would be very difficult for her to adapt to both routine as well as more complex work changes, as well as perform repetitive work according to set procedures, sequences or pace, and he expected her to respond inappropriately to the customer pressures at work and have difficulty with production quotas as well as interactions with co-workers and supervisors. So that would indicate to me that the types of work environment that she needs to avoid (T.613).

Lalk's summaries of Shuter's report references only medical causation, PPD ratings of both wrists and the existence of pre-existing medical conditions that were hindrances or obstacles to obtaining employment (T.685, 694). Lalk's summaries cite no opinion from Dr. Shuter commenting on the Employee's PTD status.

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

In *Garrett v. Treasurer*, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007), the court cited §490.065, RSMo., which provides that an expert opinion based on another expert's opinion is not necessarily inadmissible. The record here does not support that Lalk "parroted" opinions of Shuter. To the contrary Lalk's 3+ hour interview, testing and review of admissible medical evidence clearly provided the basis for his opinion that the Employee was not able to compete, secure and maintain employment in the open labor market (T.630). Lalk testified that physically the Employee could perform in an unskilled, sedentary or near sedentary position, if she had access to a restroom. He concluded that her primary reason that prevented her from employment is due to her pre-existing psychiatric conditions that would affect her concentration, pace and place her near co-workers or the public giving rise to increase in her psychiatric conditions (T.630). He cited Dr. Sky's diagnosis of severe recurrent depression, anxiety disorder and PTSD that damaged the Employee's focus, concentration and attention for other types of work. He concluded she would be ineffective with both routine, complex and repetitive work and difficulty responding to the customer pressures, production quotas and interactions with co-workers and supervisors (T.613). Lalk has expert experience in placing individuals with mental conditions having worked at the Independence Center in St. Louis which placed individuals with mental conditions in jobs (T.585-586). Lalk's conclusions regarding employability did not parrot what he cited by Shuter. Information about the Employee's physical limitations from Dr. German, physical therapist Meier, and later Dr. Volarich all document the extreme weakness in her hands that eliminated her past unskilled work. Lalk's report written prior to Dr. Shuter's death that may have

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003253

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

consider physical difficulties in employability cannot be removed from that report. But he again reviewed the additional information from Dr. Volarich which supported the weaknesses documented by the physical therapist Greg Meier in May as 22 lbs. on right and 11 lbs. on left (T.214). Dr. German on June 24, 2009 found 30 lbs. on right and 22 lbs. on left (T.209). Both significantly below normal findings. Dr. German does not measure her grip strength on his last visit, but notes she is still symptomatic and would like for her to return and does not release her to work, only to use her hands as much as possible (T.209).

The Commission's exclusion of Lalk's entire deposition is an abuse of discretion as the minor references to Shuter's findings did not comment on employability. Lalk's analysis was based on review of multiple admissible records, his experience and expertise, testing he performed and the age, education and work experience of the Employee. He has unique expertise from his work at the Independent Center, St. Louis, in assessing the employability of individuals who suffer from mental conditions.

II.

The Commission misapplied the law in excluding Dr. Volarich's testimony that concurred with Lalk's assessment that the Employee was PTD as there was no objection timely made on this issue, Volarich did not rely only stated they concurred on this issue, and Volarich did review psychiatric records so the exclusion of Volarich's conclusions on PTD is an abuse of discretion and should be reversed.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003254

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

Argument

The Commission adopted the evidentiary decisions of the ALJ who on his own and without an objection raised by the Fund, excluded portions of Dr. Volarich's opinion that specifically referenced Lalk's assessment that the Employee was permanently and totally disabled in large part due to her psychiatric disorders (T.52). At the Hearing, the Fund only objected to any portion of Volarich's report that referenced reliance on Shuter's opinion (T.52). Volarich's deposition was submitted without an objection regarding Lalk's testimony and as such is admissible in this instance as he only concurred

AMERICAN OVERSIGHT

and did not rely on Lalk's testimony (T.517). *Nichols v. Belleview R-IIII School District,* 528 S.W.3d 918, 930 (Mo.App.S.D. 2017); *Proffer v. Federal Mogul Corp.*, 341 S.W.3d 184, 187 (Mo.App.S.D. 2011). Adequacy of the factual or scientific foundation for expert opinion is an admissibility issue which is waived absent a timely objection or motion to strike. *Proffer*, 341 S.W.3d at 187. Expert testimony, admitted without objection, can be considered as any other evidence in determining the submissibility of the case. *Id.*

As stated in Point I, there is no evidence that Shuter had opined that the Employee was PTD. Volarich testified he reviewed a great deal of medical records and reports, but came to his own conclusions regarding his assessments of the Employee's conditions (T.520-521). Finally he never said he relied on Lalk's testimony on employability:

> Based on my evaluation, review of the medical records and review of the vocational assessment that was completed on 8/4/17 by Mr. Lalk, vocational assessment could not identify a job for which she could return to, I thought that she was permanently and totally disabled primarily as a result of her psychiatric disorders, I concurred with that assessment (T.517).

The Commission's second proffered basis for excluding Volarich's testimony on employability was a finding that Volarich had failed to review any medical evidence regarding her treatment for psychiatric conditions in forming his conclusion (L.F.56). The ALJ found only one reference in Volarich's report that referenced the Employee's chronic psychiatric illness (L.F.56). This overlooks Volarich's testimony that he did review Lalk's and Sky's reports (T.499); records of Psychiatrist Chilikamarri and

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003256
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

treatment records of Dr. Pope. Volarich also noted her medications for psychiatric conditions (T.510-511). He also reviewed the Chrysler Clinic records which provided references of treatment for mental conditions. He noticed and commented on her psychiatric problems that affected her ability to communicate to him at the evaluation (T.503-504). He testified that he felt she had a psychiatric disability but deferred to psychiatry for that assessment. Clearly the Commission has the authority and function to determine factual findings and credibility of witnesses and the weight to be given to their testimony. *Cook v. Missouri Highway & Transp. Comm'n,* 500 S.W.3d 917, 923 (Mo.App.S.D. 2016). However, here the Commission's determination that Volarich testified he relied on Lalk's opinion for employability is not present as that is not a correct statement of his testimony. The conclusion he reviewed no psychiatric records is also contrary to his testimony. The Commission's decision to exclude is not based on substantial evidence that supports the exclusion of a portion of Volarich's testimony that concerned his conclusion that she is PTD because of combined conditions from her pre-existing physical and psychiatric conditions and the primary injury to her hands.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003257

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

III.

The Commission misapplied the law in requiring symptoms of a pre-existing psychiatric condition for a PTD finding as it is not required and in failing to find "actual and measurable" conditions for PPD as psychiatric conditions are complex and the Commission improperly disregarded competent substantial expert evidence and erroneously relied on lay conjecture and opinion.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008). The Court examines the record as a whole to determine if the award is supported by sufficient competent and substantial evidence or whether the award is contrary to overwhelming weight of the evidence. *Hampton v. Big*

AMERICAN OVERSIGHT

Boy Steel erection, 121 S.W.3d 220, 220-23 (Mo. Banc 2003). The Commission is the sole judge of the weight of the evidence and credibility of the witnesses, which includes the weight to be given expert opinions *George v. City of St. Louis*, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005). The Court does not view the evidence in the light most favorable to the Commission's award. *Hampton,* 121 S.W.3d at 222-23. The Employee has the burden of proving all of the elements of his claim to a reasonable probability. *Hoven v. Treas. of State, Custodian of Second Injury Fund,* 414 S.W.3d 676, 678 (Mo.App.E.D. 2013).

Argument

The Commission found there was no pre-existing psychiatric condition only post claim worsening. They outline their reasons to disregard expert testimony and rely on their lay opinion as follows:

1. Sky relied on inadmissible evidence, two letters from Cometa (L.F.61).
2. ALJ found a "timely" objection in Sky's deposition testimony that characterized the Cometa letters as "records" was "misleading to the reader" and weighed against Sky's opinion (LF.57, 407).
3. No medical records from Chilikamarri pre- accident to review (LF.57).
4. Sky admitted he did not review the records from the Employee's hospitalization in March 23-27, 2009, at St Anthony's Hospital (LF.57).
5. Lack of treating records for mental conditions prior to 2009, except for Pope, who was not a psychiatrist and who noted "undeveloped references to "mild distress" and "mood disorder" (LF.58).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003259
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

6. Sky's opinion relied only on anecdotal evidence from the Employee (LF.58).

7. The ALJ observed the Employee's demeanor at trial as normal, not suggestive of anger or sadness. He mentioned her domestic issues throughout adulthood as impacting her psychological condition. He further found the Employee's single reference that she felt "suicidal" was not credible when there were no pre-claim hospitalization or treatment records corroborate this assertion (LF 46, 60)

8. Therapist Toon treated Employee from 2008-2009 for difficulties dealing with personal, family and martial illness (LF.46).

9. Employee attended a part-time day clinic for stress in late February 2009 (LF.46).

10. The Employee's mental conditions got worse post primary injury (T.46).

Dr. Sky is a board-certified psychiatrist (T.459). He conducted a medical examination of the Employee which included a history of mental health difficulties and treatment. He diagnosed major depression, recurrent, anxiety and PTSD. He testified that all three overlapped on each other adding to a difficult and worse impact on the Employee (T.424). It was his unrefuted expert opinion that these psychiatric conditions were present prior to the claim filed and synergistically combined and were made worse by the difficulties she had using her hands as a result of the development of bilateral carpal tunnel syndrome (T.425). He also concluded that her pre-existing psychiatric

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003260

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

condition, which was well documented, represented a pre-existing PPD of 35% body as a whole pre-claim, and due to the claim and limited improvement following medical care she became 100% disabled in combination (T.426).

The reasons the Commission provided in disregarding expert opinion on the Employee's mental conditions is not sufficient, substantial and also mistaken. Sky did not have the Cometa letters at the time of his May 15, 2017, report in which he made his conclusions, so no reliance on the letters (T.464). The reference of treatment in his report came from the Employee's medical history (T.465). Next, the Commission and ALJ found Sky's testimony less credible as he referred to the Cometa letters as records. The ALJ alleges that an objection was made at the time of this statement, but none appears at the cite the ALJ provides which was page 14 of Dr. Sky's deposition (T.407). Objections to improper form during a deposition should be stated concisely on the record during the deposition, to provide a reasonable opportunity to correct the form of the question. Dr. Sky did not use the word records, he only stated that he reviewed the letters (T.405). In addition, other evidence of treatment of Employee by Cometa is documented in admissible evidence from Chrysler Clinic (T.93). The Commission's finding that Sky could not consider facts not in evidence to form an opinion or inference misapplies the law as it is permissible if the facts otherwise comply with §490.065.2 RSMo. 2017. Information of prior psychiatric treatment from medical history is such permissible evidence.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003261

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The Employee testified that she first came under the care of Dr. Chilikamarri when she was sent by her employer to the Stress Program in 2007 (T.34, 36, 98). Because Chilikamarri treated her at the program, he was the psychiatrist who admitted her to the hospital in March, 2009 (T.242). She began privately treating with him after the hospitalization (T.232). The Commission found that Sky did not review the St. Anthony's records of March, 2009 (T.437). Sky did not have the records at the time of the Employee's interview, but did review them later as he testified to the admission record's past reference to a suicide attempt of Employee at age 13 (T.438). Regardless of the review of the hospital records there was sufficient and substantial admissible evidence available to him that he did review that is consistent and supported of his analysis diagnosis of the Employee's mental conditions and their impact on her life.

Sky did review the records of Dr. Pope, who recorded on October 16, 2007, the Employee's mental problems arising from physical/emotional abuse as a child, and current spousal abuse (T.133). Pope's records noted Employee's past counseling and prescriptions of Paxil, Wellbutrin and Klonopin for depression. On October 16, 2007, he noted her transient thoughts of self-harm. He prescribed her Effexor for depression and Valium for anxiety (T.133). He continued to prescribe her medication for chronic depression which was moderate in severity (T.129-130). Sky also had the medical records from Dr. Hugge who prescribed medication for the Employee's depression on September 15, 2005, and May 26, 2006 (T.169, 172-173). To find Sky not credible on the inaccurate basis that he failed to read the post claim hospital records is not a reasonable basis as it

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003262

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

cites no information that was not already available in the other admissible medical evidence listed above that he did review.

The Commission is correct that there are no prior records of a hospitalization for mental conditions prior to March, 2009. There is no requirement in the statute that any of the pre-existing injuries or conditions be "symptomatic" The requirement is simply that the Commission must find that the combination of the last injury and the pre-existing disabilities resulted in PTD.[4] *Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund*, 603 S.W.3d 719 (Mo.App.S.D. 2020).

The Commission also adopted the ALJ's opinion that the Employee's testimony that she felt "suicidal" prior to the claim was not credible. The Commission acknowledges that there are treating records from therapist Toon who counseled her at the stress program for 3 weeks in 2007, and then privately beginning December 15, 2007, to July 31, 2009 (T.35, 194-204). The Commission characterizes Toon's treatment as "difficulties with personal, family and martial problems". An analysis of an individual's mental conditions is a complex medical issue and not within the understanding of lay opinion. Toon's records prior to the date the claim was filed reflect the Employee's lifelong depression and anxiety with daily SI. The Employee reported childhood neglect and abuse, currently exacerbated by the amount of physical work she was doing at the

[4] The determination of PTD requires the court to determine whether the Employee's last injury in and of itself rendered the Employee PTD, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.E.D. 2000); *Hazeltine v. Second Injury Fund*, 591 S.W.3d 45, 57 [fn.7] (Mo.App.E.D. 2019).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Chrysler Fenton Plant, affecting her health. Ms. Toon's diagnosis on December 15, 2007, was Major Depression, recurrent, Post-Traumatic Stress Disorder and Generalized Anxiety Disorder with gambling addiction (T.195). Ms. Toon's records reflects SI, 11 times in 19 visits prior to the primary claim (T.196-202). On December 6, 2008, and January 8 and 9 of 2009, Toon notes severe symptoms of depression, anxiety with suicidal reports related to multiple issues, physical health and her husband's mental and verbal abuse. Toon discussed possibility of re-entering Chrysler's Partial Day Hospital program for a short period of time due to the severity of her depression, but the Employee declined (T.201-202). She eventually enters the Partial Day program on February 25, 2009 (T.203). Toon's records were reviewed by Sky in conjunction with the Employee's evaluation. The Commission's characterization of the Employee's mental conditions lacks the medical training required in this complex diagnosis of past and current trauma from abusive relationships affecting her mental functioning. The hospitalization that occurred approximately 5 weeks postdate the claim an exacerbation of her lifelong mental conditions as explained by Dr. Sky (T. 450).

Sky diagnosed the Employee with Major Depression, recurrent, Generalized Anxiety Disorder and Post-Traumatic Stress Disorder based on his evaluation and her medical records. He found that she had pre-existing permanent psychiatric disability which synergistically worsened by the primary injury to her hands that slowed her down in her job (T.426). Dr. Volarich also testified regarding the psychiatric condition

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003264

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

contributing to the Employee's inability to compete in the open labor market. Dr. Pope, Dr. Hugge, Dr. German, therapist Toon, and Lalk all comment on her mental conditions.

Chrysler clinic records show she lost time from work due to depression/anxiety on March 26, 2002, October 7 to November 20 in 2007, and again on December 3, 2007.

The Fund presented no evidence that contradict Sky's conclusions that the Employee had a pre-existing psychiatric condition of 35%. The Fund presented no expert opinion that the psychiatric condition did not combine with her primary injury or that it worsened post claim. The diagnosis of mental illness, and its origins, is a complex medical condition which is not within common knowledge or experience of a lay person and requires medical expert testimony which here was supported by the medical expertise of psychiatrist Adam Sky, M.D. *Pruett v. Fed Mogul Corp.* 365 S.W.3d 296, 306 (Mo.App.S.D. 2012); *Wright v. Sports Associated, Inc.,* 887 S.W.2d 596 (Mo.App.W.D. 1994). The Commission lay's analysis of the Employee's psychiatric conditions is grossly inadequate. The Commission took extreme measures to remove as much expert testimony as possible, but even so what remains is evidence of a 50-year-old worker whose abusive childhood regrettably affected her ability to establish and maintain work and personal relationships that led to 5 marriages, difficulties with her children and people with whom she worked.

The Commission is given deference on issues involving the credibility of witnesses and the weight to be given testimony. They also may decide a case 'upon its disbelief of uncontradicted and unimpeached testimony'. *Angus v Second Injury Fund,* 328 S.W.3d

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

294, 300). (quoting *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. banc 1993) (quoting *Ricks v. H.K Porter, Inc*, 439 S.W.164, 167 (Mo. 1969)). However, " the commission may not substitute an ALJ's personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert." *Wright v. Sports Associated, Inc.* 887 S.W.2d 596, 600 (Mo. Banc 1994). "The question of causation is one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not substantial evidence." *Elliott v. Kansas City, Mo., Sch Dist.,* 71 S.W.3d 652, 658 (Mo.App.W.D. 2002). When "expert medical testimony is presented, an ALJ's personal views of [the evidence] cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony." *Van Winkle v. Lewellens Prof'l Cleaning, Inc.*, 258 S.W.3d 889, 898 (Mo.App. 2008). The Commission's adoption of the ALJ's determination of the Employee's mental condition based on her demeanor at a hearing or Dr. The credibility of Dr. Sky's diagnosis of mental conditions and the effect on the Employee's functioning is based on no other expert medical testimony necessary for a complex medical condition. They are substituting their unqualified lay opinion for that of an expert witness and ignores too much of the admitted record and rests on an uneducated understanding of the effects PTSD, depression and anxiety.

On this complex issue the Commission may not arbitrarily disregard or ignore competent, substantial, and undisputed evidence of witnesses not impeached or base its finding on conjecture or its own opinion unsupported by sufficient evidence. *Bond v. Site*

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003266
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010). The Commission's finding that Dr. Sky's conclusions were less than credible are not reasonable. The determination as to the presence of a psychiatric condition pre-existing and how it combined with the un-employability of the Employee once she had additional work difficulties because of her weak hands should be properly acknowledged as the Commission cannot substitute their opinion on this complex matter. The finding of no pre-existence of a mental condition should have been considered in determining PTD and PPD.

IV.

The Commission's misapplied the law in finding that the primary injury settlement for 16% of each wrist was so "modest" that it could not combine to make her totally disabled as §287.220.1 does not require a threshold on primary injury to combine with a pre-existing condition.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

The plain language of §287.220.1 does not require a threshold on the primary injury or occupational conditions to combine with a pre-existing disability. Further, this section only requires that the pre-existing partial disability be of some minimal hindrance or obstacle to employment or to obtaining re-employment. "[A]ny pre-existing injury which could be considered a hindrance to an Employee's competition for employment in the open labor market should trigger second injury fund liability." *Lewis v. State,* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014) (internal quotation omitted).

V.

The commission misapplied the law in not Awarding PTD or PPD for combined mental conditions, right shoulder, incontinence and her hand injuries against the Fund as the reasonable consideration of the evidence supports including the psychiatric condition as a pre-existing condition and the Award is against the overwhelming weight of the evidence.

Standard of Review

Section 287.495.1(4) provides reversal of the Commission's Award if there is not sufficient competent evidence in the record to warrant the making of the award. "A

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003268
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

§487.495.1(4) challenge succeeds only in the demonstrated absence of sufficient competent substantial evidence; evidence contrary to the award of the Commission, regardless of quantity or quality, is 'irrelevant.'" *Nichols v. Belleview R-III Sch. Dist., 528 S.W.3d 918,922* (Mo. App. S.D. 2017) (citing *Hornbeck v. Spectra Painting, Inc.,* 370 S.W.3d 624, 629 (Mo. banc 2012)). "Sufficient competent evidence is a minimum threshold and can be satisfied by the testimony of one witness, even if there is contradictory testimony from other witnesses." *Robinson v. Loxcreen Co.*, 571 S.W.3d 247, 249 (Mo.App.S.D. 2019) (internal quotation omitted). In determining the validity of a challenge, The court will

(1) Identify a factual proposition necessary to sustain the Commission's result.

(2) Marshal all evidence in the record supporting that factual proposition, subject to the Commission's authorized factual and credibility determinations, explicit or implicit, and viewing the record objectively where there were no explicit or implicit findings.

(3) Demonstrate why the evidence from the second step lacks sufficient probative force on the issues, such that the Commission could not have reasonably believed the factual position set forth in step one.

The Employee has the burden of proof, so the question is not whether there was sufficient evidence to support an award in his favor, but to determine whether the award of the Commission is supported by competent evidence, not whether an opposing award could have been made. *Dehatre v. Smith & Nephew Equip. Grp.,* 892 S.W.2d 369, 371 (Mo.App.E.D. 1995) (overruled on other grounds by *Hampton,* 121 S.W.3d at 233).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The proper criteria for determining whether a pre-existing condition is serious enough to trigger the provisions of §287.220, RSMo. Supp. 1993 requires the condition to be a "hindrance or obstacle" to employment or to obtaining reemployment." *Leutzinger v. Treas of Mo, Custodian of Second Injury Fund,* 895 S.W.2d 591, 592 (Mo.App. E.D. 1995). There is no requirement that the pre-existing disability for PTD be "actual and measurable" to trigger Fund liability for PTD benefits. *Lewis v. Treasurer of Mo.,* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014). The requirement of "actual and measurable" affects applies to cases involving Fund liability for PPD benefits as such calculation requires the knowledge and consideration of the degree or percentage of disability of the pre-existing disability. *Id.* at 160.

Argument

In this case the Employee sought recovery for PTD pursuant to §287.220.1 The Fund is liable where the Employee establishes that she is PTD due to the combination of her present compensation injury and her pre-existing PPD or that the combination of the present compensable injury and the pre-existing PPD creates a greater overall disability than the sum of the disabilities independently. *Highley v. Von Weise Gear*, 247 S.W.3d 52, 55 (Mo.App.E.D. 2008). Here the Commission determined that the present injury to her hands did not render her PTD but did support a PPD of 16% of each hand and a load for bilateral injuries. The Commission further found pre-existing PPD of the right shoulder and the presence of incontinence. They found no pre-existing disability that represented an "obstacle or hinderance" to employment or was" actual and measurable" arising from a mental condition. As previously laid out in the brief, this finding is based

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003270
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

on their lay opinion interpreting a complex medical condition. that They found the documentation in the admissible medical records prior to the primary injury represented "difficulties with personal relationships" or "mood disorder" and as such did not represent medical condition that met either requirements for PTD or PPD.

On credibility, they found the Employee less than credible based on her demeanor at trial (no display of sadness or anger) and her severity of complaints not compatible with the 16% settlement of each wrist. They also opined that there was a post claim worsening of mental problems with a hospitalization that is the cause of her PTD. Dr. Malik's note that that she could work full duty if she were not on sick leave for mental conditions as reasons (L.F. 45-46). They further concluded dislike of working as a "floater," her divorce and plant shutdown contributed to her not working. The Commission believed a reasonable inference that the Employee chose to retire due to several life factors that occurred, aside from the level of disability she was experiencing (L.F. 46).

The implicitly found Volarich credible except for his statements concerning his conclusion that she had a mental condition that pre-existed the primary claim that represented an obstacle of hindrance to employment and was the greater factor in finding her PTD.

The Commission by excluding vocational expert Lalk's deposition did not consider his conclusions.

The Commission admitted Dr. Sky's deposition as there were no Fund objections but found the psychiatrist conclusions "less credible" as set out in Point III of this brief.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

What evidence is left are medical records of the Employee's therapist Toon, her family physician, Dr Pope, records from the plant Clinic and her gynecologist Dr. Hugge. The statements of treatment for mental conditions that rise above the absurd one time lay observation of the Employee's demeanor at the hearing. Toon is a mental health therapist trained and Dr. Pope as a family practitioner also trained to recognize the status of his patient's mental conditions and provided treatment as did Dr. Hugge. They all had numerous encounters with the Employee prior to the claim being filed. The plant clinic records also document disruptions from her mental health conditions for which the company directed her to the stress day program.

As previously stated the presence of a mental condition is a complex diagnosis and requires expert medical opinion (Dr. Sky), which was admitted without objections by the Fund. Deciding whether someone has PTSD, or is just crabby is based on expert analysis and not personal opinion. In finding a diagnosis of Depression the Commission required a "record of a prior hospitalization" as evidence of a pre-existing mental condition when no such evidence is required for a PTD award. But even if it were, the post hospitalization records so note a prior suicide attempt at the age of 13. There is no such requirement that a pre-existing disability must be present and measurable to trigger Fund liability for PTD benefits. *Lewis v Treasurer of State* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014). For PPD, Dr. Sky found the Employee had 35% PPD related to her mental conditions. The Plant Clinic records document her loss time and attendance for mental health issues dating back to 2002. Her supervisor sent her to the plant clinic do to her inability to work due to

AMERICAN OVERSIGHT

crying on the line. Toon's records beginning in 2007 document her mental conditions arising from childhood and spousal abuse.

The presence of Employee's psychiatric conditions and symptoms before and after the primary claim differ not in kind, but rather in degree. When the damage to her hands removed her out of a Chrysler unskilled job that limited co- Employee/supervisor contact, she became unemployable as discussed by Dr. Sky, Dr. Volarich and Lalk. Even Dr. Malik points to her mental health issues as preventing her from returning to her job.

Dr. Sky diagnosed the Employee with Major Depression, recurrent, Generalized Anxiety Disorder and Post-Traumatic Stress Disorder based on his evaluation and her medical records. He found that she had pre-existing permanent psychiatric disability which synergistically worsened by the primary injury to her hands (T. 426). Sky explains that the Employee's lifelong mental conditions are not new, but recurrent and exacerbated at various times. Her physical problems were just enough to combine and interfere in her ability to continual in a job that did allow her to work with minimal interactions with other Employees. The hospitalization in March of 2009 was evidence of her mental conditions that have affected her ability to function in a normal way. He notes that Toon felt the Employee's inability to cope with a divorce and physical problems were on the rise shortly before she had an EMG/NCS on February 10, 2009. Her inability to cope was compromised by her mental conditions:

A. You know, I don't know that we have a specific reason why she was angry at her boss, but people who are depressed, people who have anxiety

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003273

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

disorders, who have been traumatized, will oftentimes make comments like that, I'm so mad at you, I could just kill you …or I wish you were dead. So those kinds of impulsive comments or statements would certainly not be unusual in someone with a history of severe mood symptoms.

Q. She's the kind of person that wouldn't do well working with other people, correct?

A. In my experience, no.

Q. Okay. So doing this kind of assembly work, where she was somewhat isolated from other people would be the only kind of work, maybe , that she might be –I mean , can you think of __

A. Well as long as it did not require her to work to any degree of pace. You know – you got to work faster and you know – and someone sooner or later is going to say, hey, you know, you're not working fast enough, or that's not an accurate enough job, or you did sloppy work. Sooner or later, you're going to have to interact with a supervisor. You're going to have to follow safety guidelines. So even if you're working off by yourself in some imaginary isolated booth somewhere, there's going to be issues that come up. (T.456-457).

Dr. Volarich clearly reviewed all he medical evidence that had numerous references to the claimant's psychiatric conditions including Dr. Sky's opinion on her lack of employability due to her psychiatric conditions. Based on review of all this

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

information he concurred that the psychological condition was a major factor interfering in her employability.

The Commission's finding that there was no evidence of psychiatric symptoms prior to the primary claim ignores the documentation of medical evidence and a lack of understanding of a complex medical condition which is found her medical providers records. The Commission does not find a reasonable basis to discredit Sky's and Volarich's testimony, that the psychiatric conditions only arose post claim. A requirement of a hospitalization prior to the primary claim is not required. The presence of a short hospitalization post primary claim represents of a temporary occurrence. The issues she had from her mental problems before her primary claim that affected her relationships and communications with people were still present after the primary claim. The Primary claim added yet another limitation that made continuing to work not an option. The degree of treatment is not in issue. The degree that her psychiatric condition compromised her ability to function in a job in conjunction with weaker hands, a bad shoulder in her dominant arm, incontinence and limitations on pushing and pulling are the factors that eliminated her from employability. Because of her psychiatric conditions and unskilled work, she was limited to a job that did not require focus, concentration or pace and would have safety and production quotas (T.431-432). Sky concluded the combine pre-existing and primary claim combine and produce a hindrance and obstacle to employment making her unable to compete in the open labor market (T.468). That expert testimony on such a complex issue of mental health is supported by the admissible documentation of mental health and physical conditions and should not be discredited.

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Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

CONCLUSION

For the reasons stated above, the Commission's evidentiary decisions excluding Lalk's testimony should be reversed, as the Lalk conclusions involved the employability of the Employee and there is no evidence in the record that Dr. Shuter commented on the Employee's employability. Unidentified portions of Dr. Volarich's testimony that agreed that the Employee had a psychiatric condition, and it combined with her physical disability to PTD, should not have been excluded. The Commission's finding that the disabilities had to be certified by a physician is not required by the statute. The credibility findings of all the witnesses are against the overwhelming weight of the evidence. The Employee has met her burden under (1) that her pre-existing permanent disabilities were serious enough to constitute a hindrance or obstacle to her employment or re-employment; (2) the nature and extent of her pre-existing permanent disabilities by a reasonable degree of certainty; and (3) that she is permanently and totally disabled due to combination of her pre-existing permanent disabilities and her primary injury. The court should reverse and find the Fund liable for her permanent total disability. The Commission's decision is not reasonable based on the documentation and presence of interruptions affecting the Employee's work as a result of mental illness. Their decision is not supported by sufficient competent evidence and is against the overwhelming weight of the evidence. In the alternative, if the Court finds insufficient evidence that the Employee is PTD, there is clearly presence of a pre-existing mental conditions that were "actual and measurable" as concluded by Dr. Sky in his rating of 35%. The Court should

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003276

reverse and find Dr. Sky's unimpeached rating of 35% be combined with the PPD award that includes the Employee's mental conditions.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003277

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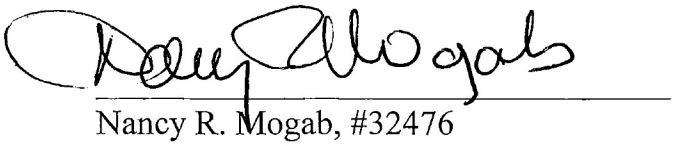

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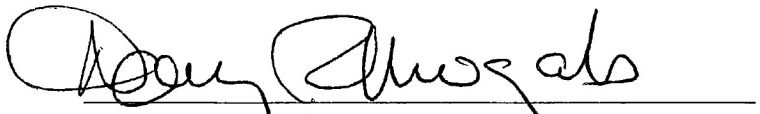
MO-AG-22-0644-A-003278

Rule 84.06 Certificate

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 14,379, excluding the cover page, table of contents, table of authorities, signature block, and certificates of service and compliance.



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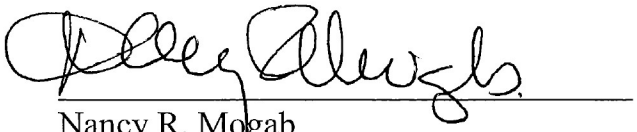
MO-AG-22-0644-A-003279

CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing was sent by electronic mail and by U.S. Mail, postage pre-paid, this 4th day of June 2021, to David C. Drescher, AAG (David.Drescher@ago.mo.gov), 815 Olive Street, Suite 200, St. Louis, Missouri 63101, Attorney for Respondent The Second Injury Fund.



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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003280

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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED109447

PATRICIA (PARRISH) OTWELL
Employee/Appellant

vs.

DAIMLER CHRYSLER
Employer (Settled)

and

MISSOURI STATE TREASURER AS
CUSTODIAN OF THE SECOND INJURY FUND
Additional Party/Respondent

APPELLANTS' BRIEF

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AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

TABLE OF CONTENTS

Table of Authorities… iii

Jurisdictional Statement 1

Statement of Facts 2

Bilateral Carpal Tunnel and Medical Care 3

Prior Psychiatric Illness 7

Prior Relevant Medical History 10

Deposition of David Volarich, M.D. 11

Deposition of Adam Sky M.D. DFAPA 14

Timothy Lalk Vocational Rehabilitation Counselor 18

Administrative Law Judge's Award 20

Labor and Industrial Relations Commission Award 23

Points Relied On 26

Argument 31

Point I 31

Point II 35

Point III 39

Point IV 48

Point V 49

Conclusion 57

Rule 84.06 Certificate 60

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003282

Certificate of Service..... 61

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003283

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

TABLE OF AUTHORITIES

Cases **Page**

Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. Banc 1993)..... 28, 47

Angus v. Second Injury Fund, 328 S.W.3d 294, 300, 299–303 (Mo.App. W.D. 2010)..... 28, 46

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014).....26, 27, 28, 29, 31, 36, 29 48

Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund, 603 S.W.3d 719 (Mo.App.S.D. 2020)..... 28, 44

Bond v. Site Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010)..... 28, 47

Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo. App. 1996).....26, 32

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.ED 2008) 26, 27, 28, 29, 32, 36 39, 49

Cook v. Missouri Highway & Transp. Comm'n, 500 S.W.3d 917, 923 (Mo.App.S.D. 2016)..... 27, 38

Dehatre v. Smith & Nephew Equip. Grp., 892 S.W.2d 369, 371 (Mo.App.E,D. 1995) 30, 50

Elliott v. Kansas City, Mo., Sch Dist., 71 S.W.3d 652, 658 (Mo.App.W.D. 2002).... 28, 47

Garrett v. Treasurer, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007) 26, 34

George v. City of St. Louis, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005)..... 28, 40

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. Banc 2003) 28, 39, 40, 50

Hazeltine v. Second Injury Fund, 591 S.W.3d 45, 57 [fn.7] (Mo.App.E.D. 2019) 44

Highley v. Von Weise Gear, 247 S.W.3d 52, 55 (Mo.App.ED 2008) 30, 51

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003284

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012) 30, 50

Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo.App.E.D. 2000) 44

Hoven v. Treas. of State, Custodian of Second Injury Fund,
414 S.W.3d 676, 678 (Mo.App.E.D. 2013) 28, 40

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250

(Mo.App.ED 2010) 26, 27, 29, 31, 36, 39, 49

Leutzinger v. Treas of Mo, Custodian of Second Injury Fund,
895 S.W.2d 591, 592 (Mo.App. E.D. 1995). *30, 51*

Lewis v. Treasurer of Mo,.435 S.W.3d 144, 160 (Mo.App.E.D. 2014).... 29, 30, 49, 51, 53

Motton v. Outsource Intern., 77 S.W.3d 669, 672
(Mo.App.ED 2002) 26, 27, 29, 31, 36, 39, 48

Nichols v. Belleview R-IIII School District., 528 S.w.3d 918, 930
(Mo.App.S.D. 2017)..... 27, 30, 37, 50

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)..... 27, 29, 37

Pruett v. Fed Mogul Corp. 365 S.W.3d 296, 306 (Mo.App.S.D. 2012)..... 29, 46

Ricks v. H.K Porter, Inc, 439 S.W.164, 167 (Mo. 1969) 29, 47

Robinson v. Loxcreen Co., 571 S.W.3d 247, 249 (Mo.App.S.D. 2019)..... 30, 50

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682
(Mo.App.W.D. 2014) 26, 27, 29, 31, 36, 39, 48

Van Winkle v. Lewellens Prof'l Cleaning, Inc., 258 S.W.3d 889, 898
(Mo.App. 2008)..... 29, 47

West v. Posten Const. Co., 804 S.W.3d 743, 744
(Mo. Banc 1991) 26, 27, 29, 30, 31, 36, 39, 48

Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo.App.W.D. 1994) 29, 46, 47

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003285

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Constitutional Provisions

Article V. Section 3, Constitution of Missouri 1

Statutory Provisions

Section 287.190.6(2), RSMo. 20

Section 287.220, RSMo. (1998) 30

Section 287.220.1, RSMo. 29

Section 287.495.1, RSMo. 30, 50

Section 477.050, RSMo. 1

Section 490.065, RSMo. 34

Section 490.065.2, RSMo. 2017 42

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003286

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

JURISDICTIONAL STATEMENT

This is an appeal in a workers' compensation case in which Patricia Otwell (hereinafter "Employee") settled her case with the Employer Chrysler and sought permanent total disability (hereinafter "PTD") from the Treasurer, State of Missouri, as Custodian of the Second Injury Fund (hereinafter "the Fund"). The claim arose when the Employee developed occupational injuries to her hands due to repetitive activity. The claim against the Employer Chrysler was settled. A hearing was held on March 6, 2019 with Administrative Law Judge (hereinafter "ALJ"), Joseph Denigan found in favor of Employee and against the Fund for Permanent Partial Disability (hereinafter "PPD") combining her hand injuries representing 33 per cent of a body, or 133.32 weeks with pre-existing conditions referable to incontinence of 2.5 percent of the body (10 weeks) and 15 percent of the right shoulder (34.8 weeks) on June 27, 2019. The Labor Industrial Relations Commission (hereinafter "Commission") affirmed the Award on December 30, 2020. Thereafter, Employee filed a Notice of Appeal on January 27, 2021.

The subject matter of this appeal does not concern any exclusive ground for jurisdiction with the Missouri Supreme Court in MO. Const. Art V, Section 3. The accident arose in Saint Louis County which lies within the territorial jurisdiction of this Court. Section 477.050 RSMo.

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

STATEMENT OF FACTS

Employee was born on May 25, 1958 (Tr.3). On the date of the hearing, she was 60 years-old and married to Tony Otwell. She previously had been married and divorced four times (T.3). She attended school to the 8th grade and later obtained a GED (T.4). At the age of 14 she married and began work as a waitress, then worked at Ryder International from 1980 to 1984 (T.5-6 & 7). In 1984 she was hired by Chrysler in Alabama to assemble and pack parts (T.8). The repetitive nature of the work led to physical problems and work restrictions for her right hand and shoulder and other body parts in 2003, 2007 and 2008 (T.92).

On March 6, 2003 she was picking up junction blocks when she developed burning sensation in her right arm and shoulder. She was seen by an orthopedic, Dr. Miller who diagnosed right shoulder tendonitis and ordered work restrictions of no lifting greater than one (1) pound, overhead or repetitive use of her right arm from April 25, 2003 to May 19, 2003. When she was released from care, she was removed from that job (T.11 & 95).

In 2005, Chrysler sold the Alabama Parts Plant and she moved to Chrysler in St. Louis (T.6). She was assigned to the Paint Department. There she used a sander, which vibrated and irritated both hands due to a strong torque that jerked her wrists (T.18). The torque was so forceful that she tied it to her right hand and held it with her left hand to sand (T.19). On October 6, 2005, she went to the Chrysler Clinic (hereinafter Clinic) with complaints in both shoulders, arms and hand numbness and tingling. She was given wrist supports, and medications and a Nerve Conduction Test was suggested (T.95-96). The

AMERICAN OVERSIGHT

Claimant sought private treatment for her neck, bilateral shoulders, arms and wrist/hands with Traci Lepper DC from October 5, 2005 to September of 2006 (T.20-21 and T.113-118). The Employee reported repetitive hand use in multiple jobs, using tools, clamps, clippers, power screwdriver (T.23-24). She drove a forklift and worked underneath a van with a powerful metal Ergo arm that placed screws overhead in elevated trucks and vans. The Employee's short stature required her to be on her tiptoes, the Ergo would jerk her up and down as she guided the arm. (T.22-26). While operating the Ergo arm in March, 2008 she was injured. Attorney Susan Roach filed a claim for injuries to her bladder (T.77). She had a sling suspension for stress incontinence October 21, 2008 and was released back to work with restrictions of no lifting greater than 10 lbs. for one month (T.37, 103 and 156-157).

Bilateral Carpal Tunnel and Medical Care

On February 4, 2009 the Employee reported bilateral pain, numbness and weakness in her hands at the Clinic (T.103-105). Chrysler's Plant physician, Dr. Malik ordered thyroid and diabetic testing and a nerve conduction velocity test (hereinafter "NCV") (T.103-104). She also saw Elaine Toon, her therapist, with suicidal ideation (hereinafter "SI") but no plan, feeling physically unwell and spoke of applying for disability. She reported mental and verbal abuse from her husband (T.202). On February 12, 2009 she reported to Toon symptoms of depression, increase anxiety related to health and severe pain in hands and the closing of Chrysler Plant. Dr. Phillips preformed a nerve conduction study (hereinafter "NCS") on February 10, 2009 (T. 106). It showed moderate sensory median neuropathy on the right wrist and mild medium neuropathy on

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

the left wrist (T. 106 and 227- 229). On February 16, 2009 was seen for bilateral hand/wrist pain and had concerns about over the counter medication to control symptoms (T.106). She reported difficulty sleeping and taking Effexor and Wellbutrin for depression (T.106). She was started on Neurontin 300 mg. and Relafen 750 mg. and made aware that Neurontin could have a side effect of increasing depression (T.106). On February 18, 2009, the lab testing for thyroid and diabetic conditions were negative (T.107). She reported to Toon depression with SI, resulting from physical problems especially pain in her abdomen, hands and wrists (T.202). On February 23, 2009, Neurontin and Relafen were discontinued and she was prescribed Ultram 5 g. (T.107). Dr. Malik explained he could not take her off work for her carpal tunnel syndrome (hereinafter "CTS") and she should see her doctor for adjustment of hormonal therapy. He noted her complaints of hot flashes and an emotional demeanor (T.107).

On February 25, 2009, the Employee was admitted to Chrysler's Partial Day Hospital Program[1] (T.203). On March 4, 2009 Dr. German diagnosed bilateral carpal tunnel syndrome and gave her injections in both wrists. He suggested surgery if her symptoms did not improve (T.207).

Due to increase symptoms of depression, SI with a plan and homicide ideation (hereinafter "HI"), she was admitted March 23 to 27, 2009 to the hospital by psychiatrist Dr. Chilikamarri (T. 246-250). She was diagnosed with Major Depression, recurrent, severe without psychosis, PTSD and panic disorder. It was noted she had thoughts to

[1] Chrysler's Partial Day Hospital Program was solely for Chrysler Employees who attended daily from 9:00 a.m. to 3:00 p.m. for mental health problems instead of working (T.32- 36).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

shoot her boss, divorce issues and recurrent flashbacks of childhood physical abuse (T.306-310, 316-319). The Admission noted a history of prior suicide attempt at age 13 by overdosing with pills, and SI for many years (T.317).

Dr. German operated on her right wrist on April 4, 2009 and the left on April 17, 2009 (T.208, 217-218, 224-225). She was prescribed physical therapy on April 9, 2009 for 12 visits (T.221).

She saw Dr. Malik on April 9, 2009 reporting she was on sick leave for depression (T.108). Malik advised a job was available for her if she were not on sick leave (T.107).

Gary E. Meier P.T. exam on April 9, 2009 noted strength in her right wrist flexion, extensors and radial deviators was 3/5 and 3/5 at the ulnar deviators (T.213). Grip strength on the right was 4 lbs. and not tested on the left hand (T. 214).

Dr. German saw her on April 22, 2009, and deferred to Dr. Malik on work restrictions (T.216).

On May 1, 2009 Malik felt she had excellent healing and could be assigned to full duty work but for her sick leave status for mental health issues (T.108).

On May 20, 2009, PT Meier noted tenderness at the wrist and hypo-thenar eminence, decrease range of motion and weakness in her right wrist of 4/5 and left wrist 3/5 for flexors, extensors, ulnar and radial deviators. Her grip strength on the right was 22 lbs. and left 11 lbs. (T.213- 214).

On May 27, 2009, she complained of burning sensation and tingling radiating into her shoulder to German (T.208-209). He felt that her symptoms may relate to a hypersensitive nerve and should settle down. She told him she was moving back to

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Alabama where she has a good support system. She was to continue anti-inflammatories and gentle exercises (T.209). She saw Toon on May 27, 2009 for depression and anxiety arising from temporary housing and Chrysler closing down both plants and freezing all sick leaves (T.203). German saw her on June 24, 2009 and noted continued numbness and tingling in her palms, aching with cold weather, waking at night, increased symptoms when talking on phone, and inability to push a granddaughter on a swing (T.209). On exam he recorded 2-point sensation in left wrist of 4 mm, on right 5 mm. Her grip on left was 22 pounds and right 30 pounds.[2] (T.209). He advised her that despite the cold sensitivity, she did not yet have reflex dystrophy. He stated she was a stoic and very nervous person who had been through a lot. He encouraged her to use her hands as much as possible and take anti-inflammatories (T.209). He commented that she had a history of panic attacks and was essentially a nervous person (T.209).

She saw therapist Toon on June 24, 2009, and was depressed with SI and anxious about her future and application for disability as she felt she was unable to work. Toon noted that she was dealing with many past issues with soon to be ex-husband and daughter (T.203). She last saw Toon for depression and SI due to stress with changes in her life and inability to work (T.204).

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[2] The following are grip strength norms for females, measured in pounds for women ages 50-54: Right 53.9-77.4; Left 46.6-68 as published by Archives of Physical Medicine and Rehabilitation 66(2):69-74 March 1985.

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

German last saw her on September 14, 2009. She was still symptomatic with numbness and tingling. He did not test her grip strength. He wanted her to return in three (3) months, but since she had returned to live in Alabama, he released her (T.210).

At the hearing, Employee testified she was on medical leave for mental conditions beginning February 26 and attended Chrysler's stress day program. She did not recall returning to work at the plant except possibly a day or two (T.41). She felt she unable to work and accepted an offer to retire as the Plant was closing (T.6, 43). She has not worked since her retirement with the Employer, stating she had no qualifications for most jobs and could not use her hands (T.44). She applied for social security disability benefits (T.43). She testified that she had abdominal surgery to remove mesh following her retirement and this relieved some symptoms except incontinence (T.45).

Prior Psychiatric Illness

The Employee testified to symptoms of depression and anxiety dating from childhood from an abusive parent (T.5, 16). She testified that she was treated for "nerves" and severe depression by Dr. Cometa, PhD, and Drs. Isenberg and Calhoun (T.12, 15). Cometa took her off work on March 19-26, 2002, following a car accident that triggered an increase in symptoms (T.93, 110). The Employee kept copies of two letters given to her by Cometa (T.13). The Chrysler Clinic (hereinafter "Clinic") documents receipt of the letters from Cometa concerning her off work status (T.93). The Clinic records also note Employee was off work from March 15, 2002 to March 26, 2002 for depression (T.93).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The Employee testified to great difficulty performing her job due to physical problem causing her to be slow and anxious about her performance. She was referred to the Chrysler Stress Program and attended the 9:00 a.m. to 3:00 p.m. program daily instead of working (T.31-32). She first was admitted to the program on October 29 to November 20, 2007 (T.22, 98). Upon release, she continued with mental difficulties. Her supervisor, Tom Weston, sent her to the Clinic to be checked on her ability to work, as she was crying. At the Clinic she reported severe depression and anxiety stating she had been released from the stress program too soon and needed more treatment. She was driving a fork truck and stated "I am slow" (T.22, 31, 98).

At the Stress Program she came under the care of Dr. Chilikamarri and therapist Toon, LCS (T.34 and 36). She began treating privately with Toon on November 22, 2008 (T.195). She began treating privately with Chilikamarri upon admission to the Hospital on March 23, 2009.

The Employee participated in the Stress Program February 26, 2009 to March 23, 2009 (T.34–35, 98, 203). She was admitted to the Hospital on March 23, 2009 to March 27, 2009 for psychosis, SI with a plan, HI and severe depression (T.319, 338). Chilikamarri's admission notes reported a prior suicide attempt with overdose of pills at age 13 (T.304).

The Employee treated with therapist Toon, privately from December 15, 2007 to July 31, 2009 (T.35, 194-204). Toon's records reflect a lifelong depression, anxiety, daily SI, childhood neglect and abuse. Toon's diagnosis: Major Depression, recurrent, PTSD and Generalized Anxiety Disorder with gambling addiction (T.195). Toon documents the

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Employee's SI in 11 out of 19 visits, prior to the primary claim (T.196-202). On December 6, 2008 and January 8 and 9 of 2009, Toon notes severe depression, anxiety with SI related to her health and her husband's mental/verbal abuse and suggests a Partial Day Hospital program. The Employee declined (T.201-202). She eventually enters the Partial Day program on February 25, 2009 (T.203).

The Employee treated with her primary care physician, Dr. Pope on October 16, 2007:

> … reports also s/a. Physical/emotional abuse as a child. Raised in very abusive environment, was in counseling on Paxil, took Wellbutrin, Paxil and Klonopin…. Depressed, transient thoughts of self-harm, husband is ETOH abuser" (T.133).

His records also reflect problems with sleeping, migraine headaches, depression/mood changes, chronic stress, moderate anxiety (T.45-46, 121, 125, 133). On January 12, 2008 she was stable and her depression was chronic and moderate in severity (T.129 -130).

At the Hearing, the Employee became upset twice :

> It did begin in my childhood because I did not have a normal childhood at all. I – there was always fear and dread. I never knew what was going to happen to me. As a small child, at 13, I was sleeping on the back porch, it was screened in. And in the middle of the night, daddy woke me up dragging mother in there and saying, look at you whore, look at you whore. I didn't know what a whore was. And he drugged me out of the bed and beat me. There was days we did not have food. One time, all we had was some flour and the weasels had gotten in it and mother, mother strained

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

it and we – that's what we had. And I always wanted to work because I knew I had to – and I had my children. And I wanted them to be able to have a better life. I tried my best to raise them right. I'm sorry, it's just real painful.

Q. No, it's fine. I don't want to get you too upset. We'll kind of, just going to switch gears a little bit. I just want to get – take your time.

A. It just hurts me to go through it and talk about it. It's like I relive it. (T.16-17)

Later in the hearing while speaking about her difficulty working, she stated she felt like she was having a panic attack (T.22).

Prior Relevant Medical History

Following the injury to her bladder in March of 2008, Dr. Hugge suggested surgery (T.158, 160). She also was found to have a hernia (T.133-135, 137- 39, 150). She underwent a sling bladder surgery and hernia repair on October 21, 2008 (T.188-192). Following surgery, she was restricted to no lifting, pushing or pulling greater than 10 pounds (T.103). Post -surgery she continued to have pain, bleeding and incontinence (T.382). She was laid off October 31, 2008 to January 20, 2009 (T.103). She underwent removal of infected mesh with Dr. Veronikis on July 20, 2009 (T.44-45, 384). Her bleeding and pain stopped, but she continued to have incontinence (T.45). She felt her supervisors were irritated with her because she was too short, slow, weak and cried, which slowed the lines down (T.47).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Deposition of David Volarich, D.O.

Dr. Volarich is board certified in nuclear medicine (diagnostic imaging), occupational medicine, and independent medical examiner (T.485). Volarich examined the Employee on September 13, 2018 (T.487). She reported the 2008 injuries of repetitive pulling and pushing caused ongoing incontinence and genitourinary pain requiring her to use the restroom frequently (T.503). She reported extreme weakness in her hands and diminished sensation which caused great difficulty caring for her hair, manipulating buttons and zippers, driving, food preparation, and various household chores (T.503, 505). She reported persistent symptoms from her right shoulder strain injury in 2004 that caused limitations and pain with reaching, lifting, pushing and pulling. She reported these problems slowed down her work pace and she took Tylenol for pain (T.505-506).

On exam of her shoulder there was a 10% loss of motion, moderately positive impingement, trace crepitus with abduction and 1/5 atrophy or mild atrophy of the deltoid nerve to the cuff (T.506). On the hand/wrists exam, she had a positive Compression Provocative test over both carpal tunnels and a three-centimeter scar at each wrist. She was not able to grab the grip on the Jaymar device of the left hand at all. On the right hand she barely registered 3-foot pounds at setting number two, and 2-foot pounds at setting number 3, which represented very poor strength (T.508-509). He found the pinch testing was 4, 3 and 3 on the right, and all 4s on the left. The 2-point discrimination normally should be 4 mm or less, 5 mm is a gray zone and 6 or more is abnormal. His examination of Ms. Otwell showed on the right hand 2-point discrimination from thumb

AMERICAN OVERSIGHT

to little finger was 8, 7, 5, 5 and 6, on the left hand it was 6, 5, 5 and 4. She also had sensory loss on the right hand, severe, and the left hand, moderate (T.509).

Volarich diagnosed 1) stress incontinence; 2) occupational conditions of overuse syndrome of right and left upper extremity causing median nerve entrapment at the wrist or carpal tunnel syndrome, status post open carpal tunnel release (T.509-510). He also found pre-existing conditions due to right shoulder sprain/strain with residual rotator cuff tendonitis and shoulder bursitis (T.510). He felt the stress incontinence resulted in 2.5 percent permanent partial disability (hereafter "PPD") to the body as a whole and 20 PPD disability for both wrists, due continued discomfort, paresthesia and weakness (T.512-513). He did not perform a mental examination (T.510).

Volarich stated the 20% PPD of the right shoulder was due to chronic strain syndrome, rotator cuff tendinitis and bursitis which caused loss of motion, crepitus and difficulties using her right arm away from her body and overhead. He found her incontinence, right shoulder and bilateral hand/wrist conditions created hindrances and obstacles to employment or re-employment (T.514). He also testified as to the synergistic combination between the right shoulder symptoms and the residual carpal tunnel syndrome problems. He noted that he discussed this with the Claimant who reported manipulating objects with her hands were more difficult, especially if she was working overhead or had to manipulate objects away from her body. The interplay between her injuries and medical conditions made it more difficult for her to function sufficiently at work and home. She had not described synergy because of the urinary incontinence, other

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

than the fact that she had to go to the bathroom frequently which interrupted the work production (T.515-516).

He testified that the disabilities arising from her hands, incontinence and shoulder combined, and a loading factor should be considered. He reviewed both vocational expert Lalk's and Dr. Sky's reports (T.499). He reviewed medical records from her psychiatrist Chilikamarri, and Dr. Pope, noting her medications for psychiatric conditions of Cymbalta and Klonopin (T.510-511). He concluded, based on his evaluation of the medical records, his exam and findings and Lalk's vocational assessment, that he could not identify a job for which she could return to work (T.499). He found she was permanently and totally disabled primarily because of the combined pre-existing physical and psychiatric disorders and the conditions of her hands (T.517). Dr. Volarich felt she had a psychiatric condition, but deferred to psychiatry for that assessment (T.514-515). He restricted her to minor repetitive gripping, pinching, squeezing, pulling, pushing, twisting and rotating motions and similar tasks as needed, recommended she avoid impact vibratory trauma to the arms and use appropriate braces, anti-vibration gloves and support straps, and not handle weights greater than two to three pounds with either upper extremity. He thought she could handle weights to tolerance with her arms close to her body, but recommended no more than 10 lbs. He deferred to a urologist or gynecologist for limitations from the incontinence. On cross examination he was asked if he relied on the reports of Dr. Poetz and Dr. Shuter, both deceased, at the time of his examination, in coming to his conclusions regarding her disability. He testified he did not rely on opinions from Poetz or Shuter (T.520-521). He noted that the Employee had difficulty

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

communicating due to psychiatric problems that interfered with her train of thought conveying incomplete and conflicting information (T.504).

Deposition of Adam Sky M.D. DFAPA

Dr. Adam Sky is a medical doctor and board-certified in Psychiatry and Neurology with added qualification in Geriatric Psychiatry (T.459). No objections were made at the time of the hearing to admission of the Deposition and Exhibits 1 – 4 into evidence (T.52). Dr. Sky examined the Employee on May 15, 2017 (T.403, 464). She reported both physical and mental problems (T.406-407). She gave a history of past medical treatment for mental illness, describing a long history of depression going back to when she was a child. He noted that she reported a suicide attempt when she was 13 (documented by Dr. Chilikamarri in the admission records). She sought mental health treatment with Dr. Cometa and a psychiatrist, Dr. Calhoun, in Alabama beginning in 1990 (T.407). In St. Louis, she began seeing Dr. Chilikamarri through the Chrysler's Stress Day Program who treated while in the program beginning in 2007. She came to St. Louis in 2005 (T.407-408). Dr. Sky knew Dr. Chilikamarri and commented that his notes are difficult to read. Chilikamarri notes suggested she had a diagnosis of depression and he had tried her on several antidepressants (T.408-409). He also reviewed Daimler-Chrysler Medical Clinic's and psychologist Elaine Toon's treatment records (T.409-410). On December 15, 2017 Elaine Toon diagnosed Ms. Otwell with major depression, anxiety, post-traumatic stress disorder, as well as a gambling condition (T.195, 410). Dr. Sky noted Ms. Otwell's current medication included a very high dose of the antidepressant Cymbalta, and Rexulti, a mood stabilizer, used to augment the effects of

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

the antidepressant. Other medications were for high blood pressure, glaucoma, and chronic headaches (T.411). She gave a history of a difficult childhood, the middle of five (5) children. Her family was poor, and her father was both physically and verbally abusive (T.412). She declined discussing past sexual abuse. Dr. Sky commented that this was not an uncommon response to a first-time interview. As a result of the difficulties at home, she had a suicide attempt at age 13. She did not run away, but she ended up getting married and dropping out of school after 8th grade at the age of 14 (T.412). She had a series of marriages that ended in divorce. The final marriage lasted barely a year. One of the gentlemen she married was an alcoholic, mean and abusive (T.413).

Dr. Sky reported her history of working at Chrysler and the various jobs she had as well as physical problems that interfered with her job from the need for a hysterectomy, urinary stress incontinence and her upper extremity problems, especially with her hands (T.414-415). Dr. Sky had many patients from the Chrysler plant and the plant physician invited him and others to tour the plant which he found very helpful providing insight into the different positions all the Employees had (T.414).

Dr. Sky conducted a mental status exam of the Employee (T.416). He felt she was alert, appeared her listed age, and was cooperative, but tearful throughout the interview (T.417). She did have symptoms of anhedonia, or the absence of pleasure, which he felt was the cardinal symptom of depression (T.417). She endorsed feelings of hopelessness and helplessness, consistent with a depression diagnosis. Reported poor sleep, waking early, consistent with depression. She had put on weight (T.418). She currently denied suicidal/homicidal ideation, but she had them previously. He tested her with the

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Montgomery-Asberg Depression Rating Scale which was consistent with moderate to severe depression and anxiety with the Hamilton Anxiety rating scale (HAM-A), which showed moderate to severe anxiety (T.418-419, 470- 473). Finally, he conducted screening for Post-Traumatic Stress Disorder, the PCL-5, for which she scored 47, consistent with severe Post-Traumatic Stress Disorder (T.420, 474-476). Dr. Sky diagnosed Major Depression Disorder, moderate to severe and recurrent (T.420); generalized anxiety disorder based on her symptoms of a lot of complaints, worries, anticipation of the worst, fearful anticipation, feelings of tension, startled response, restlessness, inability to relax (T.423); and Post-Traumatic Stress Disorder he related to her childhood experiences which continued to produce symptoms (T.424). He concluded there was a lot of overlap between Depression, Anxiety and Post-Traumatic Stress Disorder from her childhood abuse (T.424). He felt the gambling addiction was no longer a factor (T.424-425).

He testified that based on the records he had reviewed and the mental evaluation he conducted, her pre-existing psychiatric disability represented a 35% permanent partial disability based on the body as a whole. This pre-existing mental disability combined and synergistically worsened with the occupational conditions to her hands, making her permanently totally disabled and unable to compete in the open labor market (100%) (T.426-427). He testified the Employee would not be capable of working in any job that required focus, concentration or pace, with special concern on her ability to follow safety guidelines and with production quotas (T.431-432). Sky further concluded her pre-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003302

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

existing mental conditions combined with the problems from incontinence and her bilateral carpal tunnel, to render her unable to compete in the open labor market (T.434).

Sky testify that he regularly treats people who are working and provides restrictions on work activities (T.428-429). Sky concluded that Employee's pre-existing psychiatric condition was a significant hindrance to gainful employment prior to the primary claim. He found that the combination of her mental and difficulties with her hands created a complete obstacle and hindrance to gainful employment in the open labor market (T.468). He testified that someone with a history of depression, anxiety and PTSD, in a work environment where they are required to work with accuracy, with speed and where shutting down the line is a very big deal, would make the individual's anxiety and mental conditions worse. (T.432). Sky indicated that his review of the Clinic records supported the history of depression/anxiety prior to the primary claim (T.433, 434).

On cross examination, Sky agreed that he could not give an exact start date of when her symptoms of depression/anxiety occurred (T.439-440). On redirect, he agreed that the history he was given which coincided with the history that appeared in the medical records, was that it dates to childhood and was chronic (T.442). He reviewed the Clinic records showed a March 26, 2002 diagnosis of clinical depression and anxiety, as well as copious documentation that she was on antidepressants (T.443). He noted she had been on leave of absence/stress classes in 2007, and the records reflect that she was on a very substantial antidepressant, Venlafaxine, in 2007 (T.444). He found the 2007 records of Toon, the counselor, documented Employee's SI, feelings of overwhelmed anxiousness and attendance at a partial hospital day program sponsored by Chrysler prior

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

to the primary claim (T.446-449). He opined Employee's depression was tied into many things that happened dating back to her abusive childhood. (T.450) He noted that she had been on numerous anti depression medications for many years prior to the primary claim (T.451).

On re-cross Sky was asked about Employee's inconsistencies regarding doctors and dates (T.437). He found those were not significant a frequent issue with patients (T.452). Dr. Sky testified it was his conclusion Employee was not that he did not 100% disabled prior to the primary claim (T.453-454).

In a supplemental report dated November 16, 2018, Sky reviewed Lalk's August 4, 2017 report and found Lalk's conclusions on employability concurred with his conclusions (T.477). Sky also reviewed Clinic records, Cometa's two letters and Volarich's report, which did not change any of his prior conclusions regarding the Employee's mental evaluation as set forth in his report of May 15, 2018 (T.478).
He noted that a psychiatric condition could get worse over time and also could be made worse by an external event, like a physical injury or medical illness (T. 454).

Timothy Lalk Vocational Rehabilitation Counselor

Lalk, a certified vocational rehabilitation counselor, interviewed the Employee on July 15, 2014 at the request of Ms. Otwell's attorney Susan Roach, who was representing her in a 2008 claim for urinary incontinence (T.593). At the time of the request from Ms. Roach he was not provided with any information regarding injuries from work (T.594-595). He requested additional records from Ms. Roach following the interview, but never received the additional records (T.594). Additional records were provided to Mr. Lalk by

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Nancy Mogab, including reports of Dr. Volarich and Dr. Sky prior to the issuance of his report dated August 4, 2017 (T.641–642, 647).

During the Employee's interview, Mr. Lalk noted that she was cooperating, but did cry frequently and seemed quite distressed. He commented that her crying did interfere with her answering questions (T.596-597). He opined her ability to communicate, however was not because of reluctance to tell him things. He felt it was due to difficulty forming ideas, collecting thoughts and organizing her thoughts (T. 596-597). He gave her the Wide Range Achievement Test, Revision 3. Reading and arithmetic showed she was at fifth-grade level reading, and sixth grade in arithmetic. He noted the reading is scored only if the person correctly pronounces the word but does not evaluate comprehension of the words (T.626). The Adult Basic Learning Examination, Level 2, showed a post-high school level, indicating she could glean meaning by context in reading (T.626). Mr. Lalk concluded after his interview, testing and review of the medical evidence, that she was not able to compete, secure and maintain employment in the open labor market. He concluded she could do unskilled sedentary or near sedentary position with access to a restroom on an as needed basis (T.630). He felt the primary inability to work arose due to psychiatric conditions that involved contact with coworkers, supervisors and the public (T.629 -630, 651). He opined the psychiatric problems had prevented her from certain types of work in the past and currently and referenced medical records of depression and anxiety prior to her 2008 bladder incident (T.630-631). Her psychiatric symptoms were likely to increase during events and interfere with various kinds of work and social activities prior to both the 2008 bladder

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

injury, and the 2009 diagnosis of bilateral carpal tunnel syndrome, and after these claims (T.652). He opined that her ability to work in the future was dependent on whether her psychiatric symptoms changed (T.633). Lalk had unique experience working with adults suffering from mental conditions at the Independence Center, St. Louis (T.677).[3]

On cross, Lalk was asked if he "relied" on Dr Shuter's August 4, 2017 report (T.634 & 684). "Relied" was defined as "reviewed, read, looked at and then subsequently came to your conclusions because of the reviewing, reading and looking at those things" (T.634). Mr. Lalk answered yes, based on that definition. Lalk affirmed he did not have the start date of Employee's mental symptoms (T.639, 640).

On redirect, Lalk addressed Volarich's restrictions concluding the extreme weakness in the Employee's hands would prevent her from doing any kind of assembly work and packaging, leaving only jobs which would primarily require her to interact with customers, co-workers, etc. and for which due to her psychiatric problems, would not be able to perform (T.647-648).

ALJ's Award

The ALJ awarded PPD of 32.52 weeks against the Fund for a combination from her hands and pre-existing conditions right shoulder and incontinence (L.F.61). He found she was likely PTD only after considering unrelated post-primary injury progression of psychiatric conditions (L.F.61). The ALJ found that §287.190.6(2) RSMo. (2016) required Volarich or Sky to certify that the Employee is PTD (L.F.59). The ALJ cited

[3] The Independence Center is a 501(c)(3) rehabilitation program for adults with severe and persistent mental illnesses.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003306
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Volarich's failure to describe any combination of the Claimant's incontinence with her hands, and that he only found her PTD after considering Lalk's assessment (L.F.59).

The ALJ opined the primary settlement amount did not reflect a severe condition of PPD from which to find a PTD combination (L.F.59-60). He thought the medical records did not eliminate all employment, only those with heavy lifting or repetitive arm work (L.F.60). He felt Otwell could perform sedentary or retail work as she was ambulatory, could drive, manage her personal needs, had no domestic help. He concluded that this was substantial evidence that the Claimant's permanent injury is partial not total (L.F.60).

The ALJ found no evidence that her psychiatric disability was causally related to the work incident, as the claimant's appearance at trial was normal and lacking in any demeanor suggestive of anger or sadness (L.F.60). He further found no medical or lay evidence corroborated a severe depression or suicidal ideations prior to 2009 and she was not credible. Specifically, her single reference she felt suicidal "was not supported by any evidence that she had previously been hospitalized or treated for her assertion that she felt suicidal" (L.F.60). He found Sky's conclusions of a pre-existing psychiatric condition was based only on Otwell's anecdotal recollection or Dr. Chilikamarri's history, who treated her post injury" (L.F. 60). He found no objective pre-claim evidence of psychiatric disability, and Sky's analysis and testimony as simply unpersuasive and not enough to impose PTD liability against the SIF (L.F.61).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003307

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Fund introduced no evidence. The Fund objected to admissibility of Cometa's letters as they were not certified (L.F..50-51). The ALJ found the letters were not medical records, sustained the objection and excluded the letters (L.F. 57).

The Fund objected to Volarich's deposition, on the basis he relied on Dr. Shuter's report (L.F.52). The ALJ apparently overruled the objection on that basis.

The Fund objected to Lalk's deposition on the basis he relied on Shuter's report (L.F.53). The ALJ noted Lalk detailed Shuter's report twice and expressly admitted he relied on it in forming his own conclusions (L.F.56, T. 684, 696). Lalk did not have Poetz's report as evidenced by his testimony (T.642-643). The ALJ excluded Lalk's entire deposition testimony based on hearsay (L.F. 56).

The ALJ on his own, and without a raised objection by the Fund, excluded portions of Volarich's deposition that concurred with Lalk's assessment Employee was PTD because of her psychiatric disorders and combined hand injuries (L.F.57). The ALJ found that Volarich's report only mentioned Employee's chronic psychiatric illness once (L.F.57). He further found Volarich did not review any psychiatric medical records (L.F.56).

The ALJ highlighted, but did not overrule, a seven-day rule objection to Sky's testimony that incorporated Employee's incontinence as combining with other pre-existing conditions and the hand injuries to render the claimant PTD. The objection was not raised at the hearing by the Fund (T.52).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003308

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Labor and Industrial Relations Commission Award

In a 2-1 decision, the Commission affirmed the ALJ decision with a Supplemental Opinion. They corrected the ALJ's mistakes that the primary injury was to her hands and not her back and that the award for future medical was also a mistake (L.F.45). The Commission adopted the ALJ's evidentiary rulings and found no abuse of discretion (LF.45).

The Commission noted the ALJ's personal observations:

> Employee's demeanor as normal, not angry or sad; that she had domestic issues throughout adulthood which impacted her psychological condition; credibility was questioned as to a severe psychiatric condition, due to no records of hospitalization or treatment that corroborated her claim of suicidal thoughts predating the primary injury (LF.45).

The Commission agreed Employee chose to retire due to life factors impacting that decision aside from the level of disability she was experiencing (LF.47).

The Commission agreed Employee's psychological conditions were not proven as disabling at the time of the primary claim and felt she had post-injury worsening of her psychiatric and bladder conditions. (LF.48).

The Commission found Fund liability based on the synergistic effect of the pre-existing incontinence issue and the right shoulder injury with the primary carpal tunnel injuries amounting to 32.52 weeks of PPD based on the disability ratings found of the ALJ and his loading of a 33 1/3% load factor (L.F.48).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003309

Commissioner Curls filed a dissenting opinion that argued evidence supported a disabling pre-existing psychiatric condition that combined with the primary injury (L.F.49). She found the ALJ's decision to exclude of the entire deposition of Lalk was an abuse of discretion as Lalk examined many different admissible sources in coming to his conclusion (LF. 49).

She would admit the Cometa letters in conjunction with the Employee's testimony recalling her encounter with Cometa (LF. 50).

She would reverse the excluded portions of Volarich's testimony that referenced Lalk's testimony as he did not rely on Lalk's conclusions (L.F. 50).

She concluded that the ALJ's credibility finding to Sky's testimony regarding pre-existing psychiatric illness were not substantiated, and she would give greater weight to Sky's testimony (LF. 50)

Finally she finds that the records from the Clinic, Toon's records from 2007 to 2009, admissions to Chrysler's stress day program on multiple occasions prior to February 10, 2009, Sky's diagnosis of PTSD, major depressive disorder, recurrent and generalized anxiety disorder, support a finding of a pre-existing psychological disorder in the range of 20-35% body as a whole, which created an obstacle and hindrance to obtaining and maintaining employment which synergistically combined with her primary injury, right shoulder, incontinence to be greater than a 33 1/3% load, but short of permanent total disability (L.F. 51).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003310

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

She was not convinced of total disability as she felt that it was not clear as to the level of post-primary injury worsening of her psychiatric condition as Dr. Sky and Mr. Lalk examined her after the primary injury (L.F. 52).

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

POINTS RELIED ON

I.

The Commission misapplied the law when it ruled to exclude the entire deposition of Lalk based on a finding that the testimony relied on an inadmissible report of Dr. Shuter when substantial evidence shows that Shuter did not express an opinion on employability or PTD and exclusion of Lalk's testimony is an abuse of discretion when the testimony was unimpeached by contrary evidence from the Fund and does not demonstrate that Lalk was acting as a conduit for Shuter's conclusions on PTD as there is no evidence Shuter's report discussed PTD.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo.App. 1996)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Garrett v. Treasurer, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003312

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

II.

The Commission misapplied the law in excluding Dr. Volarich's testimony that concurred with Lalk's assessment that the Employee was PTD as there was no objection timely made on this issue, Volarich did not rely only stated they concurred on this issue, and Volarich did review psychiatric records so the exclusion of Volarich's conclusions on PTD is an abuse of discretion and should be reversed.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Cook v. Missouri Highway & Transp. Comm'n, 500 S.W.3d 917, 923 (Mo.App.S.D. 2016)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Nichols v. Belleview R-IIII School District, 528 S.W.3d 918, 930 (Mo.App.S.D. 2017)

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

III.

The Commission misapplied the law in finding require symptoms of psychiatric condition pre-existed and that there likely was only post injury worsening as psychiatric issues are complex and not within the understanding of lay understanding and here the Commission improperly disregarded competent, substantial and expert evidence and relied on lay conjecture and opinion unsupported by sufficient evidence and there is no requirement that a pre-existing condition be symptomatic.

Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. Banc 1993)

Angus v Second Injury Fund, 328 S.W.3d 294, 300)

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund, 603 S.W.3d 719 (Mo.App.S.D. 2020)

Bond v. Site Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Elliott v. Kansas City, Mo., Sch Dist., 71 S.W.3d 652, 658 (Mo.App.W.D. 2002)

George v. City of St. Louis, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005)

Hampton v. Big Boy Steel erection, 121 S.W.3d 220, 220-23 (Mo. Banc 2003)

Hoven v. Treas. of State, Custodian of Second Injury Fund, 414 S.W.3d 676, 678 (Mo.App.E.D. 2013)

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Proffer v. Federal Mogul Corp., 341 S.W.3d 184, 187 (Mo.App.S.D. 2011)

Pruett v. Fed Mogul Corp. 365 S.W.3d 296, 306 (Mo.App.S.D. 2012)

Ricks v. H.K Porter, Inc, 439 S.W.164, 167 (Mo. 1969)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

Van Winkle v. Lewellens Prof'l Cleaning, Inc., 258 S.W.3d 889, 898 (Mo.App. 2008)

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo.App.W.D. 1994)

IV.

The Commission's misapplied the law in finding that the primary injury settlement for 16% of each wrist was so "modest" that it could not combine to make her totally disabled as §287.220.1 does not require a threshold on primary injury to combine with a pre-existing condition.

Archer v. City of Cameron, 460 S.W.3d 775, 778 (Mo. banc 2014)

Cardwell v. Treasurer of the State of Missouri, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008)

Lawrence v. Anheuser Busch Cos. Inc., 310 S.W.3d 248, 250 (Mo.App.E.D. 2010)

Lewis v. State, 435 S.W.3d 144, 160 (Mo.App.E.D. 2014)

Motton *v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002)

Scholastic, Inc. v. Viley 452 S.W.3d 680, 682 (Mo.App.W.D. 2014)

AMERICAN OVERSIGHT

West v. Posten Const. Co., 804 S.W.3d 743, 744 (Mo. banc 1991)

§287.220.1

V.

The commission misapplied the law in not Awarding PTD or PPD for combined mental conditions, right shoulder, incontinence and her hand injuries against the Fund as the reasonable consideration of the evidence supports including the psychiatric condition as a pre-existing condition and the Award is against the overwhelming weight of the evidence.

Dehatre v. Smith & Nephew Equip. Grp., 892 S.W.2d 369, 371 (Mo.App.E.D. 1995)

Highley v. Von Weise Gear, 247 S.W.3d 52, 55 (Mo.App.E.D. 2008)

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012)

Lewis v. State, 435 S.W.3d 144, 160 (Mo.App.E.D. 2014)

Leutzinger v. Treas of Mo, Custodian of Second Injury Fund, 895 S.W.2d 591, 592 (Mo.App. E.D. 1995)

Nichols v. Belleview R-IIII School District, 528 S.W.3d 918, 930 (Mo.App.S.D. 2017)

Robinson v. Loxcreen Co., 571 S.W.3d 247, 249 (Mo.App.S.D. 2019)

Section 287.220, RSMo. Supp. 1993

Section 287.495.1(4), RSMo.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003316

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

ARGUMENT

I.

The Commission misapplied the law when it ruled to exclude the entire deposition of Lalk based on a finding that the testimony relied on an inadmissible report of Dr. Shuter when substantial evidence shows that Shuter did not express an opinion on employability or PTD and exclusion of Lalk's testimony is an abuse of discretion when the testimony was unimpeached by contrary evidence from the Fund and does not demonstrate that Lalk was acting as a conduit for Shuter's conclusions on PTD as there is no evidence Shuter's report discussed PTD.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ

AMERICAN OVERSIGHT

as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

Argument

Lalk examined Employee at the request of Susan Roach for her 2008 injury to her bladder July 15, 2014 (T.593-594). Following the evaluation, he contacted Roach for additional medical records but never received a response (T.595). Later Employee's current counsel, provided medical records to complete the evaluation.

At Lalk's deposition, the Fund asked if he "relied" on the summary of Shuter's March 3, 2012 in coming to his conclusions that Employee was PTD (T.634). Based on the Fund's definition of "rely," Lalk said yes.

The Commission found Lalk detailed Shuter's comprehensive rating report at two places in his "Review" portion and, later in the report, under "Functional Restrictions/Limitations" just preceding Summary and Conclusions (L.F. 56). He further found because, Lalk expressly admitted he relied on Shuter's findings in forming his own conclusions, he excluded the entire deposition from evidence based on hearsay. *Bruflat v. Mister Guy, Inc.,* 933 S.W.2d 829, 833 (Mo.App. 1996) (L.F. 22).

In the *Bruflat* case the Commission excluded portions of a medical expert testimony concerning disability that reflected reliance on an inadmissible report of a psychologist. The court noted that the testimony as to the amount of disability did not rely solely on facts outside the inadmissible opinion of the psychologist but instead totally deferred to the opinion of another expert as to disability. *Id* at 834. The court held that a testifying expert cannot be a mere conduit for another non-testifying expert and agreed that the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003318
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Commission's order to exclude that portion of the medical expert's opinion that parroted the inadmissible medical expert opinion was not an abuse of discretion.

A fair review of Lalk's testimony shows that it was Sky's limitations from her mental conditions that led to his conclusion that she was unable to compete in the open labor market and unemployable:

> .....Now what was important to me is a psychiatrist to comment about prognosis and/or any restrictions for the individual or at least a discussion of what he thought would be difficult for an individual to do, and he indicated that because of her psychiatric condition, that she would have poor focus, concentration and attention and would be very difficult for her to follow both simple as well as complex instructions. It would be very difficult for her to adapt to both routine as well as more complex work changes, as well as perform repetitive work according to set procedures, sequences or pace, and he expected her to respond inappropriately to the customer pressures at work and have difficulty with production quotas as well as interactions with co-workers and supervisors. So that would indicate to me that the types of work environment that she needs to avoid (T.613).

Lalk's summaries of Shuter's report references only medical causation, PPD ratings of both wrists and the existence of pre-existing medical conditions that were hindrances or obstacles to obtaining employment (T.685, 694). Lalk's summaries cite no opinion from Dr. Shuter commenting on the Employee's PTD status.

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

In *Garrett v. Treasurer*, 215 S.W.3d 244, 249 (Mo.App.S.D. 2007), the court cited §490.065, RSMo., which provides that an expert opinion based on another expert's opinion is not necessarily inadmissible. The record here does not support that Lalk "parroted" opinions of Shuter. To the contrary Lalk's 3+ hour interview, testing and review of admissible medical evidence clearly provided the basis for his opinion that the Employee was not able to compete, secure and maintain employment in the open labor market (T.630). Lalk testified that physically the Employee could perform in an unskilled, sedentary or near sedentary position, if she had access to a restroom. He concluded that her primary reason that prevented her from employment is due to her pre-existing psychiatric conditions that would affect her concentration, pace and place her near co-workers or the public giving rise to increase in her psychiatric conditions (T.630). He cited Dr. Sky's diagnosis of severe recurrent depression, anxiety disorder and PTSD that damaged the Employee's focus, concentration and attention for other types of work. He concluded she would be ineffective with both routine, complex and repetitive work and difficulty responding to the customer pressures, production quotas and interactions with co-workers and supervisors (T.613). Lalk has expert experience in placing individuals with mental conditions having worked at the Independence Center in St. Louis which placed individuals with mental conditions in jobs (T.585-586). Lalk's conclusions regarding employability did not parrot what he cited by Shuter. Information about the Employee's physical limitations from Dr. German, physical therapist Meier, and later Dr. Volarich all document the extreme weakness in her hands that eliminated her past unskilled work. Lalk's report written prior to Dr. Shuter's death that may have

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003320

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

consider physical difficulties in employability cannot be removed from that report. But he again reviewed the additional information from Dr. Volarich which supported the weaknesses documented by the physical therapist Greg Meier in May as 22 lbs. on right and 11 lbs. on left (T.214). Dr. German on June 24, 2009 found 30 lbs. on right and 22 lbs. on left (T.209). Both significantly below normal findings. Dr. German does not measure her grip strength on his last visit, but notes she is still symptomatic and would like for her to return and does not release her to work, only to use her hands as much as possible (T.209).

The Commission's exclusion of Lalk's entire deposition is an abuse of discretion as the minor references to Shuter's findings did not comment on employability. Lalk's analysis was based on review of multiple admissible records, his experience and expertise, testing he performed and the age, education and work experience of the Employee. He has unique expertise from his work at the Independent Center, St. Louis, in assessing the employability of individuals who suffer from mental conditions.

II.

The Commission misapplied the law in excluding Dr. Volarich's testimony that concurred with Lalk's assessment that the Employee was PTD as there was no objection timely made on this issue, Volarich did not rely only stated they concurred on this issue, and Volarich did review psychiatric records so the exclusion of Volarich's conclusions on PTD is an abuse of discretion and should be reversed.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003321

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

Argument

The Commission adopted the evidentiary decisions of the ALJ who on his own and without an objection raised by the Fund, excluded portions of Dr. Volarich's opinion that specifically referenced Lalk's assessment that the Employee was permanently and totally disabled in large part due to her psychiatric disorders (T.52). At the Hearing, the Fund only objected to any portion of Volarich's report that referenced reliance on Shuter's opinion (T.52). Volarich's deposition was submitted without an objection regarding Lalk's testimony and as such is admissible in this instance as he only concurred

AMERICAN OVERSIGHT

and did not rely on Lalk's testimony (T.517). *Nichols v. Belleview R-IIII School District,* 528 S.W.3d 918, 930 (Mo.App.S.D. 2017); *Proffer v. Federal Mogul Corp.*, 341 S.W.3d 184, 187 (Mo.App.S.D. 2011). Adequacy of the factual or scientific foundation for expert opinion is an admissibility issue which is waived absent a timely objection or motion to strike. *Proffer*, 341 S.W.3d at 187. Expert testimony, admitted without objection, can be considered as any other evidence in determining the submissibility of the case. *Id.*

As stated in Point I, there is no evidence that Shuter had opined that the Employee was PTD. Volarich testified he reviewed a great deal of medical records and reports, but came to his own conclusions regarding his assessments of the Employee's conditions (T.520-521). Finally he never said he relied on Lalk's testimony on employability:

> Based on my evaluation, review of the medical records and review of the vocational assessment that was completed on 8/4/17 by Mr. Lalk, vocational assessment could not identify a job for which she could return to, I thought that she was permanently and totally disabled primarily as a result of her psychiatric disorders, I concurred with that assessment (T.517).

The Commission's second proffered basis for excluding Volarich's testimony on employability was a finding that Volarich had failed to review any medical evidence regarding her treatment for psychiatric conditions in forming his conclusion (L.F.56). The ALJ found only one reference in Volarich's report that referenced the Employee's chronic psychiatric illness (L.F.56). This overlooks Volarich's testimony that he did review Lalk's and Sky's reports (T.499); records of Psychiatrist Chilikamarri and

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003323

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

treatment records of Dr. Pope. Volarich also noted her medications for psychiatric conditions (T.510-511). He also reviewed the Chrysler Clinic records which provided references of treatment for mental conditions. He noticed and commented on her psychiatric problems that affected her ability to communicate to him at the evaluation (T.503-504). He testified that he felt she had a psychiatric disability but deferred to psychiatry for that assessment. Clearly the Commission has the authority and function to determine factual findings and credibility of witnesses and the weight to be given to their testimony. *Cook v. Missouri Highway & Transp. Comm'n,* 500 S.W.3d 917, 923 (Mo.App.S.D. 2016). However, here the Commission's determination that Volarich testified he relied on Lalk's opinion for employability is not present as that is not a correct statement of his testimony. The conclusion he reviewed no psychiatric records is also contrary to his testimony. The Commission's decision to exclude is not based on substantial evidence that supports the exclusion of a portion of Volarich's testimony that concerned his conclusion that she is PTD because of combined conditions from her pre-existing physical and psychiatric conditions and the primary injury to her hands.

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

III.

The Commission misapplied the law in requiring symptoms of a pre-existing psychiatric condition for a PTD finding as it is not required and in failing to find "actual and measurable" conditions for PPD as psychiatric conditions are complex and the Commission improperly disregarded competent substantial expert evidence and erroneously relied on lay conjecture and opinion.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008). The Court examines the record as a whole to determine if the award is supported by sufficient competent and substantial evidence or whether the award is contrary to overwhelming weight of the evidence. *Hampton v. Big*

AMERICAN OVERSIGHT

Boy Steel erection, 121 S.W.3d 220, 220-23 (Mo. Banc 2003). The Commission is the sole judge of the weight of the evidence and credibility of the witnesses, which includes the weight to be given expert opinions *George v. City of St. Louis*, 162 S.W.3d 26, 30 (Mo.App.E.D. 2005). The Court does not view the evidence in the light most favorable to the Commission's award. *Hampton,* 121 S.W.3d at 222-23. The Employee has the burden of proving all of the elements of his claim to a reasonable probability. *Hoven v. Treas. of State, Custodian of Second Injury Fund,* 414 S.W.3d 676, 678 (Mo.App.E.D. 2013).

Argument

The Commission found there was no pre-existing psychiatric condition only post claim worsening. They outline their reasons to disregard expert testimony and rely on their lay opinion as follows:

1. Sky relied on inadmissible evidence, two letters from Cometa (L.F.61).
2. ALJ found a "timely" objection in Sky's deposition testimony that characterized the Cometa letters as "records" was "misleading to the reader" and weighed against Sky's opinion (LF.57, 407).
3. No medical records from Chilikamarri pre- accident to review (LF.57).
4. Sky admitted he did not review the records from the Employee's hospitalization in March 23-27, 2009, at St Anthony's Hospital (LF.57).
5. Lack of treating records for mental conditions prior to 2009, except for Pope, who was not a psychiatrist and who noted "undeveloped references to "mild distress" and "mood disorder" (LF.58).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

6. Sky's opinion relied only on anecdotal evidence from the Employee (LF.58).

7. The ALJ observed the Employee's demeanor at trial as normal, not suggestive of anger or sadness. He mentioned her domestic issues throughout adulthood as impacting her psychological condition. He further found the Employee's single reference that she felt "suicidal" was not credible when there were no pre-claim hospitalization or treatment records corroborate this assertion (LF 46, 60)

8. Therapist Toon treated Employee from 2008-2009 for difficulties dealing with personal, family and martial illness (LF.46).

9. Employee attended a part-time day clinic for stress in late February 2009 (LF.46).

10. The Employee's mental conditions got worse post primary injury (T.46).

Dr. Sky is a board-certified psychiatrist (T.459). He conducted a medical examination of the Employee which included a history of mental health difficulties and treatment. He diagnosed major depression, recurrent, anxiety and PTSD. He testified that all three overlapped on each other adding to a difficult and worse impact on the Employee (T.424). It was his unrefuted expert opinion that these psychiatric conditions were present prior to the claim filed and synergistically combined and were made worse by the difficulties she had using her hands as a result of the development of bilateral carpal tunnel syndrome (T.425). He also concluded that her pre-existing psychiatric

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003327

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

condition, which was well documented, represented a pre-existing PPD of 35% body as a whole pre-claim, and due to the claim and limited improvement following medical care she became 100% disabled in combination (T.426).

The reasons the Commission provided in disregarding expert opinion on the Employee's mental conditions is not sufficient, substantial and also mistaken. Sky did not have the Cometa letters at the time of his May 15, 2017, report in which he made his conclusions, so no reliance on the letters (T.464). The reference of treatment in his report came from the Employee's medical history (T.465). Next, the Commission and ALJ found Sky's testimony less credible as he referred to the Cometa letters as records. The ALJ alleges that an objection was made at the time of this statement, but none appears at the cite the ALJ provides which was page 14 of Dr. Sky's deposition (T.407). Objections to improper form during a deposition should be stated concisely on the record during the deposition, to provide a reasonable opportunity to correct the form of the question. Dr. Sky did not use the word records, he only stated that he reviewed the letters (T.405). In addition, other evidence of treatment of Employee by Cometa is documented in admissible evidence from Chrysler Clinic (T.93). The Commission's finding that Sky could not consider facts not in evidence to form an opinion or inference misapplies the law as it is permissible if the facts otherwise comply with §490.065.2 RSMo. 2017. Information of prior psychiatric treatment from medical history is such permissible evidence.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003328

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The Employee testified that she first came under the care of Dr. Chilikamarri when she was sent by her employer to the Stress Program in 2007 (T.34, 36, 98). Because Chilikamarri treated her at the program, he was the psychiatrist who admitted her to the hospital in March, 2009 (T.242). She began privately treating with him after the hospitalization (T.232). The Commission found that Sky did not review the St. Anthony's records of March, 2009 (T.437). Sky did not have the records at the time of the Employee's interview, but did review them later as he testified to the admission record's past reference to a suicide attempt of Employee at age 13 (T.438). Regardless of the review of the hospital records there was sufficient and substantial admissible evidence available to him that he did review that is consistent and supported of his analysis diagnosis of the Employee's mental conditions and their impact on her life.

Sky did review the records of Dr. Pope, who recorded on October 16, 2007, the Employee's mental problems arising from physical/emotional abuse as a child, and current spousal abuse (T.133). Pope's records noted Employee's past counseling and prescriptions of Paxil, Wellbutrin and Klonopin for depression. On October 16, 2007, he noted her transient thoughts of self-harm. He prescribed her Effexor for depression and Valium for anxiety (T.133). He continued to prescribe her medication for chronic depression which was moderate in severity (T.129-130). Sky also had the medical records from Dr. Hugge who prescribed medication for the Employee's depression on September 15, 2005, and May 26, 2006 (T.169, 172-173). To find Sky not credible on the inaccurate basis that he failed to read the post claim hospital records is not a reasonable basis as it

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

cites no information that was not already available in the other admissible medical evidence listed above that he did review.

The Commission is correct that there are no prior records of a hospitalization for mental conditions prior to March, 2009. There is no requirement in the statute that any of the pre-existing injuries or conditions be "symptomatic" The requirement is simply that the Commission must find that the combination of the last injury and the pre-existing disabilities resulted in PTD.[4] *Atchinson v. Mo State Treas. Custodian of the 2nd Injury Fund*, 603 S.W.3d 719 (Mo.App.S.D. 2020).

The Commission also adopted the ALJ's opinion that the Employee's testimony that she felt "suicidal" prior to the claim was not credible. The Commission acknowledges that there are treating records from therapist Toon who counseled her at the stress program for 3 weeks in 2007, and then privately beginning December 15, 2007, to July 31, 2009 (T.35, 194-204). The Commission characterizes Toon's treatment as "difficulties with personal, family and martial problems". An analysis of an individual's mental conditions is a complex medical issue and not within the understanding of lay opinion. Toon's records prior to the date the claim was filed reflect the Employee's lifelong depression and anxiety with daily SI. The Employee reported childhood neglect and abuse, currently exacerbated by the amount of physical work she was doing at the

[4] The determination of PTD requires the court to determine whether the Employee's last injury in and of itself rendered the Employee PTD, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.E.D. 2000); *Hazeltine v. Second Injury Fund*, 591 S.W.3d 45, 57 [fn.7] (Mo.App.E.D. 2019).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Chrysler Fenton Plant, affecting her health. Ms. Toon's diagnosis on December 15, 2007, was Major Depression, recurrent, Post-Traumatic Stress Disorder and Generalized Anxiety Disorder with gambling addiction (T.195). Ms. Toon's records reflects SI, 11 times in 19 visits prior to the primary claim (T.196-202). On December 6, 2008, and January 8 and 9 of 2009, Toon notes severe symptoms of depression, anxiety with suicidal reports related to multiple issues, physical health and her husband's mental and verbal abuse. Toon discussed possibility of re-entering Chrysler's Partial Day Hospital program for a short period of time due to the severity of her depression, but the Employee declined (T.201-202). She eventually enters the Partial Day program on February 25, 2009 (T.203). Toon's records were reviewed by Sky in conjunction with the Employee's evaluation. The Commission's characterization of the Employee's mental conditions lacks the medical training required in this complex diagnosis of past and current trauma from abusive relationships affecting her mental functioning. The hospitalization that occurred approximately 5 weeks postdate the claim an exacerbation of her lifelong mental conditions as explained by Dr. Sky (T. 450).

Sky diagnosed the Employee with Major Depression, recurrent, Generalized Anxiety Disorder and Post-Traumatic Stress Disorder based on his evaluation and her medical records. He found that she had pre-existing permanent psychiatric disability which synergistically worsened by the primary injury to her hands that slowed her down in her job (T.426). Dr. Volarich also testified regarding the psychiatric condition

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003331

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

contributing to the Employee's inability to compete in the open labor market. Dr. Pope, Dr. Hugge, Dr. German, therapist Toon, and Lalk all comment on her mental conditions.

Chrysler clinic records show she lost time from work due to depression/anxiety on March 26, 2002, October 7 to November 20 in 2007, and again on December 3, 2007.

The Fund presented no evidence that contradict Sky's conclusions that the Employee had a pre-existing psychiatric condition of 35%. The Fund presented no expert opinion that the psychiatric condition did not combine with her primary injury or that it worsened post claim. The diagnosis of mental illness, and its origins, is a complex medical condition which is not within common knowledge or experience of a lay person and requires medical expert testimony which here was supported by the medical expertise of psychiatrist Adam Sky, M.D. *Pruett v. Fed Mogul Corp.* 365 S.W.3d 296, 306 (Mo.App.S.D. 2012); *Wright v. Sports Associated, Inc.,* 887 S.W.2d 596 (Mo.App.W.D. 1994). The Commission lay's analysis of the Employee's psychiatric conditions is grossly inadequate. The Commission took extreme measures to remove as much expert testimony as possible, but even so what remains is evidence of a 50-year-old worker whose abusive childhood regrettably affected her ability to establish and maintain work and personal relationships that led to 5 marriages, difficulties with her children and people with whom she worked.

The Commission is given deference on issues involving the credibility of witnesses and the weight to be given testimony. They also may decide a case 'upon its disbelief of uncontradicted and unimpeached testimony'. *Angus v Second Injury Fund,* 328 S.W.3d

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

294, 300). (quoting *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. banc 1993) (quoting *Ricks v. H.K Porter, Inc*, 439 S.W.164, 167 (Mo. 1969)). However, " the commission may not substitute an ALJ's personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert." *Wright v. Sports Associated, Inc.* 887 S.W.2d 596, 600 (Mo. Banc 1994). "The question of causation is one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not substantial evidence." *Elliott v. Kansas City, Mo., Sch Dist.,* 71 S.W.3d 652, 658 (Mo.App.W.D. 2002). When "expert medical testimony is presented, an ALJ's personal views of [the evidence] cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony." *Van Winkle v. Lewellens Prof'l Cleaning, Inc.*, 258 S.W.3d 889, 898 (Mo.App. 2008). The Commission's adoption of the ALJ's determination of the Employee's mental condition based on her demeanor at a hearing or Dr. The credibility of Dr. Sky's diagnosis of mental conditions and the effect on the Employee's functioning is based on no other expert medical testimony necessary for a complex medical condition. They are substituting their unqualified lay opinion for that of an expert witness and ignores too much of the admitted record and rests on an uneducated understanding of the effects PTSD, depression and anxiety.

On this complex issue the Commission may not arbitrarily disregard or ignore competent, substantial, and undisputed evidence of witnesses not impeached or base its finding on conjecture or its own opinion unsupported by sufficient evidence. *Bond v. Site*

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003333
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Line Surveying, 322 S.W.3d 165, 171 (Mo.App.W.D. 2010). The Commission's finding that Dr. Sky's conclusions were less than credible are not reasonable. The determination as to the presence of a psychiatric condition pre-existing and how it combined with the un-employability of the Employee once she had additional work difficulties because of her weak hands should be properly acknowledged as the Commission cannot substitute their opinion on this complex matter. The finding of no pre-existence of a mental condition should have been considered in determining PTD and PPD.

IV.

The Commission's misapplied the law in finding that the primary injury settlement for 16% of each wrist was so "modest" that it could not combine to make her totally disabled as §287.220.1 does not require a threshold on primary injury to combine with a pre-existing condition.

Standard of Review

The Commission's factual findings are binding and conclusive to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud. *Archer v. City of Cameron,* 460 S.W.3d 775, 778 (Mo. banc 2014). However, "this Court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment." M*otton v. Outsource Intern.*, 77 S.W.3d 669, 672 (Mo.App.E.D. 2002) (quoting *West v. Posten Const. Co.,* 804 S.W.3d 743, 744 (Mo. Banc 1991). Said review of issues of Law is de novo. *Scholastic, Inc. v. Viley* 452 S.W.3d 680, 682 (Mo.App.W.D. 2014). This court

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

reviews findings of the Commission not the ALJ. *Lawrence v. Anheuser Busch Cos. Inc.,* 310 S.W.3d 248, 250 (Mo.App.E.D. 2010). Where, as here, the Commission affirms and incorporates the ALJ's decision into its award, this Court reviews the findings of the ALJ as adopted by the Commission. *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.3d 902, 906 (Mo.App.E.D. 2008).

The plain language of §287.220.1 does not require a threshold on the primary injury or occupational conditions to combine with a pre-existing disability. Further, this section only requires that the pre-existing partial disability be of some minimal hindrance or obstacle to employment or to obtaining re-employment. "[A]ny pre-existing injury which could be considered a hindrance to an Employee's competition for employment in the open labor market should trigger second injury fund liability." *Lewis v. State,* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014) (internal quotation omitted).

V.

The commission misapplied the law in not Awarding PTD or PPD for combined mental conditions, right shoulder, incontinence and her hand injuries against the Fund as the reasonable consideration of the evidence supports including the psychiatric condition as a pre-existing condition and the Award is against the overwhelming weight of the evidence.

Standard of Review

Section 287.495.1(4) provides reversal of the Commission's Award if there is not sufficient competent evidence in the record to warrant the making of the award. "A

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003335
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

§487.495.1(4) challenge succeeds only in the demonstrated absence of sufficient competent substantial evidence; evidence contrary to the award of the Commission, regardless of quantity or quality, is 'irrelevant.'" *Nichols v. Belleview R-III Sch. Dist., 528 S.W.3d 918,922* (Mo. App. S.D. 2017) (citing *Hornbeck v. Spectra Painting, Inc.,* 370 S.W.3d 624, 629 (Mo. banc 2012)). "Sufficient competent evidence is a minimum threshold and can be satisfied by the testimony of one witness, even if there is contradictory testimony from other witnesses." *Robinson v. Loxcreen Co.*, 571 S.W.3d 247, 249 (Mo.App.S.D. 2019) (internal quotation omitted). In determining the validity of a challenge, The court will

(1) Identify a factual proposition necessary to sustain the Commission's result.

(2) Marshal all evidence in the record supporting that factual proposition, subject to the Commission's authorized factual and credibility determinations, explicit or implicit, and viewing the record objectively where there were no explicit or implicit findings.

(3) Demonstrate why the evidence from the second step lacks sufficient probative force on the issues, such that the Commission could not have reasonably believed the factual position set forth in step one.

The Employee has the burden of proof, so the question is not whether there was sufficient evidence to support an award in his favor, but to determine whether the award of the Commission is supported by competent evidence, not whether an opposing award could have been made. *Dehatre v. Smith & Nephew Equip. Grp.,* 892 S.W.2d 369, 371 (Mo.App.E.D. 1995) (overruled on other grounds by *Hampton,* 121 S.W.3d at 233).

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

The proper criteria for determining whether a pre-existing condition is serious enough to trigger the provisions of §287.220, RSMo. Supp. 1993 requires the condition to be a "hindrance or obstacle" to employment or to obtaining reemployment." *Leutzinger v. Treas of Mo, Custodian of Second Injury Fund,* 895 S.W.2d 591, 592 (Mo.App. E.D. 1995). There is no requirement that the pre-existing disability for PTD be "actual and measurable" to trigger Fund liability for PTD benefits. *Lewis v. Treasurer of Mo.,* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014). The requirement of "actual and measurable" affects applies to cases involving Fund liability for PPD benefits as such calculation requires the knowledge and consideration of the degree or percentage of disability of the pre-existing disability. *Id.* at 160.

Argument

In this case the Employee sought recovery for PTD pursuant to §287.220.1 The Fund is liable where the Employee establishes that she is PTD due to the combination of her present compensation injury and her pre-existing PPD or that the combination of the present compensable injury and the pre-existing PPD creates a greater overall disability than the sum of the disabilities independently. *Highley v. Von Weise Gear*, 247 S.W.3d 52, 55 (Mo.App.E.D. 2008). Here the Commission determined that the present injury to her hands did not render her PTD but did support a PPD of 16% of each hand and a load for bilateral injuries. The Commission further found pre-existing PPD of the right shoulder and the presence of incontinence. They found no pre-existing disability that represented an "obstacle or hinderance" to employment or was" actual and measurable" arising from a mental condition. As previously laid out in the brief, this finding is based

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003337
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

on their lay opinion interpreting a complex medical condition. that They found the documentation in the admissible medical records prior to the primary injury represented "difficulties with personal relationships" or "mood disorder" and as such did not represent medical condition that met either requirements for PTD or PPD.

On credibility, they found the Employee less than credible based on her demeanor at trial (no display of sadness or anger) and her severity of complaints not compatible with the 16% settlement of each wrist. They also opined that there was a post claim worsening of mental problems with a hospitalization that is the cause of her PTD. Dr. Malik's note that that she could work full duty if she were not on sick leave for mental conditions as reasons (L.F. 45-46). They further concluded dislike of working as a "floater," her divorce and plant shutdown contributed to her not working. The Commission believed a reasonable inference that the Employee chose to retire due to several life factors that occurred, aside from the level of disability she was experiencing (L.F. 46).

The implicitly found Volarich credible except for his statements concerning his conclusion that she had a mental condition that pre-existed the primary claim that represented an obstacle of hindrance to employment and was the greater factor in finding her PTD.

The Commission by excluding vocational expert Lalk's deposition did not consider his conclusions.

The Commission admitted Dr. Sky's deposition as there were no Fund objections but found the psychiatrist conclusions "less credible" as set out in Point III of this brief.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

What evidence is left are medical records of the Employee's therapist Toon, her family physician, Dr Pope, records from the plant Clinic and her gynecologist Dr. Hugge. The statements of treatment for mental conditions that rise above the absurd one time lay observation of the Employee's demeanor at the hearing. Toon is a mental health therapist trained and Dr. Pope as a family practitioner also trained to recognize the status of his patient's mental conditions and provided treatment as did Dr. Hugge. They all had numerous encounters with the Employee prior to the claim being filed. The plant clinic records also document disruptions from her mental health conditions for which the company directed her to the stress day program.

As previously stated the presence of a mental condition is a complex diagnosis and requires expert medical opinion (Dr. Sky), which was admitted without objections by the Fund. Deciding whether someone has PTSD, or is just crabby is based on expert analysis and not personal opinion. In finding a diagnosis of Depression the Commission required a "record of a prior hospitalization" as evidence of a pre-existing mental condition when no such evidence is required for a PTD award. But even if it were, the post hospitalization records so note a prior suicide attempt at the age of 13. There is no such requirement that a pre-existing disability must be present and measurable to trigger Fund liability for PTD benefits. *Lewis v Treasurer of State* 435 S.W.3d 144, 160 (Mo.App.E.D. 2014). For PPD, Dr. Sky found the Employee had 35% PPD related to her mental conditions. The Plant Clinic records document her loss time and attendance for mental health issues dating back to 2002. Her supervisor sent her to the plant clinic do to her inability to work due to

AMERICAN OVERSIGHT

crying on the line. Toon's records beginning in 2007 document her mental conditions arising from childhood and spousal abuse.

The presence of Employee's psychiatric conditions and symptoms before and after the primary claim differ not in kind, but rather in degree. When the damage to her hands removed her out of a Chrysler unskilled job that limited co- Employee/supervisor contact, she became unemployable as discussed by Dr. Sky, Dr. Volarich and Lalk. Even Dr. Malik points to her mental health issues as preventing her from returning to her job.

Dr. Sky diagnosed the Employee with Major Depression, recurrent, Generalized Anxiety Disorder and Post-Traumatic Stress Disorder based on his evaluation and her medical records. He found that she had pre-existing permanent psychiatric disability which synergistically worsened by the primary injury to her hands (T. 426). Sky explains that the Employee's lifelong mental conditions are not new, but recurrent and exacerbated at various times. Her physical problems were just enough to combine and interfere in her ability to continual in a job that did allow her to work with minimal interactions with other Employees. The hospitalization in March of 2009 was evidence of her mental conditions that have affected her ability to function in a normal way. He notes that Toon felt the Employee's inability to cope with a divorce and physical problems were on the rise shortly before she had an EMG/NCS on February 10, 2009. Her inability to cope was compromised by her mental conditions:

A. You know, I don't know that we have a specific reason why she was angry at her boss, but people who are depressed, people who have anxiety

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003340

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

disorders, who have been traumatized, will oftentimes make comments like that, I'm so mad at you, I could just kill you …or I wish you were dead. So those kinds of impulsive comments or statements would certainly not be unusual in someone with a history of severe mood symptoms.

Q. She's the kind of person that wouldn't do well working with other people, correct?

A. In my experience, no.

Q. Okay. So doing this kind of assembly work, where she was somewhat isolated from other people would be the only kind of work, maybe , that she might be –I mean , can you think of __

A. Well as long as it did not require her to work to any degree of pace. You know – you got to work faster and you know – and someone sooner or later is going to say, hey, you know, you're not working fast enough, or that's not an accurate enough job, or you did sloppy work. Sooner or later, you're going to have to interact with a supervisor. You're going to have to follow safety guidelines. So even if you're working off by yourself in some imaginary isolated booth somewhere, there's going to be issues that come up. (T.456-457).

Dr. Volarich clearly reviewed all he medical evidence that had numerous references to the claimant's psychiatric conditions including Dr. Sky's opinion on her lack of employability due to her psychiatric conditions. Based on review of all this

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

information he concurred that the psychological condition was a major factor interfering in her employability.

The Commission's finding that there was no evidence of psychiatric symptoms prior to the primary claim ignores the documentation of medical evidence and a lack of understanding of a complex medical condition which is found her medical providers records. The Commission does not find a reasonable basis to discredit Sky's and Volarich's testimony, that the psychiatric conditions only arose post claim. A requirement of a hospitalization prior to the primary claim is not required. The presence of a short hospitalization post primary claim represents of a temporary occurrence. The issues she had from her mental problems before her primary claim that affected her relationships and communications with people were still present after the primary claim. The Primary claim added yet another limitation that made continuing to work not an option. The degree of treatment is not in issue. The degree that her psychiatric condition compromised her ability to function in a job in conjunction with weaker hands, a bad shoulder in her dominant arm, incontinence and limitations on pushing and pulling are the factors that eliminated her from employability. Because of her psychiatric conditions and unskilled work, she was limited to a job that did not require focus, concentration or pace and would have safety and production quotas (T.431-432). Sky concluded the combine pre-existing and primary claim combine and produce a hindrance and obstacle to employment making her unable to compete in the open labor market (T.468). That expert testimony on such a complex issue of mental health is supported by the admissible documentation of mental health and physical conditions and should not be discredited.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003342

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

CONCLUSION

For the reasons stated above, the Commission's evidentiary decisions excluding Lalk's testimony should be reversed, as the Lalk conclusions involved the employability of the Employee and there is no evidence in the record that Dr. Shuter commented on the Employee's employability. Unidentified portions of Dr. Volarich's testimony that agreed that the Employee had a psychiatric condition, and it combined with her physical disability to PTD, should not have been excluded. The Commission's finding that the disabilities had to be certified by a physician is not required by the statute. The credibility findings of all the witnesses are against the overwhelming weight of the evidence. The Employee has met her burden under (1) that her pre-existing permanent disabilities were serious enough to constitute a hindrance or obstacle to her employment or re-employment; (2) the nature and extent of her pre-existing permanent disabilities by a reasonable degree of certainty; and (3) that she is permanently and totally disabled due to combination of her pre-existing permanent disabilities and her primary injury. The court should reverse and find the Fund liable for her permanent total disability. The Commission's decision is not reasonable based on the documentation and presence of interruptions affecting the Employee's work as a result of mental illness. Their decision is not supported by sufficient competent evidence and is against the overwhelming weight of the evidence. In the alternative, if the Court finds insufficient evidence that the Employee is PTD, there is clearly presence of a pre-existing mental conditions that were "actual and measurable" as concluded by Dr. Sky in his rating of 35%. The Court should

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003343

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reverse and find Dr. Sky's unimpeached rating of 35% be combined with the PPD award that includes the Employee's mental conditions.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003344

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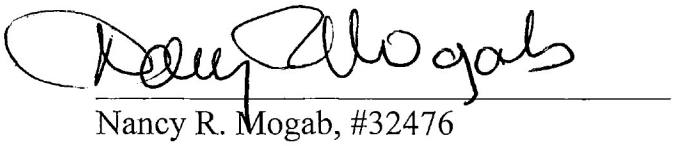

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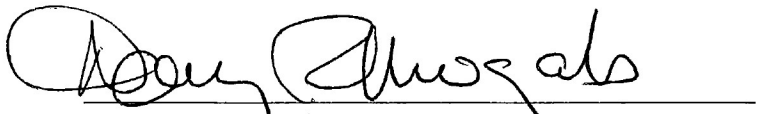
AMERICAN OVERSIGHT

MO-AG-22-0644-A-003345

Rule 84.06 Certificate

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 14,379, excluding the cover page, table of contents, table of authorities, signature block, and certificates of service and compliance.



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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003346

CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing was sent by electronic mail and by U.S. Mail, postage pre-paid, this 4th day of June 2021, to David C. Drescher, AAG (David.Drescher@ago.mo.gov), 815 Olive Street, Suite 200, St. Louis, Missouri 63101, Attorney for Respondent The Second Injury Fund.

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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED109447

PATRICIA (PARRISH) OTWELL
Employee/Appellant

vs.

DAIMLER CHRYSLER
Employer (Settled)

and

MISSOURI STATE TREASURER AS
CUSTODIAN OF THE SECOND INJURY FUND
Additional Party/Respondent

APPENDIX TO APPELLANTS' BRIEF

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AMERICAN OVERSIGHT

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APPENDIX TO
APPELLANT'S BRIEF

TABLE OF CONTENTS

Commission's Final Award 12/30/2020, including ALJ Award 06/27/2019 ..... A-1

Section 287.190, RSMo.… A-19

Section 287.220, RSMo. A-23

Section 287.495, RSMo. A-26

Section 490.065, RSMo. A-27

AMERICAN OVERSIGHT

FINAL AWARD ALLOWING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 09-015610

Employee: Patricia (Parrish) Otwell

Employer: Chrysler, LLC (settled)

Insurer: Old Carco, LLC (settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Preliminaries

Hearing was conducted on March 6, 2019, with employee and the Treasurer of Missouri as Custodian of the Second Injury Fund (Fund) participating. Employee's date of injury for the work-related wrist injury was February 10, 2009. In February 2010, employee had settled with Employer/Insurer prior to the hearing. The sole issue before the administrative law judge was whether and to what extent Second Injury Fund liability existed.

The administrative law judge ruled as follows: Employee's primary disability for bilateral carpal tunnel syndrome is 16% referable to each wrist (56 weeks). The preexisting disability referable to urinary incontinence is 2.5% PPD[1] of the body as a whole (10 weeks). The right shoulder preexisting disability is found to be 15% (34.8 weeks). There is no significant pre-existing psychiatric disability. The primary injury and preexisting right shoulder and incontinence combined for greater overall disability, to an increased overall PPD of 33 1/3% body as a whole (133.32 weeks). The synergistic effect results in an additional 32.52 weeks of PPD liability against the Fund.

An application for review[2] was filed by employee on July 15, 2019, setting forth the following issues: the administrative law judge erred in not admitting certain exhibits and portions of testimony; finding that employee did not have a preexisting psychological disability; finding diminished credibility of Dr. Adam Sky; and in not finding permanent total disability or an increased level of permanent partial disability, in combination with all preexisting disabilities, including psychological.

[1] PPD refers to permanent partial disability.

[2] We note that employee's application for review identifies an Injury # of 09-05732 and a date of injury as February 10, 2009. It appears that the Injury # identified by employee is a typographical error, although the date of injury is correct. The correct Injury # is 09-015610.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003350

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An application for review was filed by the Fund on July 16, 2019, setting forth the issue: the administrative law judge erred in finding a synergistic combination between employee's alleged pre-existing disabilities and her current primary disability, such that a 33.333% load factor was warranted.

Corrections

At page 1 of the Award, item # 13, the Award states:

> 13. Part(s) of body injured by accident or occupational disease: Low Back

This is in error. The primary injury claimed by employee is bilateral carpal tunnel syndrome.

We correct the Award at page 1, item # 13 as follows:

> 13. Part(s) of body injured by accident or occupational disease: bilateral carpal tunnel syndrome

At page 2 of the Award, item # 23, the Award states:

> 23. Future requirements awarded: prescription drugs (see narrative award)

This is in error, as the only two parties to the hearing were the Second Injury Fund and the employee. No liability would extend to the Fund for prescription drugs under the law.

We correct the Award at page 2, item # 23, as follows:

> 23. Future requirements awarded: Not Applicable.

Evidentiary Rulings

Employee challenges several evidentiary rulings by the administrative law judge, and requests that we review them. The objections by the Fund to employee's request to admit certain exhibits were taken under submission at the hearing, and were ruled on in the Award at page 4 - 6. The administrative law judge upheld some of the objections to the evidence, as explained in the Award and decision. We adopt the administrative law judge's rulings in sustaining the objections as noted in the Award. We see no abuse of discretion in these rulings.

Supplemental Findings of Fact:

The administrative law judge was able to observe the employee's demeanor at the hearing.[3]

On that basis and in consideration of the evidence presented, he was able to make some observations and conclusions in a summary fashion, regarding the level of claimed disability and employee's representations of her injuries and conditions. As he noted in his Findings of Fact on page 3:

[3] In his Rulings of Law at page 8, the administrative law judge also noted his observation of claimant's demeanor at trial as normal, not suggestive of anger or sadness. He mentioned her domestic issues throughout adulthood as impacting her psychological condition. In reference to her credibility, he noted the lack of records of hospitalization or treatment records to corroborate her claim of suicidal thoughts pre-dating the primary injury.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003351

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5. Claimant[4] testified she retired in February 2009. She was briefly hospitalized in March 2009 for depression and anxiety. Claimant testified very confidently and easily followed the Q and A format. Her residual complaints and characterizations of the primary injury exceeded reasonable inferences that might be made from the approved settlement value.

The record further corroborates and expands upon the judge's findings.

Employee believes her last day of work at the employer's plant was February 25, 2009, before being off for medical reasons. *Transcript, page 40-41.* However, employee remained as an employee for some time after February 25, 2009. She was in a partial day clinic provided by the employer because she was unable to work due to a health condition in the early months of 2009. Chrysler clinic records show various physical complaints reported by employee through her employment, including the later months of 2008 (coinciding with her bladder symptoms) and several months in 2009.

From March 23 - 27, 2009, employee was briefly hospitalized due to mental health issues. She indicated that she had suicidal thoughts and nothing was going right with her home and husband. *Transcript, page 42.* There is no record in evidence of hospitalization for mental health prior to that time.

Elaine Toon, Licensed Professional Counselor, saw employee for therapy on and off in 2008 - 2009. Employee attended a part-time day clinic for stress sponsored by her employer in late February 2009. Notes from some of those sessions suggest employee had difficulties dealing with personal, family and marital issues.

In April 2009, employee underwent bilateral carpal tunnel surgeries, performed by Dr. David German.

The last entry in the Chrysler clinic records which were provided[5] is on May 1, 2009. There are two entries on that date; one indicates "Non-Occupational Visit-stress Leave", and the second indicates "RT Shoulder Sprain & Bil hand/." *Transcript, page 108.* The entry indicates the nature of an upcoming assignment "if she is not currently on sick leave and that she will be full duty in regards to both hands." The projected date is obscured on the copy of the record. *Id.* Following the entry is the name MALAK MD. *Id.*

Employee believes she may have returned to work for a few days after her hand surgeries, but that she "…didn't like just floating. And I would try to get a job but I never would qualify, I was afraid." *Transcript, page 43.* Thereafter she took retirement.

At the time employee chose to accept a retirement option from the employer in May 2009, the plant where she had been working was in the process of closing. Employee moved back to Alabama.

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[4] The parties and the administrative law judge refer to the *claimant* in several instances. We use the term *employee* as defined in the statute at §288.020 RSMo. Throughout this Final Award, those terms are interchangeable.

[5] Discussion on the record suggests that there was some difficulty in retrieving all records, due to the clinic closure. *Transcript pages 32-35.*

AMERICAN OVERSIGHT

Employee applied for Social Security disability around the time of ending her employment.

Employee underwent a mesh removal surgery in July 2009, related to complications from her October 2008 bladder surgery which had been to address incontinence.

Dr. David German released her from care on September 14, 2009 and identified only a 5% permanent partial disability at the wrist. No future medical treatment was identified by the doctor. *Transcript, page 68.* Employee had no disability rating or restrictions identified for psychiatric conditions at that time. Dr. Volarich noted that he didn't think she had restrictions for the right shoulder strain prior to primary wrist injury in February 2009. *Transcript, page* 518. She had no permanent restrictions identified for her incontinence issue, however, Dr. Volarich explained that lifting excessive weight in excess of 10 pounds would put pressure on the abdomen and could cause incontinence. Employee's work experience has been in factory work, which required lifting and pulling,

Given all these circumstances, a reasonable inference is that at the time employee chose to take her retirement, there were several life factors impacting that decision, aside from the level of disability she was experiencing.

Discussion

Synergy

For Fund liability in a permanent partial disability case, there must be a substantially greater disability resulting from the combination of the primary injury and the preexisting condition(s) claimed. §287.220.2 RSMo. In order to prove such a synergistic effect between a primary injury and preexisting condition, there must be proof that the two conditions interacted in such a way that the total disability is greater than the mere sum of the two disability ratings.

The point of reference for when this synergistic combination is to be evaluated is at the time of the primary injury, in this case February 10, 2009. So we look to what the evidence shows at the time of injury, and whether employee had other hindrances or obstacles to employment or re-employment. If so, did those conditions combine with the primary disability to create the required synergistic effect?

A right shoulder strain injury was identified as a preexisting condition. We adopt the judge's rating of 15% PPD (34.8 weeks). It is reasonable to make a connection between two injuries to the upper extremities, in this case a bilateral injury to the wrists creating a synergistic effect with the right shoulder. Dr. Volarich explained this synergistic effect in the adjustments employee had to make to adapt to certain functions on the job, given these two conditions.

The preexisting incontinence disability was rated at 2.5% PPD. The administrative law judge found a synergistic effect between upper and lower body. Given that employee's work experience has been limited to factory work, involving pushing and pulling at various weights and pressure exertions, these job components would further be affected by a disabling incontinence condition interacting with the upper body limitations.

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We agree with the administrative law judge's ruling that the psychological conditions which employee identifies are not clearly proven as disabling at the time of the February 10, 2009 primary injury. In that regard, employee has not met the first step of the analysis before we would evaluate whether there is a synergistic effect in combination with the primary injury. We also agree with the judge's recognition that post-injury worsening of a condition, (unless it is caused or aggravated by the work injury), is not properly placed on the liability of the Fund. Likewise, the bladder condition required further surgery in July 2009, and any subsequent worsening of that condition would not be attributable to the Fund.

Therefore, we adopt the findings of the administrative law judge regarding Fund liability based on the synergistic effect of the preexisting incontinence issue and right shoulder injury with the primary carpal tunnel injuries. The Fund is liable for an additional 32.52 weeks of PPD, based on the disability ratings found by the administrative law judge, and his finding of a 33 1/3% load factor.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Joseph E. Denigan is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 30th day of December 2020.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

DISSENTING OPINION FILED
Shalonn K. Curls, Member

Attest:

Secretary

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DISSENTING OPINION

The majority has voted to affirm the administrative law judge's award, granting a permanent partial disability rating for the primary injury of 16% permanent partial disability (PPD) of each wrist, as combined for Second Injury Fund liability with preexisting incontinence (2.5% PPD) and a right shoulder injury (15% PPD). A 33 1/3% loading factor was awarded as against the Second Injury Fund, which resulted in 32.52 weeks of PPD from the Fund. I would not disturb the PPD ratings as awarded on the primary, and identified preexisting disabilities. However, I disagree with the exclusion of the psychological injury as a preexisting disabling condition, and would include that preexisting condition as well, and in turn would modify the loading factor to be applied.

The administrative law judge excluded certain evidence, and the majority agrees with his rulings. I disagree, and I believe it is the improper exclusion of this evidence that led to the limited ruling on permanent partial disability. The evidence all relates to the psychological preexisting condition suffered by employee. I believe the exclusion of the entire deposition and report of Mr. Tim Lalk was an abuse of discretion in that it was an extreme ruling on an objection which -- while it had some merit, did not require an all or nothing approach. The stated objection to the reliability, and foundation of Mr. Lalk's opinion, did not warrant a complete expulsion of the evidence from the vocational rehabilitation expert. I would rule as follows.

1 Exclusion of the entire deposition testimony of Timothy Lalk, (Exhibit 16)

Mr. Lalk, a vocational rehabilitation specialist, provided opinion through a report and deposition, regarding employee's employability in the open market. Mr. Lalk reviewed the forensic report of Dr. Eli Shuter and considered it along with other materials in coming to his conclusions. Dr. Shuter is deceased. This exhibit was not admitted on the basis of hearsay, citing the case of *Bruflat v. Mister Guy, Inc.*, 933 S.W. 2d 829, 833 (Mo. App.1996).[6]

Mr. Lalk's August 4, 2017 report did place some emphasis on his review of Dr. Shuter's report. The findings from the independent medical evaluation conducted by Dr. Shuter in May 2011, were reflected in the doctor's report, dated March 3, 2012 and that report is not in evidence. Mr. Lalk also placed significant emphasis on the report and opinion of Dr. Adam Sky, which is in evidence, along with other medical records.

An expert can consider facts not in evidence to form an opinion or inference, but admissibility of that opinion depends on 1) were facts reasonably relied on, and 2) do foundational facts meet a level of reliability? "The testimony of an expert who merely acts as a conduit for another expert's opinion is hearsay and inadmissible." *Id.* Mr. Lalk was not merely acting as a conduit for Dr. Shuter's opinion. He examined many different sources and examined and interviewed the employee himself. The administrative law judge upheld the objection and found that Mr. Lalk "relied" on Dr. Shuter's opinion. But when Mr. Lalk's testimony is read in context, it is clear that he did not merely rely on or adopt that report as his own. He had several sources, including his own observations during a lengthy interview with employee, upon which to come to his own conclusions. We are able to evaluate which portions of Mr. Lalk's

[6] Subsequent history reflects overruled in part by *Hampton v. Big Boy Steel Erection*, (Mo. 2003) 121 S.W. 3d 220 at 227.

AMERICAN OVERSIGHT

report and testimony are reliable and persuasive, while separating those portions that suggest mere "parroting" of the doctor's opinion from the non-admitted report. I would admit both the deposition and the report of Mr. Lalk and give them the weight they deserve, given indicia of reliability, and whether the specific opinion comes from a sound foundational basis.

2 Exclusion of Dr. Michael Cometa letters (Exhibit 4)

There are two letters: one dated March 19, 2002 *Transcript, page 110*[7], and one is undated, although the body of that letter refers to an upcoming date of 10-10-01. It is addressed to Judy Isenberg, M.D. *Transcript page 111.* Employee refers to these letters as Exhibit 2 in her "Response to Second Injury Fund Objections to Admit Exhibits 4, 14 and 16, page 1"[8] but also refers to them as Exhibit 4. The hearing exhibit index identified these letters as Exhibit 4.

Employee briefly testified about the letters, and appears to offer them as proof of psychological treatment as early as 2001. Employee also offers them to show an earlier period of treatment for psychological disorders. I would accept her testimony of recalling an encounter with Dr. Cometa. Aside from this purpose, (as refreshing recollection), the letters are not properly authenticated as a medical record, so their probative value is diminished. I would accept them into evidence for the purpose of showing how employee's recollection was refreshed, and would give them the weight they deserve.

3 Exclusion of portions of Dr. David Volarich's deposition testimony

The ruling to exclude consideration of portions of Dr. Volarich's testimony is tied to the reference to Mr. Lalk's report, which was excluded by the judge. Dr. Volarich did not rely solely on Mr. Lalk's report and opinion, but had other reliable bases for the foundation of his opinion and conclusions. I do note his indication that he would defer to the psychiatric expert on any such disability. I would accept Dr. Volarich's deposition testimony, taking into consideration the flaws pointed out by the judge, and would give it the weight it deserves.

4 Dr. Adam Sky –Foundation and Seven Day Rule Objections

The administrative law judge's rulings on objections to Dr. Sky's deposition testimony were not sustained to the extent of excluding his opinions, but merely cast doubt as to the persuasiveness of the doctor's opinion. While the judge found Dr. Sky not persuasive in regard to the existence or extent of any preexisting psychiatric illness, I do not wholly share this view. As with the other medical professionals, my view was that Dr. Sky relied on various sources of information in coming to his opinions. The flaws pointed out regarding the technical evidentiary objections are noted, and I take them into consideration.

[7] Inexplicably, the March 19, 2002 letter has an identifier at the bottom as Claimant's Exhibit 4, Injury # 11-015610 (sic), with court reporter initials and date of 3-6-19.
[8] See Exhibit A to Employee's Application for Review.

MO-AG-22-0644-A-003356

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Discussion

Nature and Extent of Disability

I would not disturb the administrative law judge's rulings on disability ratings relative to the primary injury (16% PPD to each wrist) and regarding the preexisting right shoulder (15% PPD) and incontinence disability (2.5% PPD body as a whole). I would not disturb the judge's ruling that there is no psychiatric component to be attributed to the primary injury as I do not believe employee has proven work exposure as a prevailing factor to any psychological condition. However, I differ with the majority and the administrative law judge insofar as their finding of no *preexisting* psychological disability.

Even the employer's own records, coming from the Chrysler Clinic which provided care to its employees, support the finding that employee had psychological issues prior to her February 2009 primary injury. Her longstanding issues related to "abusive childhood and multiple failed marriages," are evidence of that. *Award, page 3.* This is included as a finding of fact in the award, but is not elaborated on by the administrative law judge. Employee had reported childhood abuse to several of the evaluators who interviewed her. She had prior mental health care and treatment over several years prior to 2009. One doctor recorded employee's report of a prior suicide attempt as a teenager, although no medical record confirms this.

Preceding the February 2009 work injury, employee had been seeing Elaine Toon, LPC, in therapy through the employer's clinic program as shown in the records in 2008. She had been admitted on more than one occasion to the employer's *stress day program,* due to difficulties observed by her supervisor at work, again prior to the February 2009 injury. Employee testified about frequent instances of being tearful at work, and difficulties keeping up because of her anxiety and mental health.

In late March 2009, shortly after her injury while employee was still off work, she was hospitalized for suicidal ideation. While the cause of the episode at that time appeared to be connected more directly to a situation regarding her marriage and family, the closeness in proximity to her last several months of work and not long after her counseling with Ms. Toon suggest this was a problem ongoing for some time.

Employee's abuse in childhood, as related by employee to Dr. Sky was found to result in a diagnosis of post-traumatic stress disorder (PTSD) at the time of his examination on May 15, 2017, along with major depressive disorder, recurrent, and generalized anxiety disorder. Elaine Toon had similar diagnoses in Dec 2007, in addition to a gambling addiction, which Dr. Sky found to have been resolved.

Employee also recalled treatment for psychological issues in 2001, and reported depressed and anxious feelings to medical providers over several years, prior to the work injury. Medical records support that she was prescribed anti-depressant medications in years prior to her work injury.

As opined by Dr. Sky, employee had a preexisting psychological disability. I would adopt a rating in the range of 20-35% body as a whole for this disability. As opined by Dr. Sky, this preexisting disability was a hindrance or obstacle to obtaining and

AMERICAN OVERSIGHT

maintaining employment and it combined with her primary injury for a greater disability. I would find employee's overall disability, as a synergistic combination with her primary injury, the right shoulder, incontinence and psychological disability to be greater than a 33 1/3% load factor, but short of permanent total disability.

The reason I am not convinced of permanent total disability as a combination of the preexisting and primary injuries I have identified, is that the medical evidence does not clearly establish the level of *post-primary injury worsening* of her psychiatric condition, as opposed to what can be attributed to the preexisting disability at the time of injury. Employee's primary injury was in February of 2009. She was off work for a significant period of time thereafter for treatment. She then chose to retire. She made various changes in her life. It wasn't until 2017, eight years later, that Dr. Sky had the opportunity to evaluate employee's mental condition. Likewise, Mr. Lalk's evaluation which found permanent total disability, was based on his examination of the employee five years post-injury (July 15, 2014), and while closer in time, still does not clearly establish the level of employee's disability at the time of the primary injury in this regard.[9] Many of the records Mr. Lalk reviewed relative to psychiatric issues were long after the date of the primary injury. Employee also had some significant life events that occurred after she left employment, including a divorce and the death of a spouse.

Because I disagree with the majority and the administrative law judge regarding the existence of a permanent partial disability to employee's psyche that preexisted her work injury, I must dissent. I would find her combined disability for Second Injury Fund liability purposes to include PTSD, major depressive disorder-recurrent and generalized anxiety disorder. Therefore, I would increase the level of Fund liability to reflect that additional preexisting disability.

I respectfully dissent.

Shalonn K. Curls

Shalonn K. Curls, Member

[9] Mr. Lalk met with the employee to interview and evaluate her on July 15, 2014, but wrote a report August 4, 2017, with a supplemental statement on October 23, 2018. *Transcript page 592.* The *Award* at page 4, only notes the year of his report as 8 years post-injury.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003358

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AWARD

Employee: Patricia Parrish

Dependents: N/A

Employer: Chrysler, LLC

Additional Party: Second Injury Fund

Insurer: Old Carco, LLC

Hearing Date: March 6, 2019

Injury No.: 09-015610

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JED

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 10, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was aboveClaimant in employ of above Employer at time of alleged accident or occupational disease? Yes
7. Did Employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was Employer insured by above insurer? Yes
11. Describe work Claimant was performing and how accident occurred or occupational disease contracted: Employee performed repetitive hand task, including use of vibratory tools, on an automobile assembly line.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 16% of each hand; 32.52 additional weeks PPD from SIF.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by Employer/insurer? $18,481.67

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003359

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17. Value necessary medical aid not furnished by Employer/insurer? None

18. Employee's average weekly wages: $1,014.23

19. Weekly compensation rate: $676.15/$404.66

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

56 weeks of PPD payable by Employer/Insurer	(settled)

22. Second Injury Fund liability: Yes

32.52 weeks of PPD payable by SIF	$13,159.54
TOTAL:	$13,159.54

23. Future requirements awarded: prescription drugs (see narrative award).

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant:

Nancy Mogab

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003360
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Issued by DIVISION OF WORKERS' COMPENSATION

Injury Number: 09-015610

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Patricia Parrish

Dependents: N/A

Employer: Chrysler, LLC

Additional Party: Second Injury Fund

Insurer: Old Carco, LLC

Hearing Date: March 6, 2019

Injury No.: 09-015610

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JED

This case involves a compensable repetitive trauma injury to Claimant resulting to Claimant in 2009. Employer previously settled its risk of liability. The Second Injury Fund ("SIF") remains a party to this case. Both parties are represented by counsel. The single issue for trial is the liability of the SIF. Claimant alleges permanent total disability on complex medical issues.

FINDINGS OF FACT

1. Claimant began work at Chrysler in 1984 and worked 25 years before the plant closing in St. Louis in 2009 and her retirement. Claimant testified at length about her experience with employer in parts and assembly work. She detailed her transfer to St. Louis from Alabama and the transition into the new positions.

2. Claimant sustained injury by repetitive trauma to her hands and wrists on the reported injury date. Claimant was diagnosed with CTS and underwent bilateral surgical releases.

3. Claimant settled this primary injury for 16 percent PPD of each hand (without reference to psychiatric disability).

4. Claimant testified at length about abusive childhood and multiple failed marriages, the details of which are not set forth here.

5. Claimant testified she retired in Febraury 2009. She was briefly hospitalized in March 2009 for depression and anxiety. Claimant testified very confidently and easily followed the Q and A format. Her residual complaints and characterization of the primary injury exceeded reasonable inferences that might be made from the approved settlement value.

Pre-existing Condition

6. In 2003, Claimant strained her right shoulder. No records are in evidence regarding this injury. She apparently continued work without accommodation and controlled symptoms with Tylenol.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003361

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7. In 2008, Claimant was diagnosed with stress incontinence and underwent bladder surgery. Recovery was complicated with infections and persistent urinary incontinence. She continues to experience problems.

Threshold Evidentiary Objections

Claimant's Exhibit 4 - Letters

The SIF raised an objection to the admissibility of Exhibit 4 as (1) unauthenticated and (2) inadmissible hearsay. The objection is well-taken. The two-page Exhibit consists of two letters by Dr. Michael Cometa, a licensed psychologist from Alabama. The first is dated 2002, and is addressed "To Whom It May Concern." It contains broad statements of diagnosis and disability without details or a records foundation. The second page is a status letter to Dr. Judy Isenberg. Both objections are sustained and the Exhibit is excluded.

Claimant's Exhibit 16 - Mr. Lalk's Report & Deposition

Claimant offered the deposition of Mr. Timothy Lalk as Exhibit 16. He examined Claimant and reviewed the record in 2017 (8 years post-injury). Mr. Lalk testified that Claimant was unemployable in the open labor market. The SIF raised a threshold objection to the admissibility of Mr. Lalk's deposition on the basis that Mr. Lalk reviewed and relied on the forensic report of Dr. Eli Shuter (deceased). The objection is well-taken. As argued, Mr. Lalk details Dr. Shuter's comprehensive rating *report* at two places in his review portion and, later in the report, just preceding his Summary and Conclusions. At *deposition*, Mr. Lalk expressly admits he reviewed and relied on Dr. Shuter's findings in forming his own conclusions (p. 55). Accordingly, Exhibit 16 is excluded from evidence on the basis of hearsay. Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo.App. 1996).

Opinion Evidence

Dr. Volarich

Claimant offered the deposition and narrative reports of Dr. David Volarich as Exhibit 15. Dr. Volarich examined Claimant in 2018 (9 years post-injury). He examined Claimant and reviewed the available medical records.[1] Noteworthy here is that Dr. Volarich's narrative report (dated 2018) is silent on Claimant's psychiatric condition except for the phrase *she has chronic psychiatric illness*:

> She tells me she had a stroke last week and she has chronic psychiatric illness.

Dr. Volarich apparently did not review any psychiatric medical records. (Exhibit 15; *Depo Ex. 2, p. 5*)

[1] Dr. Volarich's review of various legal assessments is unexplained. (See Exhibit 15; *Depo Ex. 2, p. 11.*)

AMERICAN OVERSIGHT

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Dr. Volarich diagnosed pre-existing stress incontinence, the primary injury as treated for bilateral CTS and a right shoulder strain from 2008. He assigned a 2.5 percent PPD as per his reference to the settlement of the incontinence claim, 20 percent PPD of each wrist and 20 percent PPD to the right shoulder. In the rating portion of his report, Dr. Volarich specifically references Mr. Lalk's assessment that Claimant was permanently and totally disabled primarily as a result of her psychiatric disorders with which assessment Dr. Volarich concurred. As discussed above, Mr. Lalk's opinion is inadmissible. Accordingly, this *portion* of Dr. Volarich's opinion evidence is excluded from evidence.

Dr. Sky - Psychiatrist

Claimant offered the deposition and narrative reports of Dr. Adam Sky, psychiatrist, as Exhibit 14. Dr. Sky examined Claimant and reviewed medical records. Family history includes early teenage marriage with two daughters with whom she has poor relationships, multiple marriages. On examination, Claimant was oriented and exhibited fluid speech without any indication of confusion, phobia or dissociative disorder. She exhibited average intelligence. Testing revealed moderate to severe depression and anxiety along with post-traumatic stress disorder. She had driven eight hours from Alabama for her IME with Dr. Sky.

Foundation - Objection

In the opening portion of his deposition, Dr. Sky, acknowledges reviewing Dr. Cometa's letters (Ex. 4) and, in response to a leading question, that characterized the letters as "records," acquiesces in the character of the exhibit as [medical] records. Objection was timely (p. 14). The representation to Dr. Sky, as a witness, that the materials from Dr. Cometa are "records" is misleading to the reader. As discussed above, Exhibit 4 is inadmissible as unauthenticated and as inadmissible hearsay. Even if admissible, the letters are not treatment records that might otherwise be certified as business records. While no portion of Dr. Sky's deposition may be stricken, the extent to which Dr. Sky relied on the letters goes to the weight of his opinion.

Also noteworthy, is the witness' acknowledgement that Dr. Chilikammari's pre-accident records are not in evidence. Only his 2009-2010 records are in evidence. Still further, a brief hospitalization March 23-27, 2009 at St. Anthony's (St. Louis), following her February retirement is referenced but Dr. Sky admits he did not actually review those records.

Accordingly, Dr. Sky's suggestion that pre-existing psychiatric illness is well documented is not persuasive. This is especially important with regard to critical events such as alleged states of Claimant being suicidal *before the reported injury*.

Seven Day Rule Objection

The SIF objected to Claimant's attorney's effort to recast or enlarge the breath of Dr. Sky's permanent disability opinion by incorporating (1) the stress incontinence and (2) the CTS "to render her unable to compete in the open labor market and, therefore, totally and permanently disabled[.]" (pp. 40-41.) Dr. Sky had, a few pages earlier, opined per his narrative report to a 35 percent pre-existing psychiatric PPD and a 100 percent psychiatric disability as a result of the combination of her "pre-existing permanent partial psychiatric disability synergistically

AMERICAN OVERSIGHT MO-AG-22-0644-A-003363

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - February 22, 2021 - 09:51 AM

combined with her primary occupational disease." (p. 33) The earlier statement, as quoted makes no mention of stress incontinence.

Upon review, the Compromise Lump Sum Settlement only references, as pertinent, repetitive trauma and hand and wrist PPD. It mentions no psychiatric PPD. Further, such a settlement under the statute carries an adjudicative signature and it may be fairly inferred that the underlying medical record for the settlement vetted any claim of psychiatric PPD having arisen out of the CTS claim. Indeed, the February 8, 2010 settlement is supported by a final examination and rating report dated September 22, 2009 from Dr. David German, hand surgeon. Dr. German assigned a PPD rating with no mention of a psychiatric feature secondary to the CTS: "[Claimant] was doing very well with at least 75-80 improvement in symptoms." (See Exhibit 1.)

* *

Dr. Sky describes a period of treatment for depression per Claimant's history beginning in Alabama as early as 2001, but he has no records before 2009. Dr. Pope's record before 2009 are PCP records which contain undeveloped references to "mild distress" and "mood disorder as circled words on the examination forms. Dr. Pope is not a psychiatrist. Thus, the alleged pre-existing psychiatric disability lacks documention by treatment records, but relies largely on anecdotal evidence from Claimant. Nevertheless, Dr. Sky assigned a 35 percent pre-existing psychiatric PPD and a 100 percent psychiatric disability as a result of the combination of her "pre-existing permanent partial psychiatric disability synergistically combined with her primary occupational disease." Dr. Sky did not apportion the degree of permanent disability related to the primary CTS injury contemplated in Exhibit 1.

Moreover, Dr. Sky did not assign any specific PPD to the "primary occupational disease." The settlement of the primary injury for CTS does not reference any psychiatric disability. (Exhibit 1.) He also believed Claimant would require ongoing treatment for psychiatric symptoms. Thus, Dr. Sky's deposition testimony contains foundation flaws, a valid *Seven Day Rule* objection, and an omission inasmuch as he failed to assign a specific amount of PPD to the primary injury. It must be observed that critical patient history on complex medical treatment remains unverified.

RULINGS OF LAW

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). An expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984).

AMERICAN OVERSIGHT MO-AG-22-0644-A-003364

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - February 22, 2021 - 09:51 AM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

In order for the Second Injury Fund to be liable for total disability benefits, claimant must establish that her total disability is due to the combination of primary injury with her then pre-existing disabilities. See *Boring v. Treasurer of Mo., Custodian of the Second Injury Fund*, 947 S.W.2d 483, 489-90 (Mo.App. E.D. 1997). In cases where permanent total disability results only from the combination of the primary injury, the pre-existing conditions and unrelated post primary injury progression of pre-existing conditions, the Second Injury Fund is not liable for permanent total disability. The Second Injury Fund is not liable for any post-accident worsening of an employee's pre-existing conditions which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Lammert v. Vess Beverages, Inc., 968 S.W.2d 152 (Mo.App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo.App. 1992).

It is Claimant's burden to prove "not only causation between the accident and the injury but also that a disability resulted and the extent of such disability." *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. W.D.1973). A claimant must provide expert testimony where he is asking the court "to discern the percentage of disability attributable to a particular workplace injury where there has been another injury that contributed to the disability." *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo.App. W.D. 2008). Expert testimony is also necessary when the injury is beyond the lay understanding. Id. At 561.

Nature and Extent of Permanent Disability

Permanent disability must be demonstrated and certified by a physician. See Section 287.190.6(2) RSMo (2016). Here, any award of permanent disability must be certified by either Dr. Volarich or Dr. Sky. With complex medical issues, treatment records alone are not sufficient unless certified by a physician. Psychiatric issues are not within the understanding on lay witnesses.

Claimant's primary settlement is unremarkable for its percentage, or severity, of PPD and the wrist ratings from her medical expert are also quite modest even from the vantage point of the 2018 examination date by Dr. Volarich. Here, Claimant did not meet her burden in proving she was permanently and totally disabled from a combination of her primary occupational disease with her then pre-existing conditions. Claimant is likely permanently and totally disabled only after considering unrelated post-primary injury progression of pre-existing conditions.

Dr. Volarich noted in his narrative report that Claimant described how her right shoulder limitations combined with her hand symptoms, but did not describe any combination between her urinary incontinence and her bilateral CTS. He never found permanent total disability except upon consideration of Mr. Lalk's vocational assessment.

Dr. Sky took a history from Claimant that the CTS surgical releases were not entirely successful inasmuch as she has numbness and tingling in all five *right* fingers and to a lesser extent on the left. Claimant's settlement, with counsel, belies this characterization. First, the severity of the settled amount of PPD is unremarkable at 16 percent bilaterally, the settlement accords no *additional* PPD for *right* hand symptoms, and she returned to work. It is difficult to

AMERICAN OVERSIGHT MO-AG-22-0644-A-003365

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - February 22, 2021 - 09:51 AM

understand how this modest level of PPD might form the basis of a disability combination that results in permanent total disability.

The medical record does not suggest Claimant needs to avoid all employment but only that which requires heavy lifting or repetitive arm work. Sedentary or retail work seems viable and Claimant's extended experience in one industry (i.e automotive) bolsters this option. Consistent with this analysis is the holding in Ransburg v. Great Plains Drilling, 22 S.W.3d 726 (Mo.App. 2000). In that case, a 60-year-old construction worker fell and required both neck and shoulder surgeries. The record included evidence that the employee was capable of performing sedentary work and received social security benefits and a pension. The employee admitted not having sought alternative employment. The court held employee's testimony itself was sufficient to find he had no motivation to return to work. Social security benefits and a pension are irrelevant for purposes of determining overall disability but are relevant to determine the ability or motivation to return to work. Id.

Similarly, here, Claimant is ambulatory and seems capable of sedentary work and, apparently, had not sought employment after the plant closure. While not exactly on point, the court in Ransburg held that the admission was competent evidence and, thus, it has some probative value here. The admission gains meaning when coupled with the lack of evidence on curtailed activity; Claimant drove eight hours to an IME from Alabama. Claimant no longer actively treats, manages her personal needs, has no domestic help and apparently drives an automobile. This is substantial competent evidence that Claimant's permanent injury is partial, not total.

Allegation of Psychiatric Disability

The record does not contain evidence that suggests Claimant has any psychiatric disability that is medically causally related to the work incident. To the contrary, Claimant's appearance at trial was normal and lacking in any demeanor suggestive of anger or sadness. Nevertheless, domestic problems appear to have followed Claimant into adulthood as evidenced by her multiple marriages and strained relationships with her adult children. Relevant to credibility, however, was Claimant's single reference at trial that she felt "suicidal" yet no pre-Claim hospitalization or treatment records corroborate this assertion.

In addition, substantial psychiatric pre-Claim medical evidence is not in evidence and, based upon Dr. Sky's substantial rating for pre-existing PPD, is based upon Claimant's anecdotal recollection or her patient history to Dr. Chilikammari who treated her post-injury. Incidentally, Dr. Chilikammari's notes also indicate Claimant's alertness and clear speech with no suicidal tendancy.

This leaves unclear how Dr. Sky posits the existence of a work related psychiatric diagnosis as expressly stated in his report. His findings also fail to identify any severe disabling upper extremity pain that might predicate a psychiatric disability. He did not rate the primary injury of CTS. Thus, Dr. Sky did not *identify* a work related psychiatric injury and, second, if, *arguendo* he could so identify, he did not explain to *what degree* Claimant's alleged psychiatric condition, or other disability, was due to the work injury as opposed to any pre-existing conditions, or subsequent deterioration. Claimant's psychiatric condition, if any, is not medically

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003366

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - February 22, 2021 - 09:51 AM
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

documented as pre-existing the reported injury and, thereafter, is not identified by any means as part of the primary CTS injury settled. Again, the record contains no objective pre-Claim evidence of psychiatric disability. The fact of Claimant not working since the plant closing was essentially unexplained at trial. Dr. Sky's analysis and testimony in this case is simply unpersuasive and not a sufficient basis to impose PTD liability against the SIF.

The current disability is determined to be 16 percent PPD of each wrist (56 weeks). The pre-existing PPD referable to urinary incontinence is found to be 2.5 percent PPD of the body (10 weeks). The right shoulder PPD is found to be 15 percent (34.8 weeks). There is neither pre-existing treatment records nor other evidence to support a finding of significant pre-existing psychiatric disability; the absence of any severely disabling pre-existing psychiatric PPD is consistent with Claimant's 25 year service record with Employer up until her voluntary retirement upon closure of the St. Louis plant in 2009.

SIF Liability

SIF liability is premised on the combination of the primary and pre-existing disabilities. Section 287.220.1 RSMo (2000). Again, in order for the SIF to be liable for permanent total disability, an employee must establish that the PTD is due to the combination of the primary injury with the pre-existing disability. Boring, *supra*. Emphasis is on the *pre-Claim conditions* that hindered employment not simply an employee's condition at the time of trial.

Here, the medical evidence and other evidence of disability, before 2009 and from the CTS wrist settlement, suggest Claimant's disabilities are a hindrance and obstacle to employment or reemployment. Here, Claimant's primary injury and right shoulder and incontinence conditions constitute common *opposing limb* and *upper body-lower body* synergy.

The opinion evidence and other evidence suggest Claimant's combined PPD equates to increased overall PPD of 33 and 1/3 percent of a body, or 133.32 weeks. Thus, after the pre-existing PPD plus the current PPD (100.8) are deducted from the combined disability, the synergistic effect results in an additional 32.52 weeks of PPD liability against the SIF.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained an additional 32.52 weeks PPD from the SIF as a result of the combination between the primary injury and the synergistic pre-existing PPD.

I certify that on 6-27-19, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By _____

Made by: Joseph E. Denigan
Administrative Law Judge

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL REL

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003367
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Title XVIII LABOR AND INDUSTRIAL RELATIONS

Chapter 287

Effective - 28 Aug 2005

287.190. Permanent partial disability, amount to be paid — permanent partial disability defined — permanent total and partial total disability require certification by physician on compensability — award reduced when. — 1. For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made, which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses.

SCHEDULE OF LOSSES		Weeks
(1)	Loss of arm at shoulder	232
(2)	Loss of arm between shoulder and elbow	222
(3)	Loss of arm at elbow joint	210
(4)	Loss of arm between elbow and wrist	200
(5)	Loss of hand at the wrist joint	175
(6)	Loss of thumb at proximal joint	60
(7)	Loss of thumb at distal joint	45
(8)	Loss of index finger at proximal joint	45
(9)	Loss of index finger at second joint	35
(10)	Loss of index finger at distal joint	30
(11)	Loss of either the middle or ring finger at the proximal joint	35
(12)	Loss of either the middle or ring finger at second joint	30
(13)	Loss of either the middle or ring finger at the distal joint	26
(14)	Loss of little finger at proximal joint	22
(15)	Loss of little finger at second joint	20
(16)	Loss of little finger at distal joint	16
(17)	Loss of one leg at the hip joint or so near thereto	207

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

	as to preclude the use of artificial limb	
(18)	Loss of one leg at or above the knee, where the stump remains sufficient to permit the use of artificial limb	160
(19)	Loss of one leg at or above ankle and below knee joint	155
(20)	Loss of one foot in tarsus	150
(21)	Loss of one foot in metatarsus	110
(22)	Loss of great toe of one foot at proximal joint	40
(23)	Loss of great toe of one foot at distal joint	22
(24)	Loss of any other toe at proximal joint	14
(25)	Loss of any other toe at second joint	10
(26)	Loss of any other toe at distal joint	8
(27)	Complete deafness of both ears	180
(28)	Complete deafness of one ear, the other being normal	49
(29)	Complete loss of the sight of one eye	140

2. If the disability suffered in any of items (1) through (29) of the schedule of losses is total by reason of severance or complete loss of use thereof the number of weeks of compensation allowed in the schedule for such disability shall be increased by ten percent.

3. For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.

4. If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation. If both the employer and employee agree, the administrative law judge may utilize a photograph of the disfigurement in determining the amount of such additional sum.

5. The amount of compensation to be paid under subsection 1 of this section shall be computed as follows:

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

(1) For all injuries occurring on or after September 28, 1983, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to forty-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(2) For all injuries occurring on or after September 28, 1981, the weekly compensation shall in no event be less than forty dollars per week;

(3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty percent of the state average weekly wage;

(4) For all injuries occurring on or after August 28, 1991, but before August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-two percent of the state average weekly wage;

(5) For all injuries occurring on or after August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-five percent of the state average weekly wage.

6. (1) "**Permanent partial disability**" means a disability that is permanent in nature and partial in degree, and when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission, a rating established by medical finding, certified by a physician, and approved by an administrative law judge or legal advisor, or an award by an administrative law judge or the commission, the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due; provided, however, the presumption shall apply only to compensable injuries which may occur after August 29, 1959.

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and

AMERICAN OVERSIGHT

disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

(3) Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.

(RSMo 1939 § 3705, A.L. 1947 V. II p. 438, A.L. 1951 p. 620, A.L. 1953 p. 530, A.L. 1955 p. 588, A.L. 1957 p. 560, A.L. 1959 S.B. 167, A.L. 1961 p. 423, A.L. 1965 pp. 397, 414, A.L. 1967 p. 384, A.L. 1969 p. 393, A.L. 1971 H.B. 25 & 364, A.L. 1974 S.B. 417, A.L. 1975 H.B. 196, A.L. 1978 H.B. 1260, A.L. 1979 H.B. 496, A.L. 1980 H.B. 1396, A.L. 1981 H.B. 324, A.L. 1983 H.B. 243 & 260, A.L. 1990 S.B. 751, A.L. 1998 H.B. 1237, et al., A.L. 2005 S.B. 1 & 130)

Prior revision: 1929 § 3315

(1972) Where claimant whose little, ring and middle fingers and all but stub of index finger had been amputated in industrial accident could write and use hand as a prop and for pushing and prying he did not sustain complete loss of his hand and was not entitled to ten percent increase in compensation for complete disability as provided in subdivision 2. Martin v. Star Cooler Corporation (A.), 484 S.W.2d 32.

(1972) Court will take judicial notice that workman with only part of his major hand remaining would be at disadvantage in labor market and this will support award for disfigurement to claimant whose little, ring and middle fingers and all but stub of his index finger had been amputated in industrial accident as provided in subdivision 4. Martin v. Star Cooler Corporation (A.), 484 S.W.2d 32.

---- end of effective 28 Aug 2005 ----
use this link to bookmark section 287.190

Click here for the **Reorganization Act of 1974 - or - Concurrent Resolutions Having Force & Effect of Law**

In accordance with Section **3.090**, the language of statutory sections enacted during a legislative session are updated and available on this website on the effective date of such enacted statutory section.

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Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

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287.220. Compensation and payment of compensation for disability--second injur...

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Vernon's Annotated Missouri Statutes
Title XVIII. Labor and Industrial Relations [Chs. 285-295]
Chapter 287. Workers' Compensation Law (Refs & Annos)

This section has been updated. Click here for the updated version.

Effective: [See Text Amendments] to December 31, 2013

V.A.M.S. 287.220

287.220. Compensation and payment of compensation for disability--second injury fund created, services covered, actuarial studies required--failure of employer to insure, penalties--public records

<Text of section eff. until Jan. 1, 2014. See, also, section eff. Jan. 1, 2014.>

1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable

Back to top

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003372
Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

2. In all cases in which a recovery against the second injury fund is sought for permanent partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against the claim. The state treasurer, with the advice and consent of the attorney general of Missouri, may enter into compromise settlements as contemplated by section 287.390, or agreed statements of fact that would affect the second injury fund. All awards for permanent partial disability, permanent total disability, or death affecting the second injury fund shall be subject to the provisions of this chapter governing review and appeal. For all claims filed against the second injury fund on or after July 1, 1994, the attorney general shall use assistant attorneys general except in circumstances where an actual or potential conflict of interest exists, to provide legal services as may be required in all claims made for recovery against the fund. Any legal expenses incurred by the attorney general's office in the handling of such claims, including, but not limited to, medical examination fees, expert witness fees, court reporter expenses, travel costs, and related legal expenses shall be paid by the fund. Effective July 1, 1993, the payment of such legal expenses shall be contingent upon annual appropriations made by the general assembly, from the fund, to the attorney general's office for this specific purpose.

3. If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

4. If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

5. If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer. Any funds received by the employee or the employee's dependents, through civil or other action, must go towards reimbursement of the second injury fund, for all payments made to the employee, the employee's dependents, or paid on the employee's behalf, from the second injury fund pursuant to this subsection. The office of the attorney general of the state of Missouri shall bring suit in the circuit court of the county in which the accident occurred against any employer not covered by this chapter as required in section 287.280.

6. Every three years the second injury fund shall have an actuarial study made to determine the solvency of the fund, appropriate funding level of the fund, and forecasted expenditures from the fund. The first actuarial study shall b

Back to top

A-24
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MO-AG-22-0644-A-003375

AMERICAN OVERSIGHT

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - June 04, 2021 - 03:47 PM

completed prior to July 1, 1988. The expenses of such actuarial studies shall be paid out of the fund for the support of the division of workers' compensation.

7. The director of the division of workers' compensation shall maintain the financial data and records concerning the fund for the support of the division of workers' compensation and the second injury fund. The division shall also compile and report data on claims made pursuant to subsection 9 of this section. The attorney general shall provide all necessary information to the division for this purpose.

8. All claims for fees and expenses filed against the second injury fund and all records pertaining thereto shall be open to the public.

9. Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

Credits

(R.S.1939 § 3707. Amended by L.1943, p. 1068; L.1945, p. 1996; L.1951, p. 617, § 1; L.1953, p. 524, § 1; L.1955, p. 590, § 1; L.1980, H.B. No. 1396, p. 369, § 1; L.1981, H.B. No. 324, p. 404, § 1; L.1982, H.B. No. 1605, p. 492, § 1; L.1987, H.B. No. 564, § A, eff. Aug. 31, 1987; L.1992, H.B. No. 975, § A; L.1993, S.B. No. 251, § A; L.1998, H.B. Nos. 1237, 1409, 1166, 1154 & 1491, § A.)

V. A. M. S. 287.220, MO ST 287.220

Statutes are current through West ID No. 1 of the 2021 First Regular Session of the 101st General Assembly. The Constitution is current through the November 3, 2020 General Election.

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Title XVIII LABOR AND INDUSTRIAL RELATIONS

Chapter 287

Effective - 28 Aug 1998

287.495. Final award conclusive unless an appeal is taken — grounds for setting aside — disputes governed by this section, claims arising on or after August 13, 1980. — 1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

(1) That the commission acted without or in excess of its powers;

(2) That the award was procured by fraud;

(3) That the facts found by the commission do not support the award;

(4) That there was not sufficient competent evidence in the record to warrant the making of the award.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

(L. 1980 H.B. 1396, A.L. 1998 H.B. 1237, et al.)

(2003) A reviewing court is not required to view evidence and all reasonable inferences therefrom in light most favorable to Labor and Industrial Relations Commission award. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo.banc).

---- end of effective 28 Aug 1998 ----

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Title XXXIII EVIDENCE AND LEGAL ADVERTISEMENTS

Chapter 490

Effective - 28 Aug 2017, 2 histories

490.065. Expert witness, opinion testimony admissible, requirements for certain actions. — 1. In actions brought under chapter 451, 452, 453, 454, or 455 or in actions adjudicated in juvenile courts under chapter 211 or in family courts under chapter 487, or in all proceedings before the probate division of the circuit court, or in all actions or proceedings in which there is no right to a jury trial:

(1) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise;

(2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact;

(3) The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable;

(4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;

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(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue.

(b) In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone;

(4) Unless the court orders otherwise, an expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

3. The provisions of this section shall not prevent a person, partnership, association, or corporation, as owner, from testifying as to the reasonable market value of the owner's land.

(L. 1989 S.B. 127, et al., A.L. 2017 H.B. 153)

(2003) Section sets forth standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings. State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo.banc).

---- end of effective 28 Aug 2017 ----

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	Effective	End
490.065	8/28/2017	
490.065	8/28/1989	8/28/2017

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(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;

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AMERICAN OVERSIGHT

(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue.

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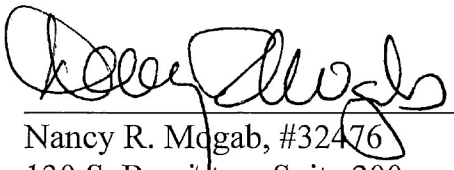

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AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing was sent by electronic mail and by U.S. Mail, postage pre-paid, this 4th day of June 2021, to David C. Drescher, AAG (David.Drescher@ago.mo.gov), 815 Olive Street, Suite 200, St. Louis, Missouri 63101, Attorney for Respondent the Second Injury Fund.

Nancy R. Mogab

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AMERICAN OVERSIGHT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2021
Lyle W. Cayce
Clerk

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; 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; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

AMERICAN OVERSIGHT

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

This case concerns the Migrant Protection Protocols ("MPP") created by the Secretary of the Department of Homeland Security on December 20, 2018, and purportedly rescinded by DHS in a memorandum on June 1, 2021 ("June 1 Memorandum").[1] After a full bench trial and 53 pages of findings of fact and conclusions of law, the district court concluded that DHS's purported rescission of MPP violated, *inter alia*, the Administrative Procedure Act ("APA"). DHS seeks a stay pending appeal. After carefully considering full briefing from the parties, we hold DHS failed to satisfy the four stay factors. *See Nken v. Holder*, 556 U.S. 418 (2009). The motion is denied.

I.

A.

On December 20, 2018, the Trump Administration implemented MPP in response to an immigration surge at the southern border. D. Ct. Op. at 7. The statutory authority for MPP is found in 8 U.S.C. § 1225(b)(2)(C), which authorizes the Government to return certain third-country nationals arriving in the United States to Mexico or Canada for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* at 8. Also on December 20, 2018, the United States obtained Mexico's agreement to permit entry of MPP enrollees. *Id.* The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum

[1] We refer to the Secretary's actions as those of "DHS" unless otherwise stated.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003383

application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* (quotation omitted).

In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Id.* (citing AR.155–56, AR.684). In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Id.* at 9 (citing AR.165–70). By December 31, 2020, DHS had enrolled 68,039 aliens in MPP. *Id.* at 12 (citing AR.555).

DHS and Texas entered into a Memorandum of Understanding (the "Agreement"), which the parties finalized on January 8, 2021. *Id.* at 13 (citing Compl., Ex. B at 8). The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* (quoting Compl., Ex. B at 2). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at 13–14 (citing Compl., Ex. B at 2). DHS also agreed to "'[p]rovide Texas with 180 days' written notice . . . of any proposed action' subject to the consultation requirement," *id.* at 14 (quoting Compl., Ex. B at 3), so that Texas would have an opportunity to comment on the proposal. The Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject Texas's input, "provide a detailed written explanation" of its reasons for doing so. *Id.* (emphasis omitted) (quoting Compl., Ex. B at 3).

On Inauguration Day, the Biden Administration announced that it would suspend further enrollments in MPP. The Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003384

enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.* at 15 (quoting AR.581).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Id.* at 14. Because it believed that the letter did not comply with the Agreement's required procedures, Texas interpreted the letter "as a notice of intent to terminate" the Agreement. *Id.* (citing ECF No. 53 at 21).

On April 13, 2021, Texas and Missouri (the "States") sued, challenging the temporary suspension of MPP. *Id.* at 1 (citing ECF No. 1). The States alleged that DHS's January 20 Memorandum violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See id.* at 2 (citing ECF No. 1 at 4; ECF No. 45). On May 14, the States moved for a preliminary injunction that would enjoin the Government from enforcing and implementing the January 20 Memorandum. Prelim. Inj. Mot., ECF No. 30.

On June 1, before briefing on the preliminary injunction had concluded, DHS issued a new memorandum permanently terminating MPP. D. Ct. Op. at 2. The district court concluded that the June 1 Memorandum mooted the States' complaint, and the court allowed the States to amend their complaint and file a new preliminary injunction motion. *Id.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3.

B.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *See* D. Ct. Op. at 1. The district court made many findings of fact that are relevant here. Among other things,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003385

the district court found that MPP had significant benefits before DHS purported to rescind it. For example, DHS's October 2019 Assessment of MPP concluded that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. And the court noted that DHS also found MPP effective in addressing the prior "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* The court found that this caused a significant decrease in immigration-enforcement encounters along the southern border. *Id.* And more directly, the court found that caused a decrease in "the number of aliens released into the interior of the United States for the duration of their U.S. removal proceedings." *Id.* at 11 (citing AR.554). These benefits, DHS emphasized, were a "cornerstone" of the agency's prior immigration policy. D. Ct. Op. at 12.

The court made specific (and largely uncontested) factual findings that "[t]he termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States," and that this increase "has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri." *Id.* at 17. On the basis of its factual findings, the district court determined that the States had Article III standing, that the court had jurisdiction to review the agency action, and that the States were within the zone of interests of the INA. *Id.* at 21–34. The court then concluded that DHS's termination of MPP was unlawful under the APA because the action was arbitrary and capricious and contrary to the INA. *Id.* at 34–44. Based on those conclusions, the district court "permanently enjoined and restrained [DHS] from implementing or enforcing the June 1 Memorandum" and ordered DHS "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003386

all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources." *Id.* at 52–53 (emphases omitted).

DHS noticed an appeal. On August 17, 2021, the Government requested an emergency stay under Federal Rule of Appellate Procedure 8. The States opposed that request on August 18. On August 19, the Government filed a reply. The Government requested that we rule the same day, August 19. In considering the Government's request, we must consider four factors: (1) whether the Government makes a strong showing that it is likely to succeed on the merits; (2) whether the Government will be irreparably injured in the absence of a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies. *See Nken*, 556 U.S. at 426.

II.

We begin with whether the Government has made a strong showing that it is likely to succeed on the merits. The Government makes two merits arguments: (A) the case is not justiciable, and (B) DHS's rescission of MPP did not violate federal law. The Government is likely wrong on both.

A.

The Government first argues that it is likely to succeed on the merits because two justiciability doctrines—standing and non-reviewability—operate as insuperable obstacles to the States' suit. We consider and reject each argument in turn.

1.

First, the States' standing. To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003387

Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "Only one of the [appellants] needs to have standing to permit us to consider the [complaint]."[2] *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord Nat'l Rife Ass'n Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). Because the Government is seeking a stay, we must ask whether it has made a strong showing that the States lack standing. *See Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020).

After a bench trial, we review the district court's factual determinations for clear error. *See, e.g.*, *Texas*, 809 F.3d at 171–72 (reviewing a factual finding for clear error); *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)). And any argument not raised on appeal (including a challenge to a district court's factual finding) is forfeited. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) ("Many of the 'errors' cited by the defendants are unbriefed. These issues have been [forfeited]."); *cf.* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

We begin with (a) the district court's uncontested factual findings. Then we hold that the Government fails to make a strong showing that it is likely to succeed on appeal because it has not shown that the States lack (b) an injury-in-fact that is (c) traceable and (d) redressable. Finally, any doubt

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[2] For this reason, we focus on Texas's standing. We note, however, that Missouri brings largely similar arguments with respect to driver's-license, educational, healthcare, and other costs.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003388

about the States' standing is resolved by (e) the special solicitude guaranteed to sovereign States in our federal system.

a.

The district court found eight facts central to the standing issue. These include:

1. The court found that because of MPP's termination, the Government has been "forced to release and parole aliens into the United States because [the Government] simply [does] not have the resources to detain aliens as mandated by statute." D. Ct. Op. at 17; *see also id.* at 18 (finding that Texas's "border state" status means some of those aliens have ended up in Texas).
2. The court found that DHS previously acknowledged that "MPP implementation contributed to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Id.* at 17 (quotation and alteration omitted).
3. The court found that "the termination of MPP has contributed to the current border surge." *Id.*
4. The court found that "[s]ince MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." *Id.*; *see also id.* at 18 n.7 (noting "the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS," including Shahoulian's statement that "[b]ased on current trends, the Department expects that total encounters this fiscal year are likely to be the highest ever recorded" (emphasis omitted)).
5. The court found that many "aliens present in Texas because of MPP's termination would apply for driver's licenses," the granting of which would impose a cost on Texas. *Id.* at 19.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003389

6. The court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States," and that (according to state estimates) Texas will expend an average of $9,216 per additional student in the 2021 school year. *Id.* at 19.
7. The court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas," imposing a cost on the state. D. Ct. Op. at 19–20 (citing AR.555, AR.587–88).
8. Finally, the court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and [some] will commit crimes in Texas," imposing costs on the state's correctional apparatus. *Id.* at 20.

The Government does not challenge *any* of these findings.[3] But even if it did, we would not find any of them clearly erroneous in the light of the record as a whole. *See, e.g.*, *United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) ("[A]s long as the determination is plausible in light of the record as a whole, clear error does not exist.").

b.

Texas's injuries are actual and imminent. As just described, MPP's termination has caused an increase in immigration into Texas. And as

[3] On one reading of the Government's brief, it does contest the fifth finding. *See* Stay Mot. at 7 (discussing "speculation about an increase in the number of aliens released and paroled who will seek driver's licenses" (quotation omitted)). But in any case, neither our precedent nor the district court's record allows us to conclude the Government is likely to show the finding is clearly erroneous. *See Texas*, 809 F.3d at 156 (making a similar inference about driver's license applications).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003390

discussed at length in *Texas v. United States*, Texas law requires the issuance of a license to any qualified person—including noncitizens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155–56 (alteration in original) (quoting TEX. TRANSP. CODE § 521.142(a)); *see also id.* (discussing other Texas requirements for a driver's license). Of course, unlike in the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the challenged action here does not *ipso facto* guarantee that a given alien will satisfy that requirement. Yet the district court's uncontested findings of fact likely compel the conclusion that MPP's termination has led to an increase in the number of aliens in Texas, many of whom will apply for driver's licenses. And the district court found that Texas incurs a cost every time it *inquires* into whether an alien satisfies the requirements for a license—even if the person does not in fact qualify for a license. D. Ct. Op. at 19 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* Decl. of Sheri Gipson, Chief of the Texas Department of Public Safety Driver License Division, ¶ 8 ("DPS estimates that for an additional 10,000 driver['s] license customers *seeking* a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." (emphasis added)). So Texas has shown imminent injury in this case. *See Texas*, 809 F.3d at 156 (reaching the same conclusion on similar facts). Driver's licenses aside, the district court's unchallenged factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.

The Government's counterargument (limited to the driver's-license theory) is that the district court's analysis was "primarily based on speculation about an increase in the number of aliens released and paroled who will seek driver's licenses." Stay Mot. at 7 (quotation omitted). But the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003391

Government has done nothing to show that district court's findings of fact about the increased number of aliens were clearly erroneous. And it is grounded in our precedent. *Texas*, 809 F.3d at 156 ("[T]here is little doubt that many [DAPA beneficiaries] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

c.

Texas's injury is also traceable to the Government's termination of MPP. The district court's uncontested factual findings establish as much: MPP's termination has caused an increase in unlawful immigration into Texas. Many new immigrants are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. Texas*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients—"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible."). Likewise, at least some MPP-caused immigrants will certainly seek educational and healthcare services from the state. And the States have incurred and will continue to incur costs associated with the border crisis, at least part of which the district court found is traceable to rescinding MPP. The causal chain is easy to see, and the Government does not meaningfully contest this point. *See also Massachusetts v. EPA*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would remedy Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico. The Government gives two arguments that it says undercut redressability. First,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003392

the Government contends, an injunction would provide no redress because immigration officers under MPP would have discretion about whether to return any given immigrant to Mexico. Stay Mot. at 8. This argument ignores the fact that, during MPP's operative period, immigration agents did in fact order over 50,000 aliens back to Mexico from the Texas border. ECF 11 at 2. The Government offers no basis to conclude that a renewed MPP would have any different impact.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. Stay Mot. at 8. This argument fails because for at least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Further, Mexico issued a statement in 2018 consenting to admit aliens excluded from the United States under MPP—and nothing in the record suggests Mexico has since retracted that consent. *See* AR.153 (Secretaría do Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018)).

e.

To eliminate any doubt as to standing, we emphasize that the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520; *see also Texas*, 809 F.3d at 151 (beginning with the special-solicitude question). Such special solicitude has two requirements: (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*, 809 F.3d at 151–52 (citing *Massachusetts*, 549 U.S. at 516–

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003393

20). In both *Massachusetts* and *Texas*, the first prong was satisfied where a State challenged an agency action as invalid under a statute. 549 U.S. at 516–17 (Clean Air Act); 809 F.3d at 152–53 (APA). And in both cases, the second prong was satisfied where a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 520; *see Texas*, 809 F.3d at 152–54. Particularly relevant here is *Texas*, where this Court held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

Texas is indeed entitled to special solicitude. First, just as in the DAPA suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153–54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry.

That solicitude means redressability is easier to establish for certain state litigants than for other litigants—and this should remove any lingering doubt as to that prong. *See Massachusetts*, 549 U.S. at 517–18 (holding a State "can assert [its] right[s] without meeting all the normal standards for redressability and immediacy" (quotations and citations omitted)). Texas would be able to establish redressability without this special solicitude—but

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003394

it reinforces our conclusion that the States have standing and that the Government has failed to make a strong showing to the contrary.

2.

The Government next argues this suit is non-justiciable under the APA. The Government makes three arguments on this score. None is persuasive.

a.

First, the Government argues that its termination of MPP is not a "final agency action" under the APA. 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. And for an agency action to qualify as final, the action must (1) mark[] the consummation of the agency's decisionmaking process," and (2) either determine "rights or obligations" or produce "legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Government does not contest that the June 1 Memorandum was the consummation of the decisionmaking process. As for the second prong, the Government simply asserts the Memorandum is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Stay Mot. at 10–11. This argument ignores Circuit precedent establishing that a "policy statement" can nonetheless be "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919–20 (5th Cir. 1993). It also ignores the principle that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). As the district court ably explained, the Memorandum withdrew DHS officers' previously existing discretion when it directed "DHS personnel,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003395

effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." D. Ct. Op. at 27 (emphasis omitted) (quoting AR.7).

b.

Second, the Government argues that the decision to terminate MPP is unreviewable under 5 U.S.C. § 701(a). Stay Mot. at 8. The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). And to vindicate that presumption, the Supreme Court has read § 701(a)(2) "quite narrowly." *Id.* (quotation omitted). The presumption can be overcome "by a showing that the relevant statute precludes review, § 701(a)(1), or that the agency action is committed to agency discretion by law, § 701(a)(2)." *Id.* (quotations and alterations omitted). Here, the Government has tried but failed to make both showings.

The Government argues that 8 U.S.C. § 1225(b)(2)(C) is a "statute[] [that] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

That provision does confer the discretion to choose among various detention and non-detention options for aliens placed in § 1229a removal proceedings. But the question presented in the States' complaint is *not* whether a particular alien is subject to detention in any particular set of circumstances. The States are instead challenging DHS's June 1 decision to rescind MPP—

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003396

which is a government program that creates rules and procedures for *entire classes* of aliens. It remains true—with or without MPP—that DHS has discretion to make individualized detention and non-detention decisions in accordance with the strictures of § 1225. What DHS cannot do, the States allege, is rescind the MPP program in a way that is arbitrary, capricious, and contrary to law. DHS cites nothing to suggest that latter decision is committed to agency discretion. In fact, cases like *Regents* prove it is not. *See* 140 S. Ct. at 1905–06 (decision to rescind DACA not committed to agency discretion); *Texas*, 809 F.3d at 168–69 (decision to implement DAPA not committed to agency discretion).

The Government's argument that the decision to rescind MPP is "committed to agency discretion by law" fails for similar reasons. 5 U.S.C. § 701(a)(2); *see Regents*, 140 S. Ct. at 1905. This form of non-reviewability occurs where a statute is "drawn so that it furnishes no meaningful standard by which to judge the [agency's] action." *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2568 (2019); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding a decision is committed to agency discretion when there is "no law to apply" (quotation omitted)). The Government argues that § 1225 provides no standard by which to evaluate DHS's action in this case. Stay Mot. at 8–9.

Once again, Supreme Court precedent undercuts the Government's argument. Even a statute that "leave[s] much to [an agency's] discretion" does not necessarily "leave [that] discretion unbounded." *Dep't of Commerce*, 139 S. Ct. at 2567–68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)). So too here. Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003397

discretion extends beyond the bounds of individualized, case-by-case determinations to begin with. And like the statute in *Department of Commerce*, which included provisions that meaningfully restrained the Secretary of Commerce, *see* 139 S. Ct. at 2568–69, § 1225 includes provisions restraining the DHS in this case. *See* § 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal, but without a credible fear of persecution, "shall be detained pending a final determination of credible fear of persecution"); § 1225(b)(1)(B)(ii) (an alien with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); § 1225(b)(2)(C) (Attorney General "may return" an alien not subject to expedited removal as an alternative to detention). We conclude that this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

c.

The Government's final justiciability argument is that the MPP-termination decision is nothing more than a non-enforcement decision, unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). This argument fails for two reasons. The first is that the termination of MPP is more than a non-enforcement policy, just like the DACA program at issue in *Regents* and the DAPA program at issue in *Texas*. As the district court explained, the termination of MPP will necessarily lead to the release and parole of aliens into the United States. And that will "create affirmative benefits for aliens such as work authorization." D. Ct. Op. at 31; *see also Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003398

thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" (quoting *Chaney*, 470 U.S. at 832)).

Second and independently, the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure. It is precisely because MPP was a government program—and *much more* than a non-enforcement decision—that the Government now claims that it will be difficult to resume it. *See infra* Part III. And the Government cites nothing to suggest that the elimination of a such a program can be dismissed as mere "non-enforcement." The Government therefore has failed to make a strong showing that the States' claims are non-justiciable.

B.

The Government next argues that it is likely to succeed on appeal because the June 1 Memorandum accords with federal law. The district court held otherwise on two independent grounds. First, the district court determined that the termination of MPP violated the APA because the June 1 Memorandum was arbitrary and capricious. D. Ct. Op. at 34–42. Second, the district court concluded that in "these particular circumstances," the termination violated 8 U.S.C. § 1225. *Id.* at 42–44 (emphasis removed). We hold the Government has not come close to showing that it is likely to succeed in challenging either conclusion, let alone both.

1.

First, the APA. The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "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). While applying this "deferential" standard, we must not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003399

"substitute" our "own policy judgment for that of the agency." *Id.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[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'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). "Put simply, we must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). This review "is not toothless." *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1013 (5th Cir. 2019). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

The Government has not shown a strong chance of success on appeal. That is because when terminating MPP in the June 1 Memorandum, the Secretary failed to consider several "relevant factors" and "'important aspect[s] of the problem.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S. Ct. at 1910. These include (a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications. These four omissions likely doom the Government's appeal. The Governments counterarguments (e) are unpersuasive.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003400

a.

DHS "failed to address whether there was 'legitimate reliance' on" MPP. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States. The closest the June 1 Memorandum gets is a reference to "the impact [terminating MPP] could have on border management and border communities." AR5. But the Memorandum makes clear that "border communities" do not include border states. *See id.* ("referring only to "nongovernmental organizations and local officials"). And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests.

In response, the Government concedes that it failed to consider the States' reliance interests. But it argues that is irrelevant because "the States have no cognizable reliance interest in a *discretionary* program." Stay Mot. at 18. We reject that argument for several reasons.

Most importantly, the Government's contention is squarely foreclosed by *Regents*. There, the Supreme Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program. 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests, including in particular those of the states. As the Supreme Court explained, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). Those reliance interests included states' interests. *See id.* at 1914 (highlighting assertions that "[s]tates and local governments could lose $1.25 billion in tax revenue each year"). So if the termination of DACA—a discretionary, immigration program—must consider states' "potential

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003401

reliance interests," then so does termination of MPP. *Id.* at 1913. That is particularly true here because the district court found as a matter of fact—and the Government does not contest—that states like Texas face fiscal harm from the termination of MPP. *See* D. Ct. Op. at 18–20.

The district court also found that the "termination of MPP has and will continue to increase the number of aliens being released into the United States." *Id.* at 17. The Supreme Court has recognized that border states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It therefore follows that a "potential reliance interest" that DHS must consider includes Texas.

The DHS-Texas Agreement reinforces the Government's awareness of the State's reliance interests. In that Agreement, DHS stipulated:

- "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." Compl., Ex. B at 1.
- "The 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." *Id.*
- "[A]n aggrieved party will be irreparably damaged." *Id.* at 5.

The Agreement further states that it "establishes a binding and enforceable commitment between DHS and Texas." *Id.* at 2. Texas therefore could reasonably rely on the Agreement. And Texas did in fact rely on the Agreement by including DHS's breach as a cause of action in its complaint—filed months before the June 1 Memorandum. And then—despite these reliance interests and despite being on notice of the Agreement from the States' complaint—the June 1 Memorandum said not one word about the Agreement. A "reasonable and reasonably explained" decision would have

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003402

said *something*. *Prometheus*, 141 S. Ct. at 1158. That is why this "omission alone [likely] renders [the Secretary's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.[4]

b.

The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits. In its October 2019 Assessment of MPP, DHS found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* These benefits, DHS emphasized, were a "core component" or "cornerstone" of the agency's prior immigration policy. *Id.* at 12.

Nonetheless, the June 1 Memorandum did not expressly mention, let alone meaningfully discuss, DHS's prior factual findings. Instead, the Secretary changed policies based on his own findings that contradict DHS's October 2019 findings. But an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*,

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[4] As the D.C. Circuit has emphasized in a different APA context, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (Sentelle, C.J.) (quotation omitted). We do not suggest that DHS needed notice-and-comment rulemaking to rescind MPP. But it did need to consider "relevant factors" to that rescission decision. *Id.* And you might reasonably think that one "relevant factor[]" to that decision was DHS's pledge "to consult Texas and consider its views before taking any action, adopting or modify[ing] a policy or procedure, or making any decision that" affects MPP. Compl., Ex. B at 2. Perhaps DHS has a good reason for its action. But it is likely arbitrary and capricious for DHS not even to acknowledge its agreement—let alone do anything to consult Texas or consider its views.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003403

556 U.S. 502, 515 (2009). The Secretary did not provide the required "more detailed justification." *Id.* This further indicates that the termination of MPP was arbitrary and capricious.

c.

The June 1 Memorandum also insufficiently addressed alternatives to terminating MPP. "[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). While considering alternatives, DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. As explained above, DHS did not adequately assess reliance interests. So it would be impossible for the June 1 Memorandum to properly weigh the relevant interests against competing policy concerns while considering alternatives.

The June 1 Memorandum offers a single conclusory sentence addressing potential modifications to MPP: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR.5. But "belief" that a "total redesign" was required, *id.*, is no substitute for a "reasonable and reasonably explained" decision. *Prometheus*, 141 S. Ct. at 1158.

Of course, "DHS was not required . . . to consider *all* policy alternatives in reaching [its] decision," and the agency has "considerable flexibility" to "wind-down" a program. *Regents*, 140 S. Ct. at 1914 (emphasis added) (quotation omitted). But the problem is that the Secretary failed to mention *any* modification to MPP as a possible alternative, even though "the alternatives . . . are within the ambit of the existing policy." *Id.* at 1913

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003404

(quotations omitted). And merely stating that an alternative was considered is not enough to show reasoned analysis. *Cf. United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)).

The Government's principal counterargument is that DHS considered an alternative *outside* "the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. Specifically, the June 1 Memorandum pointed to a "Dedicated Docket" program designed to provide counsel to aliens in removal proceedings. AR.4–5 & n.6; *see* Stay Mot. at 16; Reply at 7. This argument is unpersuasive for at least two reasons. First, by the Government's own admission, the "Dedicated Docket" is outside the ambit of MPP—and hence it does not count as a reasoned consideration of alternatives "*within* the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (emphasis added). And second, neither the June 1 Memorandum nor the Government in its stay motion explains why MPP and the "Dedicated Docket" are mutually exclusive.

d.

The June 1 Memorandum also failed to consider the legal implications of terminating the policy. After the Government suspended MPP—but before it rescinded the program—Texas filed this lawsuit. In its original complaint, and in its initial motion for preliminary injunction, Texas argued that the suspension of MPP violated § 1225. *See* Compl. at 36–38; Prelim. Inj. Mot., ECF No. 30. About a month and a half later, the Secretary issued the memorandum terminating MPP. So the government was on notice of the legal implications. Yet in the memorandum, the Secretary does not mention the lawfulness concerns involving § 1225—even though, the "natural response" to this "newly identified problem" would be to consider the problem. *Regents*, 140 S. Ct. at 1916. This further indicates that "the process

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003405

by which" the Secretary reached that result was neither "logical" nor "rational." *Michigan*, 576 U.S. at 750.

e.

The Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum's omissions. None is persuasive.

The Government repeatedly argues that DHS's statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems. *See* Stay Mot. at 16. The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements . . . ."); *United Techs.*, 601 F.3d at 562 ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). This well-established principle makes sense. After all:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under Fed. R. Evid. 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003406

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted).

The Government also points to the June 1 Memorandum's observations on MPP's shortcomings. *See* Stay Mot. at 16–17. Even if creditable, these observations cannot justify the other omissions discussed above. But in any event, many of those observations are neither "logical" nor "rational." *Michigan*, 576 U.S. at 750. Take DHS's termination justification based on *in absentia* removal orders. DHS observed that "the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions* for me about the design and operation of the program." AR.4 (emphasis added). The district court found that "[t]he federal government's data shows similarly high rates of *in absentia* removals *prior* to implementation of MPP." D. Ct. Op. at 40. The Government has not said one word to suggest the district court's factual finding was clearly erroneous.[5] We therefore cannot conclude that the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted). And even on the Government's own terms—considering *only* half the statistics and ignoring the district court's factual finding—the June 1 Memorandum only said that *in absentia* statistics "raise[d] questions for [DHS] about the design and operation of the

[5] In its reply brief, the Government argues that it need not have commissioned an "in-depth empirical analysis" of the *in absentia* statistics before rescinding MPP. Reply at 9. Of course that is true. But it is equally true that the Government cannot cherry-pick only the statistics it likes in the administrative record. Nor can the Government fail to address statistics that already exist in that record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003407

program." AR.4. But the process required by the APA requires agencies to *seek answers* and reasonably explain the outcome of that effort, including its conclusions.

The June 1 Memorandum places much weight on COVID-19. According to the Memorandum, the pandemic "compounded" "challenges faced by MPP" when "immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021." AR.4. But DHS issued its memorandum terminating MPP at least one month *after* courts reopened. As the district court explained: "*Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic." D. Ct. Op. at 41. The Government challenges this conclusion on the ground that "infrastructure used for MPP remains shuttered." Stay Mot. at 19 n.4. But the Government provides no indication that the facilities are not maintained or are shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP in January 2021.

2.

In addition to the APA, the district court also relied on 8 U.S.C. § 1225. The Government claims that the district court determined that "the Secretary is *required* to return any noncitizen he fails to detain" and that the district court's "core legal analysis" is that DHS has "a binary choice between detention or return to Mexico for noncitizens arriving from Mexico." Stay Mot. at 11–13. In essence, the Government characterizes the district court's decision and injunction as removing the Government's ability to use its discretion under 8 U.S.C. §§ 1182(d)(5)(A) and 1226. But as we explain in Part III, *infra*, the Government has mischaracterized the district

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003408

court's order. This matters because all of the Government's § 1225 arguments hinge on an incorrect premise.

Therefore, we cannot conclude that the Government is likely to succeed on either its APA arguments or its § 1225 arguments—let alone that the Government is likely to succeed on both. The Government therefore has not come close to a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426.

III.

The Government also has not shown that it will be irreparably injured absent a stay pending appeal. The Government's arguments are largely built on two strawmen. We consider and reject those before turning to the Government's other arguments.

First, the Government complains that it will be irreparably harmed absent a stay because DHS is incapable of reinstating MPP "in a matter of days." Stay Mot. at 21; *see also* Decl. of David Shahoulian ¶ 16 (Aug. 16, 2021) (arguing DHS cannot immediately "reestablish the entire infrastructure upon which [MPP] was built"). This is a strawman. The district court did not order the Government to restore MPP's infrastructure overnight. It ordered that, once the injunction takes effect on August 21, DHS must "enforce and implement MPP *in good faith*." D. Ct. Op. at 52. DHS does not argue that good faith is an unreasonably high standard to meet.

Second, the Government asserts it will be irreparably injured because the injunction obligates DHS to detain "every single person described in 8 U.S.C. § 1225," which DHS cannot do because it lacks "sufficient detention capacity." Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021). This is a second strawman. The injunction does not require the Government to detain every alien subject to § 1225. Nor does it order the Government to "build or obtain" additional detention facilities. Stay Mot. at 21. Instead, it requires

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003409

the Government to "enforce and implement MPP *in good faith . . . until such a time* as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." D. Ct. Op. at 52 (second emphasis added).

And far from ordering the Government to detain "every single person described in 8 U.S.C. § 1225," Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021), the district court specifically acknowledged that the Government has other options. Under § 1225(b)(2)(A), which provides the statutory authority for MPP, an alien arriving on land from a contiguous foreign territory can be returned to that territory. *See* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1182(d)(5)(A), DHS can parole an alien into the United States "on a *case-by-case basis* for urgent humanitarian reasons or significant public benefit." (Emphasis added); *see* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1226, DHS can release on "bond" or "conditional parole" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed." *See also* Stay Mot. at 12; D. Ct. Op. at 51 (noting this discretion). Last but not least, of course, the Government can choose to detain an alien in accordance with § 1225. *See* D. Ct. Op. at 43 (noting this discretion).

What the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.

Third and finally, we turn to the Government's non-strawmen arguments for its irreparable injuries. Most of these are self-inflicted and therefore do not count. *See* 11A CHARLES ALAN WRIGHT, ET AL.,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003410

FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). For example, the Government notes that "DHS has been in the process of unwinding MPP and its infrastructure for months," such that restarting the program now would be difficult. Stay Mot. at 21. But as the district court noted, "Texas filed suit challenging the suspension of enrollments in MPP . . . nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." D. Ct. Op. at 47. Therefore, DHS could have avoided this problem by waiting to unwind MPP until this litigation was resolved. The self-inflicted nature of the government's asserted harm "'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993)); *accord Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Before the district court, the Government also suggested that it began unwinding MPP four or more months *before* the June 1 Memorandum. *See* D. Ct. Op. at 48. That understandably would make it harder for DHS to restart MPP on Saturday. But it also makes DHS's legal position dramatically weaker. It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later. *See, e.g.*, *Regents*, 140 S. Ct. at 1908–10. Insofar as DHS concedes that its June 1 Memorandum is a *post hoc* rationalization for a decision that it made many months earlier, it has conceded that the June 1 Memorandum is arbitrary, capricious, and not a good faith explanation for its decision. Such inequitable conduct is "sufficient to deny" DHS's request for an equitable stay pending

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003411

appeal. *See In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26–*27 (Bankr. C.D. Cal. Nov. 15, 2013).

The Government also asserts that reinstating MPP will cause harm because "DHS cannot restart MPP without significant cooperation with Mexico," and the injunction implicates "delicate and ongoing discussions with Mexico." Stay Mot. at 21. There are at least four problems with that. First, as the district court noted, DHS created MPP unilaterally and without any previous agreement with Mexico. *See* D. Ct. Op. at 49 & n.15. DHS does not explain why it cannot likewise restart MPP unilaterally. Second, the Government does not point to any evidence that Mexico has withdrawn its support for MPP. *See* AR.152–53 (Mexico's December 20, 2018 statement of support). Third, the Government "'could have avoided' any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." D. Ct. Op. at 47 (quoting *Texas*, 809 F.3d at 187). Insofar as the Government failed to do that, again, its injury is self-inflicted. Fourth, even assuming Mexico's support is required, assuming Mexico has withdrawn its support, and assuming Mexico will not support a new MPP, the injunction *still* does not irreparably harm the Government. The injunction only requires good faith on the part of the United States—if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order, so long as it also adheres to the rest of the statutory requirements.

Finally, because the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*. Even if the Government were correct that long-term compliance with the district court's injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court's requirement of good faith

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003412

while the appeal proceeds. Therefore, the Government has failed to demonstrate that it will be irreparably injured absent a stay pending appeal.

IV.

The final two *Nken* factors also do not warrant a stay. *See Nken*, 556 U.S. at 434.

The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. *See* D. Ct. Op. at 17 ("The termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States and has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri."). We agree. *See supra* Part II.A.1 (standing). A stay "would enable" aliens released into the interior "to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits." *Texas*, 787 F.3d at 768.

Likewise, the "public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994). Here, the Government has failed to carry its burden to show that its conduct comports with federal law. And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers. All the district court's injunction requires of the Government is that it act in accordance with the INA. And in all events, "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect" principles of "separation of powers and federalism." *Texas*, 787 F.3d at 768.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003413

The DHS-Texas Agreement also suggests the public interest counsels against issuing a stay. That Agreement expressly acknowledged that if DHS failed to comply with the Agreement's terms, Texas would "be irreparably damaged" and would "not have an adequate remedy at law." Compl., Ex. B at 4. The Agreement remained binding until August 1, 2021, and the parties agree DHS violated its terms. *See* D. Ct. Op. at 14 ("The parties agree DHS did not follow the[] procedures" required by the Agreement.). The district court concluded that the expiration of the Agreement mooted Texas's claim under it. *See id.* at 44. As noted in Part II above, however, the States' likelihood of success on the merits of their APA claims means that DHS will have to consider all relevant factors before attempting to rescind MPP—including its effects on the States. The public interest plainly lies in not allowing DHS to circumvent those federalism concerns.

V.

Finally, the Government argues a stay is warranted because the district court should have remanded without vacating the June 1 Memorandum or issuing an injunction. Stay Mot. at 22; *see also* Reply at 12. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). But it is unclear how DHS can substantiate its decision on remand. Neither in its opening stay motion nor in its reply does the Government suggest how it can. *See generally* Stay Mot. at 22–23; Reply at 12. And Supreme Court precedent suggests that any later memorandum on remand elaborating on the June 1 Memorandum would be irrelevant to an arbitrary-and-capricious analysis because it is a *post hoc* rationalization. *See Regents*, 140 S. Ct. at 1907–09. So at this stage, without any argument whatsoever to the contrary, it appears that DHS would have to issue "a *new* rule implementing a *new* policy" that

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003414

"compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (emphases added).

Vacatur, by contrast, would not cause "disruptive consequences". *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (also considering "the disruptive consequences of vacatur" (internal quotation marks omitted)). The Government makes no argument materially different from its irreparable-injury argument. So we reject the Government's arguments here for the same reasons we rejected them in Part III, *supra*.

* * *

The Government has failed to make the requisite showing for all four *Nken* factors. The Government's motion for a stay pending appeal is therefore DENIED. The Government's appeal is hereby EXPEDITED for consideration before the next available oral argument panel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003415

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2021
Lyle W. Cayce
Clerk

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; 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; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

AMERICAN OVERSIGHT

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

This case concerns the Migrant Protection Protocols ("MPP") created by the Secretary of the Department of Homeland Security on December 20, 2018, and purportedly rescinded by DHS in a memorandum on June 1, 2021 ("June 1 Memorandum").[1] After a full bench trial and 53 pages of findings of fact and conclusions of law, the district court concluded that DHS's purported rescission of MPP violated, *inter alia*, the Administrative Procedure Act ("APA"). DHS seeks a stay pending appeal. After carefully considering full briefing from the parties, we hold DHS failed to satisfy the four stay factors. *See Nken v. Holder*, 556 U.S. 418 (2009). The motion is denied.

I.

A.

On December 20, 2018, the Trump Administration implemented MPP in response to an immigration surge at the southern border. D. Ct. Op. at 7. The statutory authority for MPP is found in 8 U.S.C. § 1225(b)(2)(C), which authorizes the Government to return certain third-country nationals arriving in the United States to Mexico or Canada for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* at 8. Also on December 20, 2018, the United States obtained Mexico's agreement to permit entry of MPP enrollees. *Id.* The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum

[1] We refer to the Secretary's actions as those of "DHS" unless otherwise stated.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003417

application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* (quotation omitted).

In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Id.* (citing AR.155–56, AR.684). In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Id.* at 9 (citing AR.165–70). By December 31, 2020, DHS had enrolled 68,039 aliens in MPP. *Id.* at 12 (citing AR.555).

DHS and Texas entered into a Memorandum of Understanding (the "Agreement"), which the parties finalized on January 8, 2021. *Id.* at 13 (citing Compl., Ex. B at 8). The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* (quoting Compl., Ex. B at 2). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at 13–14 (citing Compl., Ex. B at 2). DHS also agreed to "'[p]rovide Texas with 180 days' written notice . . . of any proposed action' subject to the consultation requirement," *id.* at 14 (quoting Compl., Ex. B at 3), so that Texas would have an opportunity to comment on the proposal. The Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject Texas's input, "provide a detailed written explanation" of its reasons for doing so. *Id.* (emphasis omitted) (quoting Compl., Ex. B at 3).

On Inauguration Day, the Biden Administration announced that it would suspend further enrollments in MPP. The Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003418

enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.* at 15 (quoting AR.581).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Id.* at 14. Because it believed that the letter did not comply with the Agreement's required procedures, Texas interpreted the letter "as a notice of intent to terminate" the Agreement. *Id.* (citing ECF No. 53 at 21).

On April 13, 2021, Texas and Missouri (the "States") sued, challenging the temporary suspension of MPP. *Id.* at 1 (citing ECF No. 1). The States alleged that DHS's January 20 Memorandum violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See id.* at 2 (citing ECF No. 1 at 4; ECF No. 45). On May 14, the States moved for a preliminary injunction that would enjoin the Government from enforcing and implementing the January 20 Memorandum. Prelim. Inj. Mot., ECF No. 30.

On June 1, before briefing on the preliminary injunction had concluded, DHS issued a new memorandum permanently terminating MPP. D. Ct. Op. at 2. The district court concluded that the June 1 Memorandum mooted the States' complaint, and the court allowed the States to amend their complaint and file a new preliminary injunction motion. *Id.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3.

B.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *See* D. Ct. Op. at 1. The district court made many findings of fact that are relevant here. Among other things,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003419

the district court found that MPP had significant benefits before DHS purported to rescind it. For example, DHS's October 2019 Assessment of MPP concluded that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. And the court noted that DHS also found MPP effective in addressing the prior "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* The court found that this caused a significant decrease in immigration-enforcement encounters along the southern border. *Id.* And more directly, the court found that caused a decrease in "the number of aliens released into the interior of the United States for the duration of their U.S. removal proceedings." *Id.* at 11 (citing AR.554). These benefits, DHS emphasized, were a "cornerstone" of the agency's prior immigration policy. D. Ct. Op. at 12.

The court made specific (and largely uncontested) factual findings that "[t]he termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States," and that this increase "has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri." *Id.* at 17. On the basis of its factual findings, the district court determined that the States had Article III standing, that the court had jurisdiction to review the agency action, and that the States were within the zone of interests of the INA. *Id.* at 21–34. The court then concluded that DHS's termination of MPP was unlawful under the APA because the action was arbitrary and capricious and contrary to the INA. *Id.* at 34–44. Based on those conclusions, the district court "permanently enjoined and restrained [DHS] from implementing or enforcing the June 1 Memorandum" and ordered DHS "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003420

all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources." *Id.* at 52–53 (emphases omitted).

DHS noticed an appeal. On August 17, 2021, the Government requested an emergency stay under Federal Rule of Appellate Procedure 8. The States opposed that request on August 18. On August 19, the Government filed a reply. The Government requested that we rule the same day, August 19. In considering the Government's request, we must consider four factors: (1) whether the Government makes a strong showing that it is likely to succeed on the merits; (2) whether the Government will be irreparably injured in the absence of a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies. *See Nken*, 556 U.S. at 426.

II.

We begin with whether the Government has made a strong showing that it is likely to succeed on the merits. The Government makes two merits arguments: (A) the case is not justiciable, and (B) DHS's rescission of MPP did not violate federal law. The Government is likely wrong on both.

A.

The Government first argues that it is likely to succeed on the merits because two justiciability doctrines—standing and non-reviewability—operate as insuperable obstacles to the States' suit. We consider and reject each argument in turn.

1.

First, the States' standing. To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003421

Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "Only one of the [appellants] needs to have standing to permit us to consider the [complaint]."[2] *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord Nat'l Rife Ass'n Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). Because the Government is seeking a stay, we must ask whether it has made a strong showing that the States lack standing. *See Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020).

After a bench trial, we review the district court's factual determinations for clear error. *See, e.g.*, *Texas*, 809 F.3d at 171–72 (reviewing a factual finding for clear error); *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)). And any argument not raised on appeal (including a challenge to a district court's factual finding) is forfeited. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) ("Many of the 'errors' cited by the defendants are unbriefed. These issues have been [forfeited]."); *cf.* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

We begin with (a) the district court's uncontested factual findings. Then we hold that the Government fails to make a strong showing that it is likely to succeed on appeal because it has not shown that the States lack (b) an injury-in-fact that is (c) traceable and (d) redressable. Finally, any doubt

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[2] For this reason, we focus on Texas's standing. We note, however, that Missouri brings largely similar arguments with respect to driver's-license, educational, healthcare, and other costs.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003422

about the States' standing is resolved by (e) the special solicitude guaranteed to sovereign States in our federal system.

a.

The district court found eight facts central to the standing issue. These include:

1. The court found that because of MPP's termination, the Government has been "forced to release and parole aliens into the United States because [the Government] simply [does] not have the resources to detain aliens as mandated by statute." D. Ct. Op. at 17; *see also id.* at 18 (finding that Texas's "border state" status means some of those aliens have ended up in Texas).
2. The court found that DHS previously acknowledged that "MPP implementation contributed to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Id.* at 17 (quotation and alteration omitted).
3. The court found that "the termination of MPP has contributed to the current border surge." *Id.*
4. The court found that "[s]ince MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." *Id.*; *see also id.* at 18 n.7 (noting "the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS," including Shahoulian's statement that "[b]ased on current trends, the Department expects that total encounters this fiscal year are likely to be the highest ever recorded" (emphasis omitted)).
5. The court found that many "aliens present in Texas because of MPP's termination would apply for driver's licenses," the granting of which would impose a cost on Texas. *Id.* at 19.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003423

6. The court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States," and that (according to state estimates) Texas will expend an average of $9,216 per additional student in the 2021 school year. *Id.* at 19.
7. The court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas," imposing a cost on the state. D. Ct. Op. at 19–20 (citing AR.555, AR.587–88).
8. Finally, the court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and [some] will commit crimes in Texas," imposing costs on the state's correctional apparatus. *Id.* at 20.

The Government does not challenge *any* of these findings.[3] But even if it did, we would not find any of them clearly erroneous in the light of the record as a whole. *See, e.g.*, *United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) ("[A]s long as the determination is plausible in light of the record as a whole, clear error does not exist.").

b.

Texas's injuries are actual and imminent. As just described, MPP's termination has caused an increase in immigration into Texas. And as

[3] On one reading of the Government's brief, it does contest the fifth finding. *See* Stay Mot. at 7 (discussing "speculation about an increase in the number of aliens released and paroled who will seek driver's licenses" (quotation omitted)). But in any case, neither our precedent nor the district court's record allows us to conclude the Government is likely to show the finding is clearly erroneous. *See Texas*, 809 F.3d at 156 (making a similar inference about driver's license applications).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003424

discussed at length in *Texas v. United States*, Texas law requires the issuance of a license to any qualified person—including noncitizens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155–56 (alteration in original) (quoting TEX. TRANSP. CODE § 521.142(a)); *see also id.* (discussing other Texas requirements for a driver's license). Of course, unlike in the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the challenged action here does not *ipso facto* guarantee that a given alien will satisfy that requirement. Yet the district court's uncontested findings of fact likely compel the conclusion that MPP's termination has led to an increase in the number of aliens in Texas, many of whom will apply for driver's licenses. And the district court found that Texas incurs a cost every time it *inquires* into whether an alien satisfies the requirements for a license—even if the person does not in fact qualify for a license. D. Ct. Op. at 19 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* Decl. of Sheri Gipson, Chief of the Texas Department of Public Safety Driver License Division, ¶ 8 ("DPS estimates that for an additional 10,000 driver['s] license customers *seeking* a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." (emphasis added)). So Texas has shown imminent injury in this case. *See Texas*, 809 F.3d at 156 (reaching the same conclusion on similar facts). Driver's licenses aside, the district court's unchallenged factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.

The Government's counterargument (limited to the driver's-license theory) is that the district court's analysis was "primarily based on speculation about an increase in the number of aliens released and paroled who will seek driver's licenses." Stay Mot. at 7 (quotation omitted). But the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003425

Government has done nothing to show that district court's findings of fact about the increased number of aliens were clearly erroneous. And it is grounded in our precedent. *Texas*, 809 F.3d at 156 ("[T]here is little doubt that many [DAPA beneficiaries] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

c.

Texas's injury is also traceable to the Government's termination of MPP. The district court's uncontested factual findings establish as much: MPP's termination has caused an increase in unlawful immigration into Texas. Many new immigrants are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. Texas*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients—"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible."). Likewise, at least some MPP-caused immigrants will certainly seek educational and healthcare services from the state. And the States have incurred and will continue to incur costs associated with the border crisis, at least part of which the district court found is traceable to rescinding MPP. The causal chain is easy to see, and the Government does not meaningfully contest this point. *See also Massachusetts v. EPA*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would remedy Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico. The Government gives two arguments that it says undercut redressability. First,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003426

the Government contends, an injunction would provide no redress because immigration officers under MPP would have discretion about whether to return any given immigrant to Mexico. Stay Mot. at 8. This argument ignores the fact that, during MPP's operative period, immigration agents did in fact order over 50,000 aliens back to Mexico from the Texas border. ECF 11 at 2. The Government offers no basis to conclude that a renewed MPP would have any different impact.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. Stay Mot. at 8. This argument fails because for at least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Further, Mexico issued a statement in 2018 consenting to admit aliens excluded from the United States under MPP—and nothing in the record suggests Mexico has since retracted that consent. *See* AR.153 (Secretaría do Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018)).

e.

To eliminate any doubt as to standing, we emphasize that the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520; *see also Texas*, 809 F.3d at 151 (beginning with the special-solicitude question). Such special solicitude has two requirements: (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*, 809 F.3d at 151–52 (citing *Massachusetts*, 549 U.S. at 516–

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003427

20). In both *Massachusetts* and *Texas*, the first prong was satisfied where a State challenged an agency action as invalid under a statute. 549 U.S. at 516–17 (Clean Air Act); 809 F.3d at 152–53 (APA). And in both cases, the second prong was satisfied where a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 520; *see Texas*, 809 F.3d at 152–54. Particularly relevant here is *Texas*, where this Court held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

Texas is indeed entitled to special solicitude. First, just as in the DAPA suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153–54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry.

That solicitude means redressability is easier to establish for certain state litigants than for other litigants—and this should remove any lingering doubt as to that prong. *See Massachusetts*, 549 U.S. at 517–18 (holding a State "can assert [its] right[s] without meeting all the normal standards for redressability and immediacy" (quotations and citations omitted)). Texas would be able to establish redressability without this special solicitude—but

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003428

it reinforces our conclusion that the States have standing and that the Government has failed to make a strong showing to the contrary.

2.

The Government next argues this suit is non-justiciable under the APA. The Government makes three arguments on this score. None is persuasive.

a.

First, the Government argues that its termination of MPP is not a "final agency action" under the APA. 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. And for an agency action to qualify as final, the action must (1) mark[] the consummation of the agency's decisionmaking process," and (2) either determine "rights or obligations" or produce "legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Government does not contest that the June 1 Memorandum was the consummation of the decisionmaking process. As for the second prong, the Government simply asserts the Memorandum is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Stay Mot. at 10–11. This argument ignores Circuit precedent establishing that a "policy statement" can nonetheless be "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919–20 (5th Cir. 1993). It also ignores the principle that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). As the district court ably explained, the Memorandum withdrew DHS officers' previously existing discretion when it directed "DHS personnel,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003429

effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." D. Ct. Op. at 27 (emphasis omitted) (quoting AR.7).

b.

Second, the Government argues that the decision to terminate MPP is unreviewable under 5 U.S.C. § 701(a). Stay Mot. at 8. The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). And to vindicate that presumption, the Supreme Court has read § 701(a)(2) "quite narrowly." *Id.* (quotation omitted). The presumption can be overcome "by a showing that the relevant statute precludes review, § 701(a)(1), or that the agency action is committed to agency discretion by law, § 701(a)(2)." *Id.* (quotations and alterations omitted). Here, the Government has tried but failed to make both showings.

The Government argues that 8 U.S.C. § 1225(b)(2)(C) is a "statute[] [that] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

That provision does confer the discretion to choose among various detention and non-detention options for aliens placed in § 1229a removal proceedings. But the question presented in the States' complaint is *not* whether a particular alien is subject to detention in any particular set of circumstances. The States are instead challenging DHS's June 1 decision to rescind MPP—

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003430

which is a government program that creates rules and procedures for *entire classes* of aliens. It remains true—with or without MPP—that DHS has discretion to make individualized detention and non-detention decisions in accordance with the strictures of § 1225. What DHS cannot do, the States allege, is rescind the MPP program in a way that is arbitrary, capricious, and contrary to law. DHS cites nothing to suggest that latter decision is committed to agency discretion. In fact, cases like *Regents* prove it is not. *See* 140 S. Ct. at 1905–06 (decision to rescind DACA not committed to agency discretion); *Texas*, 809 F.3d at 168–69 (decision to implement DAPA not committed to agency discretion).

The Government's argument that the decision to rescind MPP is "committed to agency discretion by law" fails for similar reasons. 5 U.S.C. § 701(a)(2); *see Regents*, 140 S. Ct. at 1905. This form of non-reviewability occurs where a statute is "drawn so that it furnishes no meaningful standard by which to judge the [agency's] action." *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2568 (2019); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding a decision is committed to agency discretion when there is "no law to apply" (quotation omitted)). The Government argues that § 1225 provides no standard by which to evaluate DHS's action in this case. Stay Mot. at 8–9.

Once again, Supreme Court precedent undercuts the Government's argument. Even a statute that "leave[s] much to [an agency's] discretion" does not necessarily "leave [that] discretion unbounded." *Dep't of Commerce*, 139 S. Ct. at 2567–68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)). So too here. Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003431

discretion extends beyond the bounds of individualized, case-by-case determinations to begin with. And like the statute in *Department of Commerce*, which included provisions that meaningfully restrained the Secretary of Commerce, *see* 139 S. Ct. at 2568–69, § 1225 includes provisions restraining the DHS in this case. *See* § 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal, but without a credible fear of persecution, "shall be detained pending a final determination of credible fear of persecution"); § 1225(b)(1)(B)(ii) (an alien with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); § 1225(b)(2)(C) (Attorney General "may return" an alien not subject to expedited removal as an alternative to detention). We conclude that this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

c.

The Government's final justiciability argument is that the MPP-termination decision is nothing more than a non-enforcement decision, unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). This argument fails for two reasons. The first is that the termination of MPP is more than a non-enforcement policy, just like the DACA program at issue in *Regents* and the DAPA program at issue in *Texas*. As the district court explained, the termination of MPP will necessarily lead to the release and parole of aliens into the United States. And that will "create affirmative benefits for aliens such as work authorization." D. Ct. Op. at 31; *see also Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003432

thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" (quoting *Chaney*, 470 U.S. at 832)).

Second and independently, the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure. It is precisely because MPP was a government program—and *much more* than a non-enforcement decision—that the Government now claims that it will be difficult to resume it. *See infra* Part III. And the Government cites nothing to suggest that the elimination of a such a program can be dismissed as mere "non-enforcement." The Government therefore has failed to make a strong showing that the States' claims are non-justiciable.

B.

The Government next argues that it is likely to succeed on appeal because the June 1 Memorandum accords with federal law. The district court held otherwise on two independent grounds. First, the district court determined that the termination of MPP violated the APA because the June 1 Memorandum was arbitrary and capricious. D. Ct. Op. at 34–42. Second, the district court concluded that in "these particular circumstances," the termination violated 8 U.S.C. § 1225. *Id.* at 42–44 (emphasis removed). We hold the Government has not come close to showing that it is likely to succeed in challenging either conclusion, let alone both.

1.

First, the APA. The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "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). While applying this "deferential" standard, we must not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003433

"substitute" our "own policy judgment for that of the agency." *Id.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[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'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). "Put simply, we must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). This review "is not toothless." *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1013 (5th Cir. 2019). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

The Government has not shown a strong chance of success on appeal. That is because when terminating MPP in the June 1 Memorandum, the Secretary failed to consider several "relevant factors" and "'important aspect[s] of the problem.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S. Ct. at 1910. These include (a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications. These four omissions likely doom the Government's appeal. The Governments counterarguments (e) are unpersuasive.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003434

a.

DHS "failed to address whether there was 'legitimate reliance' on" MPP. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States. The closest the June 1 Memorandum gets is a reference to "the impact [terminating MPP] could have on border management and border communities." AR5. But the Memorandum makes clear that "border communities" do not include border states. *See id.* ("referring only to "nongovernmental organizations and local officials"). And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests.

In response, the Government concedes that it failed to consider the States' reliance interests. But it argues that is irrelevant because "the States have no cognizable reliance interest in a *discretionary* program." Stay Mot. at 18. We reject that argument for several reasons.

Most importantly, the Government's contention is squarely foreclosed by *Regents*. There, the Supreme Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program. 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests, including in particular those of the states. As the Supreme Court explained, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). Those reliance interests included states' interests. *See id.* at 1914 (highlighting assertions that "[s]tates and local governments could lose $1.25 billion in tax revenue each year"). So if the termination of DACA—a discretionary, immigration program—must consider states' "potential

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003435

reliance interests," then so does termination of MPP. *Id.* at 1913. That is particularly true here because the district court found as a matter of fact—and the Government does not contest—that states like Texas face fiscal harm from the termination of MPP. *See* D. Ct. Op. at 18–20.

The district court also found that the "termination of MPP has and will continue to increase the number of aliens being released into the United States." *Id.* at 17. The Supreme Court has recognized that border states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It therefore follows that a "potential reliance interest" that DHS must consider includes Texas.

The DHS-Texas Agreement reinforces the Government's awareness of the State's reliance interests. In that Agreement, DHS stipulated:

- "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." Compl., Ex. B at 1.
- "The 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." *Id.*
- "[A]n aggrieved party will be irreparably damaged." *Id.* at 5.

The Agreement further states that it "establishes a binding and enforceable commitment between DHS and Texas." *Id.* at 2. Texas therefore could reasonably rely on the Agreement. And Texas did in fact rely on the Agreement by including DHS's breach as a cause of action in its complaint—filed months before the June 1 Memorandum. And then—despite these reliance interests and despite being on notice of the Agreement from the States' complaint—the June 1 Memorandum said not one word about the Agreement. A "reasonable and reasonably explained" decision would have

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003436

said *something*. *Prometheus*, 141 S. Ct. at 1158. That is why this "omission alone [likely] renders [the Secretary's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.[4]

b.

The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits. In its October 2019 Assessment of MPP, DHS found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* These benefits, DHS emphasized, were a "core component" or "cornerstone" of the agency's prior immigration policy. *Id.* at 12.

Nonetheless, the June 1 Memorandum did not expressly mention, let alone meaningfully discuss, DHS's prior factual findings. Instead, the Secretary changed policies based on his own findings that contradict DHS's October 2019 findings. But an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*,

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[4] As the D.C. Circuit has emphasized in a different APA context, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (Sentelle, C.J.) (quotation omitted). We do not suggest that DHS needed notice-and-comment rulemaking to rescind MPP. But it did need to consider "relevant factors" to that rescission decision. *Id.* And you might reasonably think that one "relevant factor[]" to that decision was DHS's pledge "to consult Texas and consider its views before taking any action, adopting or modify[ing] a policy or procedure, or making any decision that" affects MPP. Compl., Ex. B at 2. Perhaps DHS has a good reason for its action. But it is likely arbitrary and capricious for DHS not even to acknowledge its agreement—let alone do anything to consult Texas or consider its views.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003437

556 U.S. 502, 515 (2009). The Secretary did not provide the required "more detailed justification." *Id.* This further indicates that the termination of MPP was arbitrary and capricious.

c.

The June 1 Memorandum also insufficiently addressed alternatives to terminating MPP. "[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). While considering alternatives, DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. As explained above, DHS did not adequately assess reliance interests. So it would be impossible for the June 1 Memorandum to properly weigh the relevant interests against competing policy concerns while considering alternatives.

The June 1 Memorandum offers a single conclusory sentence addressing potential modifications to MPP: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR.5. But "belief" that a "total redesign" was required, *id.*, is no substitute for a "reasonable and reasonably explained" decision. *Prometheus*, 141 S. Ct. at 1158.

Of course, "DHS was not required . . . to consider *all* policy alternatives in reaching [its] decision," and the agency has "considerable flexibility" to "wind-down" a program. *Regents*, 140 S. Ct. at 1914 (emphasis added) (quotation omitted). But the problem is that the Secretary failed to mention *any* modification to MPP as a possible alternative, even though "the alternatives . . . are within the ambit of the existing policy." *Id.* at 1913

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003438

(quotations omitted). And merely stating that an alternative was considered is not enough to show reasoned analysis. *Cf. United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)).

The Government's principal counterargument is that DHS considered an alternative *outside* "the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. Specifically, the June 1 Memorandum pointed to a "Dedicated Docket" program designed to provide counsel to aliens in removal proceedings. AR.4–5 & n.6; *see* Stay Mot. at 16; Reply at 7. This argument is unpersuasive for at least two reasons. First, by the Government's own admission, the "Dedicated Docket" is outside the ambit of MPP—and hence it does not count as a reasoned consideration of alternatives "*within* the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (emphasis added). And second, neither the June 1 Memorandum nor the Government in its stay motion explains why MPP and the "Dedicated Docket" are mutually exclusive.

d.

The June 1 Memorandum also failed to consider the legal implications of terminating the policy. After the Government suspended MPP—but before it rescinded the program—Texas filed this lawsuit. In its original complaint, and in its initial motion for preliminary injunction, Texas argued that the suspension of MPP violated § 1225. *See* Compl. at 36–38; Prelim. Inj. Mot., ECF No. 30. About a month and a half later, the Secretary issued the memorandum terminating MPP. So the government was on notice of the legal implications. Yet in the memorandum, the Secretary does not mention the lawfulness concerns involving § 1225—even though, the "natural response" to this "newly identified problem" would be to consider the problem. *Regents*, 140 S. Ct. at 1916. This further indicates that "the process

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003439

by which" the Secretary reached that result was neither "logical" nor "rational." *Michigan*, 576 U.S. at 750.

e.

The Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum's omissions. None is persuasive.

The Government repeatedly argues that DHS's statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems. *See* Stay Mot. at 16. The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements . . . ."); *United Techs.*, 601 F.3d at 562 ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). This well-established principle makes sense. After all:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under Fed. R. Evid. 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003440

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted).

The Government also points to the June 1 Memorandum's observations on MPP's shortcomings. *See* Stay Mot. at 16–17. Even if creditable, these observations cannot justify the other omissions discussed above. But in any event, many of those observations are neither "logical" nor "rational." *Michigan*, 576 U.S. at 750. Take DHS's termination justification based on *in absentia* removal orders. DHS observed that "the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions* for me about the design and operation of the program." AR.4 (emphasis added). The district court found that "[t]he federal government's data shows similarly high rates of *in absentia* removals *prior* to implementation of MPP." D. Ct. Op. at 40. The Government has not said one word to suggest the district court's factual finding was clearly erroneous.[5] We therefore cannot conclude that the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted). And even on the Government's own terms—considering *only* half the statistics and ignoring the district court's factual finding—the June 1 Memorandum only said that *in absentia* statistics "raise[d] questions for [DHS] about the design and operation of the

[5] In its reply brief, the Government argues that it need not have commissioned an "in-depth empirical analysis" of the *in absentia* statistics before rescinding MPP. Reply at 9. Of course that is true. But it is equally true that the Government cannot cherry-pick only the statistics it likes in the administrative record. Nor can the Government fail to address statistics that already exist in that record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003441

program." AR.4. But the process required by the APA requires agencies to *seek answers* and reasonably explain the outcome of that effort, including its conclusions.

The June 1 Memorandum places much weight on COVID-19. According to the Memorandum, the pandemic "compounded" "challenges faced by MPP" when "immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021." AR.4. But DHS issued its memorandum terminating MPP at least one month *after* courts reopened. As the district court explained: "*Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic." D. Ct. Op. at 41. The Government challenges this conclusion on the ground that "infrastructure used for MPP remains shuttered." Stay Mot. at 19 n.4. But the Government provides no indication that the facilities are not maintained or are shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP in January 2021.

2.

In addition to the APA, the district court also relied on 8 U.S.C. § 1225. The Government claims that the district court determined that "the Secretary is *required* to return any noncitizen he fails to detain" and that the district court's "core legal analysis" is that DHS has "a binary choice between detention or return to Mexico for noncitizens arriving from Mexico." Stay Mot. at 11–13. In essence, the Government characterizes the district court's decision and injunction as removing the Government's ability to use its discretion under 8 U.S.C. §§ 1182(d)(5)(A) and 1226. But as we explain in Part III, *infra*, the Government has mischaracterized the district

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003442

court's order. This matters because all of the Government's § 1225 arguments hinge on an incorrect premise.

Therefore, we cannot conclude that the Government is likely to succeed on either its APA arguments or its § 1225 arguments—let alone that the Government is likely to succeed on both. The Government therefore has not come close to a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426.

III.

The Government also has not shown that it will be irreparably injured absent a stay pending appeal. The Government's arguments are largely built on two strawmen. We consider and reject those before turning to the Government's other arguments.

First, the Government complains that it will be irreparably harmed absent a stay because DHS is incapable of reinstating MPP "in a matter of days." Stay Mot. at 21; *see also* Decl. of David Shahoulian ¶ 16 (Aug. 16, 2021) (arguing DHS cannot immediately "reestablish the entire infrastructure upon which [MPP] was built"). This is a strawman. The district court did not order the Government to restore MPP's infrastructure overnight. It ordered that, once the injunction takes effect on August 21, DHS must "enforce and implement MPP *in good faith*." D. Ct. Op. at 52. DHS does not argue that good faith is an unreasonably high standard to meet.

Second, the Government asserts it will be irreparably injured because the injunction obligates DHS to detain "every single person described in 8 U.S.C. § 1225," which DHS cannot do because it lacks "sufficient detention capacity." Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021). This is a second strawman. The injunction does not require the Government to detain every alien subject to § 1225. Nor does it order the Government to "build or obtain" additional detention facilities. Stay Mot. at 21. Instead, it requires

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003443

the Government to "enforce and implement MPP *in good faith . . . until such a time* as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." D. Ct. Op. at 52 (second emphasis added).

And far from ordering the Government to detain "every single person described in 8 U.S.C. § 1225," Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021), the district court specifically acknowledged that the Government has other options. Under § 1225(b)(2)(A), which provides the statutory authority for MPP, an alien arriving on land from a contiguous foreign territory can be returned to that territory. *See* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1182(d)(5)(A), DHS can parole an alien into the United States "on a *case-by-case basis* for urgent humanitarian reasons or significant public benefit." (Emphasis added); *see* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1226, DHS can release on "bond" or "conditional parole" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed." *See also* Stay Mot. at 12; D. Ct. Op. at 51 (noting this discretion). Last but not least, of course, the Government can choose to detain an alien in accordance with § 1225. *See* D. Ct. Op. at 43 (noting this discretion).

What the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.

Third and finally, we turn to the Government's non-strawmen arguments for its irreparable injuries. Most of these are self-inflicted and therefore do not count. *See* 11A CHARLES ALAN WRIGHT, ET AL.,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003444

FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). For example, the Government notes that "DHS has been in the process of unwinding MPP and its infrastructure for months," such that restarting the program now would be difficult. Stay Mot. at 21. But as the district court noted, "Texas filed suit challenging the suspension of enrollments in MPP . . . nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." D. Ct. Op. at 47. Therefore, DHS could have avoided this problem by waiting to unwind MPP until this litigation was resolved. The self-inflicted nature of the government's asserted harm "'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993)); *accord Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Before the district court, the Government also suggested that it began unwinding MPP four or more months *before* the June 1 Memorandum. *See* D. Ct. Op. at 48. That understandably would make it harder for DHS to restart MPP on Saturday. But it also makes DHS's legal position dramatically weaker. It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later. *See, e.g.*, *Regents*, 140 S. Ct. at 1908–10. Insofar as DHS concedes that its June 1 Memorandum is a *post hoc* rationalization for a decision that it made many months earlier, it has conceded that the June 1 Memorandum is arbitrary, capricious, and not a good faith explanation for its decision. Such inequitable conduct is "sufficient to deny" DHS's request for an equitable stay pending

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003445

appeal. *See In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26–*27 (Bankr. C.D. Cal. Nov. 15, 2013).

The Government also asserts that reinstating MPP will cause harm because "DHS cannot restart MPP without significant cooperation with Mexico," and the injunction implicates "delicate and ongoing discussions with Mexico." Stay Mot. at 21. There are at least four problems with that. First, as the district court noted, DHS created MPP unilaterally and without any previous agreement with Mexico. *See* D. Ct. Op. at 49 & n.15. DHS does not explain why it cannot likewise restart MPP unilaterally. Second, the Government does not point to any evidence that Mexico has withdrawn its support for MPP. *See* AR.152–53 (Mexico's December 20, 2018 statement of support). Third, the Government "'could have avoided' any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." D. Ct. Op. at 47 (quoting *Texas*, 809 F.3d at 187). Insofar as the Government failed to do that, again, its injury is self-inflicted. Fourth, even assuming Mexico's support is required, assuming Mexico has withdrawn its support, and assuming Mexico will not support a new MPP, the injunction *still* does not irreparably harm the Government. The injunction only requires good faith on the part of the United States—if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order, so long as it also adheres to the rest of the statutory requirements.

Finally, because the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*. Even if the Government were correct that long-term compliance with the district court's injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court's requirement of good faith

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003446

while the appeal proceeds. Therefore, the Government has failed to demonstrate that it will be irreparably injured absent a stay pending appeal.

IV.

The final two *Nken* factors also do not warrant a stay. *See Nken*, 556 U.S. at 434.

The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. *See* D. Ct. Op. at 17 ("The termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States and has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri."). We agree. *See supra* Part II.A.1 (standing). A stay "would enable" aliens released into the interior "to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits." *Texas*, 787 F.3d at 768.

Likewise, the "public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994). Here, the Government has failed to carry its burden to show that its conduct comports with federal law. And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers. All the district court's injunction requires of the Government is that it act in accordance with the INA. And in all events, "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect" principles of "separation of powers and federalism." *Texas*, 787 F.3d at 768.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003447

The DHS-Texas Agreement also suggests the public interest counsels against issuing a stay. That Agreement expressly acknowledged that if DHS failed to comply with the Agreement's terms, Texas would "be irreparably damaged" and would "not have an adequate remedy at law." Compl., Ex. B at 4. The Agreement remained binding until August 1, 2021, and the parties agree DHS violated its terms. *See* D. Ct. Op. at 14 ("The parties agree DHS did not follow the[] procedures" required by the Agreement.). The district court concluded that the expiration of the Agreement mooted Texas's claim under it. *See id.* at 44. As noted in Part II above, however, the States' likelihood of success on the merits of their APA claims means that DHS will have to consider all relevant factors before attempting to rescind MPP—including its effects on the States. The public interest plainly lies in not allowing DHS to circumvent those federalism concerns.

V.

Finally, the Government argues a stay is warranted because the district court should have remanded without vacating the June 1 Memorandum or issuing an injunction. Stay Mot. at 22; *see also* Reply at 12. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). But it is unclear how DHS can substantiate its decision on remand. Neither in its opening stay motion nor in its reply does the Government suggest how it can. *See generally* Stay Mot. at 22–23; Reply at 12. And Supreme Court precedent suggests that any later memorandum on remand elaborating on the June 1 Memorandum would be irrelevant to an arbitrary-and-capricious analysis because it is a *post hoc* rationalization. *See Regents*, 140 S. Ct. at 1907–09. So at this stage, without any argument whatsoever to the contrary, it appears that DHS would have to issue "a *new* rule implementing a *new* policy" that

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003448

"compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (emphases added).

Vacatur, by contrast, would not cause "disruptive consequences". *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (also considering "the disruptive consequences of vacatur" (internal quotation marks omitted)). The Government makes no argument materially different from its irreparable-injury argument. So we reject the Government's arguments here for the same reasons we rejected them in Part III, *supra*.

* * *

The Government has failed to make the requisite showing for all four *Nken* factors. The Government's motion for a stay pending appeal is therefore DENIED. The Government's appeal is hereby EXPEDITED for consideration before the next available oral argument panel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003449

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2021
Lyle W. Cayce
Clerk

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; 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; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

AMERICAN OVERSIGHT

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

This case concerns the Migrant Protection Protocols ("MPP") created by the Secretary of the Department of Homeland Security on December 20, 2018, and purportedly rescinded by DHS in a memorandum on June 1, 2021 ("June 1 Memorandum").[1] After a full bench trial and 53 pages of findings of fact and conclusions of law, the district court concluded that DHS's purported rescission of MPP violated, *inter alia*, the Administrative Procedure Act ("APA"). DHS seeks a stay pending appeal. After carefully considering full briefing from the parties, we hold DHS failed to satisfy the four stay factors. *See Nken v. Holder*, 556 U.S. 418 (2009). The motion is denied.

I.

A.

On December 20, 2018, the Trump Administration implemented MPP in response to an immigration surge at the southern border. D. Ct. Op. at 7. The statutory authority for MPP is found in 8 U.S.C. § 1225(b)(2)(C), which authorizes the Government to return certain third-country nationals arriving in the United States to Mexico or Canada for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* at 8. Also on December 20, 2018, the United States obtained Mexico's agreement to permit entry of MPP enrollees. *Id.* The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum

[1] We refer to the Secretary's actions as those of "DHS" unless otherwise stated.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003451

application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* (quotation omitted).

In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Id.* (citing AR.155–56, AR.684). In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Id.* at 9 (citing AR.165–70). By December 31, 2020, DHS had enrolled 68,039 aliens in MPP. *Id.* at 12 (citing AR.555).

DHS and Texas entered into a Memorandum of Understanding (the "Agreement"), which the parties finalized on January 8, 2021. *Id.* at 13 (citing Compl., Ex. B at 8). The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* (quoting Compl., Ex. B at 2). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at 13–14 (citing Compl., Ex. B at 2). DHS also agreed to "'[p]rovide Texas with 180 days' written notice . . . of any proposed action' subject to the consultation requirement," *id.* at 14 (quoting Compl., Ex. B at 3), so that Texas would have an opportunity to comment on the proposal. The Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject Texas's input, "provide a detailed written explanation" of its reasons for doing so. *Id.* (emphasis omitted) (quoting Compl., Ex. B at 3).

On Inauguration Day, the Biden Administration announced that it would suspend further enrollments in MPP. The Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003452

enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.* at 15 (quoting AR.581).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Id.* at 14. Because it believed that the letter did not comply with the Agreement's required procedures, Texas interpreted the letter "as a notice of intent to terminate" the Agreement. *Id.* (citing ECF No. 53 at 21).

On April 13, 2021, Texas and Missouri (the "States") sued, challenging the temporary suspension of MPP. *Id.* at 1 (citing ECF No. 1). The States alleged that DHS's January 20 Memorandum violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See id.* at 2 (citing ECF No. 1 at 4; ECF No. 45). On May 14, the States moved for a preliminary injunction that would enjoin the Government from enforcing and implementing the January 20 Memorandum. Prelim. Inj. Mot., ECF No. 30.

On June 1, before briefing on the preliminary injunction had concluded, DHS issued a new memorandum permanently terminating MPP. D. Ct. Op. at 2. The district court concluded that the June 1 Memorandum mooted the States' complaint, and the court allowed the States to amend their complaint and file a new preliminary injunction motion. *Id.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3.

B.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *See* D. Ct. Op. at 1. The district court made many findings of fact that are relevant here. Among other things,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003453

the district court found that MPP had significant benefits before DHS purported to rescind it. For example, DHS's October 2019 Assessment of MPP concluded that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. And the court noted that DHS also found MPP effective in addressing the prior "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* The court found that this caused a significant decrease in immigration-enforcement encounters along the southern border. *Id.* And more directly, the court found that caused a decrease in "the number of aliens released into the interior of the United States for the duration of their U.S. removal proceedings." *Id.* at 11 (citing AR.554). These benefits, DHS emphasized, were a "cornerstone" of the agency's prior immigration policy. D. Ct. Op. at 12.

The court made specific (and largely uncontested) factual findings that "[t]he termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States," and that this increase "has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri." *Id.* at 17. On the basis of its factual findings, the district court determined that the States had Article III standing, that the court had jurisdiction to review the agency action, and that the States were within the zone of interests of the INA. *Id.* at 21–34. The court then concluded that DHS's termination of MPP was unlawful under the APA because the action was arbitrary and capricious and contrary to the INA. *Id.* at 34–44. Based on those conclusions, the district court "permanently enjoined and restrained [DHS] from implementing or enforcing the June 1 Memorandum" and ordered DHS "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003454

all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources." *Id.* at 52–53 (emphases omitted).

DHS noticed an appeal. On August 17, 2021, the Government requested an emergency stay under Federal Rule of Appellate Procedure 8. The States opposed that request on August 18. On August 19, the Government filed a reply. The Government requested that we rule the same day, August 19. In considering the Government's request, we must consider four factors: (1) whether the Government makes a strong showing that it is likely to succeed on the merits; (2) whether the Government will be irreparably injured in the absence of a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies. *See Nken*, 556 U.S. at 426.

II.

We begin with whether the Government has made a strong showing that it is likely to succeed on the merits. The Government makes two merits arguments: (A) the case is not justiciable, and (B) DHS's rescission of MPP did not violate federal law. The Government is likely wrong on both.

A.

The Government first argues that it is likely to succeed on the merits because two justiciability doctrines—standing and non-reviewability—operate as insuperable obstacles to the States' suit. We consider and reject each argument in turn.

1.

First, the States' standing. To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003455

Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "Only one of the [appellants] needs to have standing to permit us to consider the [complaint]."[2] *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord Nat'l Rife Ass'n Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). Because the Government is seeking a stay, we must ask whether it has made a strong showing that the States lack standing. *See Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020).

After a bench trial, we review the district court's factual determinations for clear error. *See, e.g.*, *Texas*, 809 F.3d at 171–72 (reviewing a factual finding for clear error); *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)). And any argument not raised on appeal (including a challenge to a district court's factual finding) is forfeited. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) ("Many of the 'errors' cited by the defendants are unbriefed. These issues have been [forfeited]."); *cf.* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

We begin with (a) the district court's uncontested factual findings. Then we hold that the Government fails to make a strong showing that it is likely to succeed on appeal because it has not shown that the States lack (b) an injury-in-fact that is (c) traceable and (d) redressable. Finally, any doubt

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[2] For this reason, we focus on Texas's standing. We note, however, that Missouri brings largely similar arguments with respect to driver's-license, educational, healthcare, and other costs.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003456

about the States' standing is resolved by (e) the special solicitude guaranteed to sovereign States in our federal system.

a.

The district court found eight facts central to the standing issue. These include:

1. The court found that because of MPP's termination, the Government has been "forced to release and parole aliens into the United States because [the Government] simply [does] not have the resources to detain aliens as mandated by statute." D. Ct. Op. at 17; *see also id.* at 18 (finding that Texas's "border state" status means some of those aliens have ended up in Texas).
2. The court found that DHS previously acknowledged that "MPP implementation contributed to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Id.* at 17 (quotation and alteration omitted).
3. The court found that "the termination of MPP has contributed to the current border surge." *Id.*
4. The court found that "[s]ince MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." *Id.*; *see also id.* at 18 n.7 (noting "the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS," including Shahoulian's statement that "[b]ased on current trends, the Department expects that total encounters this fiscal year are likely to be the highest ever recorded" (emphasis omitted)).
5. The court found that many "aliens present in Texas because of MPP's termination would apply for driver's licenses," the granting of which would impose a cost on Texas. *Id.* at 19.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003457

6. The court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States," and that (according to state estimates) Texas will expend an average of $9,216 per additional student in the 2021 school year. *Id.* at 19.
7. The court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas," imposing a cost on the state. D. Ct. Op. at 19–20 (citing AR.555, AR.587–88).
8. Finally, the court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and [some] will commit crimes in Texas," imposing costs on the state's correctional apparatus. *Id.* at 20.

The Government does not challenge *any* of these findings.[3] But even if it did, we would not find any of them clearly erroneous in the light of the record as a whole. *See, e.g.*, *United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) ("[A]s long as the determination is plausible in light of the record as a whole, clear error does not exist.").

b.

Texas's injuries are actual and imminent. As just described, MPP's termination has caused an increase in immigration into Texas. And as

[3] On one reading of the Government's brief, it does contest the fifth finding. *See* Stay Mot. at 7 (discussing "speculation about an increase in the number of aliens released and paroled who will seek driver's licenses" (quotation omitted)). But in any case, neither our precedent nor the district court's record allows us to conclude the Government is likely to show the finding is clearly erroneous. *See Texas*, 809 F.3d at 156 (making a similar inference about driver's license applications).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003458

discussed at length in *Texas v. United States*, Texas law requires the issuance of a license to any qualified person—including noncitizens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155–56 (alteration in original) (quoting TEX. TRANSP. CODE § 521.142(a)); *see also id.* (discussing other Texas requirements for a driver's license). Of course, unlike in the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the challenged action here does not *ipso facto* guarantee that a given alien will satisfy that requirement. Yet the district court's uncontested findings of fact likely compel the conclusion that MPP's termination has led to an increase in the number of aliens in Texas, many of whom will apply for driver's licenses. And the district court found that Texas incurs a cost every time it *inquires* into whether an alien satisfies the requirements for a license—even if the person does not in fact qualify for a license. D. Ct. Op. at 19 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* Decl. of Sheri Gipson, Chief of the Texas Department of Public Safety Driver License Division, ¶ 8 ("DPS estimates that for an additional 10,000 driver['s] license customers *seeking* a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." (emphasis added)). So Texas has shown imminent injury in this case. *See Texas*, 809 F.3d at 156 (reaching the same conclusion on similar facts). Driver's licenses aside, the district court's unchallenged factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.

The Government's counterargument (limited to the driver's-license theory) is that the district court's analysis was "primarily based on speculation about an increase in the number of aliens released and paroled who will seek driver's licenses." Stay Mot. at 7 (quotation omitted). But the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003459

Government has done nothing to show that district court's findings of fact about the increased number of aliens were clearly erroneous. And it is grounded in our precedent. *Texas*, 809 F.3d at 156 ("[T]here is little doubt that many [DAPA beneficiaries] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

c.

Texas's injury is also traceable to the Government's termination of MPP. The district court's uncontested factual findings establish as much: MPP's termination has caused an increase in unlawful immigration into Texas. Many new immigrants are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. Texas*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients—"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible."). Likewise, at least some MPP-caused immigrants will certainly seek educational and healthcare services from the state. And the States have incurred and will continue to incur costs associated with the border crisis, at least part of which the district court found is traceable to rescinding MPP. The causal chain is easy to see, and the Government does not meaningfully contest this point. *See also Massachusetts v. EPA*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would remedy Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico. The Government gives two arguments that it says undercut redressability. First,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003460

the Government contends, an injunction would provide no redress because immigration officers under MPP would have discretion about whether to return any given immigrant to Mexico. Stay Mot. at 8. This argument ignores the fact that, during MPP's operative period, immigration agents did in fact order over 50,000 aliens back to Mexico from the Texas border. ECF 11 at 2. The Government offers no basis to conclude that a renewed MPP would have any different impact.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. Stay Mot. at 8. This argument fails because for at least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Further, Mexico issued a statement in 2018 consenting to admit aliens excluded from the United States under MPP—and nothing in the record suggests Mexico has since retracted that consent. *See* AR.153 (Secretaría do Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018)).

e.

To eliminate any doubt as to standing, we emphasize that the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520; *see also Texas*, 809 F.3d at 151 (beginning with the special-solicitude question). Such special solicitude has two requirements: (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*, 809 F.3d at 151–52 (citing *Massachusetts*, 549 U.S. at 516–

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003461

20). In both *Massachusetts* and *Texas*, the first prong was satisfied where a State challenged an agency action as invalid under a statute. 549 U.S. at 516–17 (Clean Air Act); 809 F.3d at 152–53 (APA). And in both cases, the second prong was satisfied where a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 520; *see Texas*, 809 F.3d at 152–54. Particularly relevant here is *Texas*, where this Court held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

Texas is indeed entitled to special solicitude. First, just as in the DAPA suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153–54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry.

That solicitude means redressability is easier to establish for certain state litigants than for other litigants—and this should remove any lingering doubt as to that prong. *See Massachusetts*, 549 U.S. at 517–18 (holding a State "can assert [its] right[s] without meeting all the normal standards for redressability and immediacy" (quotations and citations omitted)). Texas would be able to establish redressability without this special solicitude—but

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003462

it reinforces our conclusion that the States have standing and that the Government has failed to make a strong showing to the contrary.

2.

The Government next argues this suit is non-justiciable under the APA. The Government makes three arguments on this score. None is persuasive.

a.

First, the Government argues that its termination of MPP is not a "final agency action" under the APA. 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. And for an agency action to qualify as final, the action must (1) mark[] the consummation of the agency's decisionmaking process," and (2) either determine "rights or obligations" or produce "legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Government does not contest that the June 1 Memorandum was the consummation of the decisionmaking process. As for the second prong, the Government simply asserts the Memorandum is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Stay Mot. at 10–11. This argument ignores Circuit precedent establishing that a "policy statement" can nonetheless be "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919–20 (5th Cir. 1993). It also ignores the principle that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). As the district court ably explained, the Memorandum withdrew DHS officers' previously existing discretion when it directed "DHS personnel,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003463

effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." D. Ct. Op. at 27 (emphasis omitted) (quoting AR.7).

b.

Second, the Government argues that the decision to terminate MPP is unreviewable under 5 U.S.C. § 701(a). Stay Mot. at 8. The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). And to vindicate that presumption, the Supreme Court has read § 701(a)(2) "quite narrowly." *Id.* (quotation omitted). The presumption can be overcome "by a showing that the relevant statute precludes review, § 701(a)(1), or that the agency action is committed to agency discretion by law, § 701(a)(2)." *Id.* (quotations and alterations omitted). Here, the Government has tried but failed to make both showings.

The Government argues that 8 U.S.C. § 1225(b)(2)(C) is a "statute[] [that] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

That provision does confer the discretion to choose among various detention and non-detention options for aliens placed in § 1229a removal proceedings. But the question presented in the States' complaint is *not* whether a particular alien is subject to detention in any particular set of circumstances. The States are instead challenging DHS's June 1 decision to rescind MPP—

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003464

which is a government program that creates rules and procedures for *entire classes* of aliens. It remains true—with or without MPP—that DHS has discretion to make individualized detention and non-detention decisions in accordance with the strictures of § 1225. What DHS cannot do, the States allege, is rescind the MPP program in a way that is arbitrary, capricious, and contrary to law. DHS cites nothing to suggest that latter decision is committed to agency discretion. In fact, cases like *Regents* prove it is not. *See* 140 S. Ct. at 1905–06 (decision to rescind DACA not committed to agency discretion); *Texas*, 809 F.3d at 168–69 (decision to implement DAPA not committed to agency discretion).

The Government's argument that the decision to rescind MPP is "committed to agency discretion by law" fails for similar reasons. 5 U.S.C. § 701(a)(2); *see Regents*, 140 S. Ct. at 1905. This form of non-reviewability occurs where a statute is "drawn so that it furnishes no meaningful standard by which to judge the [agency's] action." *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2568 (2019); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding a decision is committed to agency discretion when there is "no law to apply" (quotation omitted)). The Government argues that § 1225 provides no standard by which to evaluate DHS's action in this case. Stay Mot. at 8–9.

Once again, Supreme Court precedent undercuts the Government's argument. Even a statute that "leave[s] much to [an agency's] discretion" does not necessarily "leave [that] discretion unbounded." *Dep't of Commerce*, 139 S. Ct. at 2567–68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)). So too here. Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003465

discretion extends beyond the bounds of individualized, case-by-case determinations to begin with. And like the statute in *Department of Commerce*, which included provisions that meaningfully restrained the Secretary of Commerce, *see* 139 S. Ct. at 2568–69, § 1225 includes provisions restraining the DHS in this case. *See* § 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal, but without a credible fear of persecution, "shall be detained pending a final determination of credible fear of persecution"); § 1225(b)(1)(B)(ii) (an alien with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); § 1225(b)(2)(C) (Attorney General "may return" an alien not subject to expedited removal as an alternative to detention). We conclude that this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

c.

The Government's final justiciability argument is that the MPP-termination decision is nothing more than a non-enforcement decision, unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). This argument fails for two reasons. The first is that the termination of MPP is more than a non-enforcement policy, just like the DACA program at issue in *Regents* and the DAPA program at issue in *Texas*. As the district court explained, the termination of MPP will necessarily lead to the release and parole of aliens into the United States. And that will "create affirmative benefits for aliens such as work authorization." D. Ct. Op. at 31; *see also Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003466

thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" (quoting *Chaney*, 470 U.S. at 832)).

Second and independently, the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure. It is precisely because MPP was a government program—and *much more* than a non-enforcement decision—that the Government now claims that it will be difficult to resume it. *See infra* Part III. And the Government cites nothing to suggest that the elimination of a such a program can be dismissed as mere "non-enforcement." The Government therefore has failed to make a strong showing that the States' claims are non-justiciable.

B.

The Government next argues that it is likely to succeed on appeal because the June 1 Memorandum accords with federal law. The district court held otherwise on two independent grounds. First, the district court determined that the termination of MPP violated the APA because the June 1 Memorandum was arbitrary and capricious. D. Ct. Op. at 34–42. Second, the district court concluded that in "these particular circumstances," the termination violated 8 U.S.C. § 1225. *Id.* at 42–44 (emphasis removed). We hold the Government has not come close to showing that it is likely to succeed in challenging either conclusion, let alone both.

1.

First, the APA. The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "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). While applying this "deferential" standard, we must not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003467

"substitute" our "own policy judgment for that of the agency." *Id.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[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'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). "Put simply, we must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). This review "is not toothless." *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1013 (5th Cir. 2019). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

The Government has not shown a strong chance of success on appeal. That is because when terminating MPP in the June 1 Memorandum, the Secretary failed to consider several "relevant factors" and "'important aspect[s] of the problem.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S. Ct. at 1910. These include (a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications. These four omissions likely doom the Government's appeal. The Governments counterarguments (e) are unpersuasive.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003468

a.

DHS "failed to address whether there was 'legitimate reliance' on" MPP. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States. The closest the June 1 Memorandum gets is a reference to "the impact [terminating MPP] could have on border management and border communities." AR5. But the Memorandum makes clear that "border communities" do not include border states. *See id.* ("referring only to "nongovernmental organizations and local officials"). And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests.

In response, the Government concedes that it failed to consider the States' reliance interests. But it argues that is irrelevant because "the States have no cognizable reliance interest in a *discretionary* program." Stay Mot. at 18. We reject that argument for several reasons.

Most importantly, the Government's contention is squarely foreclosed by *Regents*. There, the Supreme Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program. 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests, including in particular those of the states. As the Supreme Court explained, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). Those reliance interests included states' interests. *See id.* at 1914 (highlighting assertions that "[s]tates and local governments could lose $1.25 billion in tax revenue each year"). So if the termination of DACA—a discretionary, immigration program—must consider states' "potential

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003469

reliance interests," then so does termination of MPP. *Id.* at 1913. That is particularly true here because the district court found as a matter of fact—and the Government does not contest—that states like Texas face fiscal harm from the termination of MPP. *See* D. Ct. Op. at 18–20.

The district court also found that the "termination of MPP has and will continue to increase the number of aliens being released into the United States." *Id.* at 17. The Supreme Court has recognized that border states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It therefore follows that a "potential reliance interest" that DHS must consider includes Texas.

The DHS-Texas Agreement reinforces the Government's awareness of the State's reliance interests. In that Agreement, DHS stipulated:

- "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." Compl., Ex. B at 1.
- "The 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." *Id.*
- "[A]n aggrieved party will be irreparably damaged." *Id.* at 5.

The Agreement further states that it "establishes a binding and enforceable commitment between DHS and Texas." *Id.* at 2. Texas therefore could reasonably rely on the Agreement. And Texas did in fact rely on the Agreement by including DHS's breach as a cause of action in its complaint—filed months before the June 1 Memorandum. And then—despite these reliance interests and despite being on notice of the Agreement from the States' complaint—the June 1 Memorandum said not one word about the Agreement. A "reasonable and reasonably explained" decision would have

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003470

said *something*. *Prometheus*, 141 S. Ct. at 1158. That is why this "omission alone [likely] renders [the Secretary's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.[4]

b.

The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits. In its October 2019 Assessment of MPP, DHS found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* These benefits, DHS emphasized, were a "core component" or "cornerstone" of the agency's prior immigration policy. *Id.* at 12.

Nonetheless, the June 1 Memorandum did not expressly mention, let alone meaningfully discuss, DHS's prior factual findings. Instead, the Secretary changed policies based on his own findings that contradict DHS's October 2019 findings. But an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*,

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[4] As the D.C. Circuit has emphasized in a different APA context, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (Sentelle, C.J.) (quotation omitted). We do not suggest that DHS needed notice-and-comment rulemaking to rescind MPP. But it did need to consider "relevant factors" to that rescission decision. *Id.* And you might reasonably think that one "relevant factor[]" to that decision was DHS's pledge "to consult Texas and consider its views before taking any action, adopting or modify[ing] a policy or procedure, or making any decision that" affects MPP. Compl., Ex. B at 2. Perhaps DHS has a good reason for its action. But it is likely arbitrary and capricious for DHS not even to acknowledge its agreement—let alone do anything to consult Texas or consider its views.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003471

556 U.S. 502, 515 (2009). The Secretary did not provide the required "more detailed justification." *Id.* This further indicates that the termination of MPP was arbitrary and capricious.

c.

The June 1 Memorandum also insufficiently addressed alternatives to terminating MPP. "[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). While considering alternatives, DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. As explained above, DHS did not adequately assess reliance interests. So it would be impossible for the June 1 Memorandum to properly weigh the relevant interests against competing policy concerns while considering alternatives.

The June 1 Memorandum offers a single conclusory sentence addressing potential modifications to MPP: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR.5. But "belief" that a "total redesign" was required, *id.*, is no substitute for a "reasonable and reasonably explained" decision. *Prometheus*, 141 S. Ct. at 1158.

Of course, "DHS was not required . . . to consider *all* policy alternatives in reaching [its] decision," and the agency has "considerable flexibility" to "wind-down" a program. *Regents*, 140 S. Ct. at 1914 (emphasis added) (quotation omitted). But the problem is that the Secretary failed to mention *any* modification to MPP as a possible alternative, even though "the alternatives . . . are within the ambit of the existing policy." *Id.* at 1913

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003472

(quotations omitted). And merely stating that an alternative was considered is not enough to show reasoned analysis. *Cf. United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)).

The Government's principal counterargument is that DHS considered an alternative *outside* "the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. Specifically, the June 1 Memorandum pointed to a "Dedicated Docket" program designed to provide counsel to aliens in removal proceedings. AR.4–5 & n.6; *see* Stay Mot. at 16; Reply at 7. This argument is unpersuasive for at least two reasons. First, by the Government's own admission, the "Dedicated Docket" is outside the ambit of MPP—and hence it does not count as a reasoned consideration of alternatives "*within* the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (emphasis added). And second, neither the June 1 Memorandum nor the Government in its stay motion explains why MPP and the "Dedicated Docket" are mutually exclusive.

d.

The June 1 Memorandum also failed to consider the legal implications of terminating the policy. After the Government suspended MPP—but before it rescinded the program—Texas filed this lawsuit. In its original complaint, and in its initial motion for preliminary injunction, Texas argued that the suspension of MPP violated § 1225. *See* Compl. at 36–38; Prelim. Inj. Mot., ECF No. 30. About a month and a half later, the Secretary issued the memorandum terminating MPP. So the government was on notice of the legal implications. Yet in the memorandum, the Secretary does not mention the lawfulness concerns involving § 1225—even though, the "natural response" to this "newly identified problem" would be to consider the problem. *Regents*, 140 S. Ct. at 1916. This further indicates that "the process

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003473

by which" the Secretary reached that result was neither "logical" nor "rational." *Michigan*, 576 U.S. at 750.

e.

The Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum's omissions. None is persuasive.

The Government repeatedly argues that DHS's statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems. *See* Stay Mot. at 16. The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements . . . ."); *United Techs.*, 601 F.3d at 562 ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). This well-established principle makes sense. After all:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under Fed. R. Evid. 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003474

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted).

The Government also points to the June 1 Memorandum's observations on MPP's shortcomings. *See* Stay Mot. at 16–17. Even if creditable, these observations cannot justify the other omissions discussed above. But in any event, many of those observations are neither "logical" nor "rational." *Michigan*, 576 U.S. at 750. Take DHS's termination justification based on *in absentia* removal orders. DHS observed that "the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions* for me about the design and operation of the program." AR.4 (emphasis added). The district court found that "[t]he federal government's data shows similarly high rates of *in absentia* removals *prior* to implementation of MPP." D. Ct. Op. at 40. The Government has not said one word to suggest the district court's factual finding was clearly erroneous.[5] We therefore cannot conclude that the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted). And even on the Government's own terms—considering *only* half the statistics and ignoring the district court's factual finding—the June 1 Memorandum only said that *in absentia* statistics "raise[d] questions for [DHS] about the design and operation of the

[5] In its reply brief, the Government argues that it need not have commissioned an "in-depth empirical analysis" of the *in absentia* statistics before rescinding MPP. Reply at 9. Of course that is true. But it is equally true that the Government cannot cherry-pick only the statistics it likes in the administrative record. Nor can the Government fail to address statistics that already exist in that record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003475

program." AR.4. But the process required by the APA requires agencies to *seek answers* and reasonably explain the outcome of that effort, including its conclusions.

The June 1 Memorandum places much weight on COVID-19. According to the Memorandum, the pandemic "compounded" "challenges faced by MPP" when "immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021." AR.4. But DHS issued its memorandum terminating MPP at least one month *after* courts reopened. As the district court explained: "*Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic." D. Ct. Op. at 41. The Government challenges this conclusion on the ground that "infrastructure used for MPP remains shuttered." Stay Mot. at 19 n.4. But the Government provides no indication that the facilities are not maintained or are shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP in January 2021.

2.

In addition to the APA, the district court also relied on 8 U.S.C. § 1225. The Government claims that the district court determined that "the Secretary is *required* to return any noncitizen he fails to detain" and that the district court's "core legal analysis" is that DHS has "a binary choice between detention or return to Mexico for noncitizens arriving from Mexico." Stay Mot. at 11–13. In essence, the Government characterizes the district court's decision and injunction as removing the Government's ability to use its discretion under 8 U.S.C. §§ 1182(d)(5)(A) and 1226. But as we explain in Part III, *infra*, the Government has mischaracterized the district

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003476

court's order. This matters because all of the Government's § 1225 arguments hinge on an incorrect premise.

Therefore, we cannot conclude that the Government is likely to succeed on either its APA arguments or its § 1225 arguments—let alone that the Government is likely to succeed on both. The Government therefore has not come close to a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426.

III.

The Government also has not shown that it will be irreparably injured absent a stay pending appeal. The Government's arguments are largely built on two strawmen. We consider and reject those before turning to the Government's other arguments.

First, the Government complains that it will be irreparably harmed absent a stay because DHS is incapable of reinstating MPP "in a matter of days." Stay Mot. at 21; *see also* Decl. of David Shahoulian ¶ 16 (Aug. 16, 2021) (arguing DHS cannot immediately "reestablish the entire infrastructure upon which [MPP] was built"). This is a strawman. The district court did not order the Government to restore MPP's infrastructure overnight. It ordered that, once the injunction takes effect on August 21, DHS must "enforce and implement MPP *in good faith*." D. Ct. Op. at 52. DHS does not argue that good faith is an unreasonably high standard to meet.

Second, the Government asserts it will be irreparably injured because the injunction obligates DHS to detain "every single person described in 8 U.S.C. § 1225," which DHS cannot do because it lacks "sufficient detention capacity." Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021). This is a second strawman. The injunction does not require the Government to detain every alien subject to § 1225. Nor does it order the Government to "build or obtain" additional detention facilities. Stay Mot. at 21. Instead, it requires

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003477

the Government to "enforce and implement MPP *in good faith . . . until such a time* as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." D. Ct. Op. at 52 (second emphasis added).

And far from ordering the Government to detain "every single person described in 8 U.S.C. § 1225," Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021), the district court specifically acknowledged that the Government has other options. Under § 1225(b)(2)(A), which provides the statutory authority for MPP, an alien arriving on land from a contiguous foreign territory can be returned to that territory. *See* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1182(d)(5)(A), DHS can parole an alien into the United States "on a *case-by-case basis* for urgent humanitarian reasons or significant public benefit." (Emphasis added); *see* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1226, DHS can release on "bond" or "conditional parole" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed." *See also* Stay Mot. at 12; D. Ct. Op. at 51 (noting this discretion). Last but not least, of course, the Government can choose to detain an alien in accordance with § 1225. *See* D. Ct. Op. at 43 (noting this discretion).

What the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.

Third and finally, we turn to the Government's non-strawmen arguments for its irreparable injuries. Most of these are self-inflicted and therefore do not count. *See* 11A CHARLES ALAN WRIGHT, ET AL.,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003478

FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). For example, the Government notes that "DHS has been in the process of unwinding MPP and its infrastructure for months," such that restarting the program now would be difficult. Stay Mot. at 21. But as the district court noted, "Texas filed suit challenging the suspension of enrollments in MPP . . . nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." D. Ct. Op. at 47. Therefore, DHS could have avoided this problem by waiting to unwind MPP until this litigation was resolved. The self-inflicted nature of the government's asserted harm "'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993)); *accord Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Before the district court, the Government also suggested that it began unwinding MPP four or more months *before* the June 1 Memorandum. *See* D. Ct. Op. at 48. That understandably would make it harder for DHS to restart MPP on Saturday. But it also makes DHS's legal position dramatically weaker. It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later. *See, e.g.*, *Regents*, 140 S. Ct. at 1908–10. Insofar as DHS concedes that its June 1 Memorandum is a *post hoc* rationalization for a decision that it made many months earlier, it has conceded that the June 1 Memorandum is arbitrary, capricious, and not a good faith explanation for its decision. Such inequitable conduct is "sufficient to deny" DHS's request for an equitable stay pending

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003479

appeal. *See In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26–*27 (Bankr. C.D. Cal. Nov. 15, 2013).

The Government also asserts that reinstating MPP will cause harm because "DHS cannot restart MPP without significant cooperation with Mexico," and the injunction implicates "delicate and ongoing discussions with Mexico." Stay Mot. at 21. There are at least four problems with that. First, as the district court noted, DHS created MPP unilaterally and without any previous agreement with Mexico. *See* D. Ct. Op. at 49 & n.15. DHS does not explain why it cannot likewise restart MPP unilaterally. Second, the Government does not point to any evidence that Mexico has withdrawn its support for MPP. *See* AR.152–53 (Mexico's December 20, 2018 statement of support). Third, the Government "'could have avoided' any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." D. Ct. Op. at 47 (quoting *Texas*, 809 F.3d at 187). Insofar as the Government failed to do that, again, its injury is self-inflicted. Fourth, even assuming Mexico's support is required, assuming Mexico has withdrawn its support, and assuming Mexico will not support a new MPP, the injunction *still* does not irreparably harm the Government. The injunction only requires good faith on the part of the United States—if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order, so long as it also adheres to the rest of the statutory requirements.

Finally, because the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*. Even if the Government were correct that long-term compliance with the district court's injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court's requirement of good faith

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003480

while the appeal proceeds. Therefore, the Government has failed to demonstrate that it will be irreparably injured absent a stay pending appeal.

IV.

The final two *Nken* factors also do not warrant a stay. *See Nken*, 556 U.S. at 434.

The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. *See* D. Ct. Op. at 17 ("The termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States and has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri."). We agree. *See supra* Part II.A.1 (standing). A stay "would enable" aliens released into the interior "to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits." *Texas*, 787 F.3d at 768.

Likewise, the "public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994). Here, the Government has failed to carry its burden to show that its conduct comports with federal law. And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers. All the district court's injunction requires of the Government is that it act in accordance with the INA. And in all events, "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect" principles of "separation of powers and federalism." *Texas*, 787 F.3d at 768.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003481

The DHS-Texas Agreement also suggests the public interest counsels against issuing a stay. That Agreement expressly acknowledged that if DHS failed to comply with the Agreement's terms, Texas would "be irreparably damaged" and would "not have an adequate remedy at law." Compl., Ex. B at 4. The Agreement remained binding until August 1, 2021, and the parties agree DHS violated its terms. *See* D. Ct. Op. at 14 ("The parties agree DHS did not follow the[] procedures" required by the Agreement.). The district court concluded that the expiration of the Agreement mooted Texas's claim under it. *See id.* at 44. As noted in Part II above, however, the States' likelihood of success on the merits of their APA claims means that DHS will have to consider all relevant factors before attempting to rescind MPP—including its effects on the States. The public interest plainly lies in not allowing DHS to circumvent those federalism concerns.

V.

Finally, the Government argues a stay is warranted because the district court should have remanded without vacating the June 1 Memorandum or issuing an injunction. Stay Mot. at 22; *see also* Reply at 12. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). But it is unclear how DHS can substantiate its decision on remand. Neither in its opening stay motion nor in its reply does the Government suggest how it can. *See generally* Stay Mot. at 22–23; Reply at 12. And Supreme Court precedent suggests that any later memorandum on remand elaborating on the June 1 Memorandum would be irrelevant to an arbitrary-and-capricious analysis because it is a *post hoc* rationalization. *See Regents*, 140 S. Ct. at 1907–09. So at this stage, without any argument whatsoever to the contrary, it appears that DHS would have to issue "a *new* rule implementing a *new* policy" that

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003482

"compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (emphases added).

Vacatur, by contrast, would not cause "disruptive consequences". *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (also considering "the disruptive consequences of vacatur" (internal quotation marks omitted)). The Government makes no argument materially different from its irreparable-injury argument. So we reject the Government's arguments here for the same reasons we rejected them in Part III, *supra*.

* * *

The Government has failed to make the requisite showing for all four *Nken* factors. The Government's motion for a stay pending appeal is therefore DENIED. The Government's appeal is hereby EXPEDITED for consideration before the next available oral argument panel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003483

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2021
Lyle W. Cayce
Clerk

No. 21-10806

STATE OF TEXAS; STATE OF MISSOURI,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; 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; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-cv-67

AMERICAN OVERSIGHT

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

This case concerns the Migrant Protection Protocols ("MPP") created by the Secretary of the Department of Homeland Security on December 20, 2018, and purportedly rescinded by DHS in a memorandum on June 1, 2021 ("June 1 Memorandum").[1] After a full bench trial and 53 pages of findings of fact and conclusions of law, the district court concluded that DHS's purported rescission of MPP violated, *inter alia*, the Administrative Procedure Act ("APA"). DHS seeks a stay pending appeal. After carefully considering full briefing from the parties, we hold DHS failed to satisfy the four stay factors. *See Nken v. Holder*, 556 U.S. 418 (2009). The motion is denied.

I.

A.

On December 20, 2018, the Trump Administration implemented MPP in response to an immigration surge at the southern border. D. Ct. Op. at 7. The statutory authority for MPP is found in 8 U.S.C. § 1225(b)(2)(C), which authorizes the Government to return certain third-country nationals arriving in the United States to Mexico or Canada for the duration of their removal proceedings under 8 U.S.C. § 1229a. *Id.* at 8. Also on December 20, 2018, the United States obtained Mexico's agreement to permit entry of MPP enrollees. *Id.* The goal of MPP was to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum

[1] We refer to the Secretary's actions as those of "DHS" unless otherwise stated.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003485

application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* (quotation omitted).

In January 2019, "DHS began implementing MPP, initially in San Diego, California, then El Paso, Texas, and Calexico, California, and then nationwide." *Id.* (citing AR.155–56, AR.684). In February 2019, U.S. Immigration and Customs Enforcement issued guidance on MPP to its field offices, anticipating the expansion of MPP across the border. *Id.* at 9 (citing AR.165–70). By December 31, 2020, DHS had enrolled 68,039 aliens in MPP. *Id.* at 12 (citing AR.555).

DHS and Texas entered into a Memorandum of Understanding (the "Agreement"), which the parties finalized on January 8, 2021. *Id.* at 13 (citing Compl., Ex. B at 8). The Agreement required Texas to provide information and assist DHS to "perform its border security, legal immigration, immigration enforcement, and national security missions." *Id.* (quoting Compl., Ex. B at 2). In return, DHS agreed to consult Texas and consider its views before taking actions that could modify immigration enforcement. *See id.* at 13–14 (citing Compl., Ex. B at 2). DHS also agreed to "'[p]rovide Texas with 180 days' written notice . . . of any proposed action' subject to the consultation requirement," *id.* at 14 (quoting Compl., Ex. B at 3), so that Texas would have an opportunity to comment on the proposal. The Agreement further required DHS to consider Texas's input "in good faith" and, if it decided to reject Texas's input, "provide a detailed written explanation" of its reasons for doing so. *Id.* (emphasis omitted) (quoting Compl., Ex. B at 3).

On Inauguration Day, the Biden Administration announced that it would suspend further enrollments in MPP. The Acting Secretary of DHS wrote that "[e]ffective January 21, 2021, the Department will suspend new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003486

enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities." *Id.* at 15 (quoting AR.581).

On February 2, 2021, DHS sent a letter to Texas purporting to terminate the Agreement "effective immediately." *Id.* at 14. Because it believed that the letter did not comply with the Agreement's required procedures, Texas interpreted the letter "as a notice of intent to terminate" the Agreement. *Id.* (citing ECF No. 53 at 21).

On April 13, 2021, Texas and Missouri (the "States") sued, challenging the temporary suspension of MPP. *Id.* at 1 (citing ECF No. 1). The States alleged that DHS's January 20 Memorandum violated the APA, the Immigration and Nationality Act ("INA"), the Constitution, and the Agreement. *See id.* at 2 (citing ECF No. 1 at 4; ECF No. 45). On May 14, the States moved for a preliminary injunction that would enjoin the Government from enforcing and implementing the January 20 Memorandum. Prelim. Inj. Mot., ECF No. 30.

On June 1, before briefing on the preliminary injunction had concluded, DHS issued a new memorandum permanently terminating MPP. D. Ct. Op. at 2. The district court concluded that the June 1 Memorandum mooted the States' complaint, and the court allowed the States to amend their complaint and file a new preliminary injunction motion. *Id.* The parties agreed to consolidate the preliminary injunction hearing with the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Id.* at 3.

B.

Following the bench trial, the district court issued a 53-page memorandum opinion and order, concluding that the States were entitled to relief on their APA and statutory claims. *See* D. Ct. Op. at 1. The district court made many findings of fact that are relevant here. Among other things,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003487

the district court found that MPP had significant benefits before DHS purported to rescind it. For example, DHS's October 2019 Assessment of MPP concluded that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. And the court noted that DHS also found MPP effective in addressing the prior "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* The court found that this caused a significant decrease in immigration-enforcement encounters along the southern border. *Id.* And more directly, the court found that caused a decrease in "the number of aliens released into the interior of the United States for the duration of their U.S. removal proceedings." *Id.* at 11 (citing AR.554). These benefits, DHS emphasized, were a "cornerstone" of the agency's prior immigration policy. D. Ct. Op. at 12.

The court made specific (and largely uncontested) factual findings that "[t]he termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States," and that this increase "has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri." *Id.* at 17. On the basis of its factual findings, the district court determined that the States had Article III standing, that the court had jurisdiction to review the agency action, and that the States were within the zone of interests of the INA. *Id.* at 21–34. The court then concluded that DHS's termination of MPP was unlawful under the APA because the action was arbitrary and capricious and contrary to the INA. *Id.* at 34–44. Based on those conclusions, the district court "permanently enjoined and restrained [DHS] from implementing or enforcing the June 1 Memorandum" and ordered DHS "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003488

all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources." *Id.* at 52–53 (emphases omitted).

DHS noticed an appeal. On August 17, 2021, the Government requested an emergency stay under Federal Rule of Appellate Procedure 8. The States opposed that request on August 18. On August 19, the Government filed a reply. The Government requested that we rule the same day, August 19. In considering the Government's request, we must consider four factors: (1) whether the Government makes a strong showing that it is likely to succeed on the merits; (2) whether the Government will be irreparably injured in the absence of a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies. *See Nken*, 556 U.S. at 426.

II.

We begin with whether the Government has made a strong showing that it is likely to succeed on the merits. The Government makes two merits arguments: (A) the case is not justiciable, and (B) DHS's rescission of MPP did not violate federal law. The Government is likely wrong on both.

A.

The Government first argues that it is likely to succeed on the merits because two justiciability doctrines—standing and non-reviewability—operate as insuperable obstacles to the States' suit. We consider and reject each argument in turn.

1.

First, the States' standing. To establish standing, the States "must show an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003489

Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "Only one of the [appellants] needs to have standing to permit us to consider the [complaint]."[2] *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *accord Nat'l Rife Ass'n Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). Because the Government is seeking a stay, we must ask whether it has made a strong showing that the States lack standing. *See Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020).

After a bench trial, we review the district court's factual determinations for clear error. *See, e.g.*, *Texas*, 809 F.3d at 171–72 (reviewing a factual finding for clear error); *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error." (citation omitted)). And any argument not raised on appeal (including a challenge to a district court's factual finding) is forfeited. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) ("Many of the 'errors' cited by the defendants are unbriefed. These issues have been [forfeited]."); *cf.* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

We begin with (a) the district court's uncontested factual findings. Then we hold that the Government fails to make a strong showing that it is likely to succeed on appeal because it has not shown that the States lack (b) an injury-in-fact that is (c) traceable and (d) redressable. Finally, any doubt

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[2] For this reason, we focus on Texas's standing. We note, however, that Missouri brings largely similar arguments with respect to driver's-license, educational, healthcare, and other costs.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003490

about the States' standing is resolved by (e) the special solicitude guaranteed to sovereign States in our federal system.

a.

The district court found eight facts central to the standing issue. These include:

1. The court found that because of MPP's termination, the Government has been "forced to release and parole aliens into the United States because [the Government] simply [does] not have the resources to detain aliens as mandated by statute." D. Ct. Op. at 17; *see also id.* at 18 (finding that Texas's "border state" status means some of those aliens have ended up in Texas).
2. The court found that DHS previously acknowledged that "MPP implementation contributed to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico." *Id.* at 17 (quotation and alteration omitted).
3. The court found that "the termination of MPP has contributed to the current border surge." *Id.*
4. The court found that "[s]ince MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed." *Id.*; *see also id.* at 18 n.7 (noting "the sworn statement of David Shahoulian, Assistant Secretary for Border and Immigration Policy at DHS," including Shahoulian's statement that "[b]ased on current trends, the Department expects that total encounters this fiscal year are likely to be the highest ever recorded" (emphasis omitted)).
5. The court found that many "aliens present in Texas because of MPP's termination would apply for driver's licenses," the granting of which would impose a cost on Texas. *Id.* at 19.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003491

6. The court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States," and that (according to state estimates) Texas will expend an average of $9,216 per additional student in the 2021 school year. *Id.* at 19.
7. The court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas," imposing a cost on the state. D. Ct. Op. at 19–20 (citing AR.555, AR.587–88).
8. Finally, the court found that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and [some] will commit crimes in Texas," imposing costs on the state's correctional apparatus. *Id.* at 20.

The Government does not challenge *any* of these findings.[3] But even if it did, we would not find any of them clearly erroneous in the light of the record as a whole. *See, e.g.*, *United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) ("[A]s long as the determination is plausible in light of the record as a whole, clear error does not exist.").

b.

Texas's injuries are actual and imminent. As just described, MPP's termination has caused an increase in immigration into Texas. And as

[3] On one reading of the Government's brief, it does contest the fifth finding. *See* Stay Mot. at 7 (discussing "speculation about an increase in the number of aliens released and paroled who will seek driver's licenses" (quotation omitted)). But in any case, neither our precedent nor the district court's record allows us to conclude the Government is likely to show the finding is clearly erroneous. *See Texas*, 809 F.3d at 156 (making a similar inference about driver's license applications).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003492

discussed at length in *Texas v. United States*, Texas law requires the issuance of a license to any qualified person—including noncitizens who "present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." 809 F.3d at 155–56 (alteration in original) (quoting TEX. TRANSP. CODE § 521.142(a)); *see also id.* (discussing other Texas requirements for a driver's license). Of course, unlike in the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the challenged action here does not *ipso facto* guarantee that a given alien will satisfy that requirement. Yet the district court's uncontested findings of fact likely compel the conclusion that MPP's termination has led to an increase in the number of aliens in Texas, many of whom will apply for driver's licenses. And the district court found that Texas incurs a cost every time it *inquires* into whether an alien satisfies the requirements for a license—even if the person does not in fact qualify for a license. D. Ct. Op. at 19 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* Decl. of Sheri Gipson, Chief of the Texas Department of Public Safety Driver License Division, ¶ 8 ("DPS estimates that for an additional 10,000 driver['s] license customers *seeking* a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." (emphasis added)). So Texas has shown imminent injury in this case. *See Texas*, 809 F.3d at 156 (reaching the same conclusion on similar facts). Driver's licenses aside, the district court's unchallenged factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.

The Government's counterargument (limited to the driver's-license theory) is that the district court's analysis was "primarily based on speculation about an increase in the number of aliens released and paroled who will seek driver's licenses." Stay Mot. at 7 (quotation omitted). But the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003493

Government has done nothing to show that district court's findings of fact about the increased number of aliens were clearly erroneous. And it is grounded in our precedent. *Texas*, 809 F.3d at 156 ("[T]here is little doubt that many [DAPA beneficiaries] would [apply for driver's licenses] because driving is a practical necessity in most of the state.").

c.

Texas's injury is also traceable to the Government's termination of MPP. The district court's uncontested factual findings establish as much: MPP's termination has caused an increase in unlawful immigration into Texas. Many new immigrants are certain to apply for driver's licenses—and evaluating each application will impose costs on Texas. *Cf. Texas*, 809 F.3d at 160 (noting that new immigrants—in that case, DAPA recipients—"have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible."). Likewise, at least some MPP-caused immigrants will certainly seek educational and healthcare services from the state. And the States have incurred and will continue to incur costs associated with the border crisis, at least part of which the district court found is traceable to rescinding MPP. The causal chain is easy to see, and the Government does not meaningfully contest this point. *See also Massachusetts v. EPA*, 549 U.S. at 523 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

d.

An injunction would remedy Texas's injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico. The Government gives two arguments that it says undercut redressability. First,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003494

the Government contends, an injunction would provide no redress because immigration officers under MPP would have discretion about whether to return any given immigrant to Mexico. Stay Mot. at 8. This argument ignores the fact that, during MPP's operative period, immigration agents did in fact order over 50,000 aliens back to Mexico from the Texas border. ECF 11 at 2. The Government offers no basis to conclude that a renewed MPP would have any different impact.

Second, the Government argues there is no redressability because aliens cannot be returned to Mexico without Mexico's consent. Stay Mot. at 8. This argument fails because for at least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place. *See* 8 U.S.C. § 1225(b)(2)(C) (allowing the Attorney General to "return [an] alien" "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a" removal proceeding). Further, Mexico issued a statement in 2018 consenting to admit aliens excluded from the United States under MPP—and nothing in the record suggests Mexico has since retracted that consent. *See* AR.153 (Secretaría do Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018)).

e.

To eliminate any doubt as to standing, we emphasize that the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520; *see also Texas*, 809 F.3d at 151 (beginning with the special-solicitude question). Such special solicitude has two requirements: (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*, 809 F.3d at 151–52 (citing *Massachusetts*, 549 U.S. at 516–

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003495

20). In both *Massachusetts* and *Texas*, the first prong was satisfied where a State challenged an agency action as invalid under a statute. 549 U.S. at 516–17 (Clean Air Act); 809 F.3d at 152–53 (APA). And in both cases, the second prong was satisfied where a State's challenge involved an agency's alleged failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 520; *see Texas*, 809 F.3d at 152–54. Particularly relevant here is *Texas*, where this Court held that DAPA, by authorizing the presence of many previously unlawful aliens in the United States, affected "quasi-sovereign interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses." 809 F.3d at 153 (quotation omitted).

Texas is indeed entitled to special solicitude. First, just as in the DAPA suit, Texas is asserting a procedural right under the APA to challenge an agency action. *See id.* at 152 ("In enacting the APA, Congress intended for those 'suffering legal wrong because of agency action' to have judicial recourse, and the states fall well within that definition." (quoting 5 U.S.C. § 702)). And second, Texas asserts precisely the same driver's-license-based injury here that it did there. *See id.* at 153–54 (explaining that DAPA, by greatly increasing the class of people to whom existing Texas law would entitle a subsidized driver's license, pressured Texas to change its own law—thus affecting a quasi-sovereign interest). Thus, Texas is entitled to special solicitude in the standing inquiry.

That solicitude means redressability is easier to establish for certain state litigants than for other litigants—and this should remove any lingering doubt as to that prong. *See Massachusetts*, 549 U.S. at 517–18 (holding a State "can assert [its] right[s] without meeting all the normal standards for redressability and immediacy" (quotations and citations omitted)). Texas would be able to establish redressability without this special solicitude—but

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003496

it reinforces our conclusion that the States have standing and that the Government has failed to make a strong showing to the contrary.

2.

The Government next argues this suit is non-justiciable under the APA. The Government makes three arguments on this score. None is persuasive.

a.

First, the Government argues that its termination of MPP is not a "final agency action" under the APA. 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. And for an agency action to qualify as final, the action must (1) mark[] the consummation of the agency's decisionmaking process," and (2) either determine "rights or obligations" or produce "legal consequences." *Texas v. EEOC*, 933 F.3d 433, 441 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The Government does not contest that the June 1 Memorandum was the consummation of the decisionmaking process. As for the second prong, the Government simply asserts the Memorandum is a general policy statement—and therefore can neither determine rights nor produce obligations or legal consequences. Stay Mot. at 10–11. This argument ignores Circuit precedent establishing that a "policy statement" can nonetheless be "final agency action" under the APA. *See Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 919–20 (5th Cir. 1993). It also ignores the principle that "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action" under the APA. *EEOC*, 933 F.3d at 442 (quotation omitted). As the district court ably explained, the Memorandum withdrew DHS officers' previously existing discretion when it directed "DHS personnel,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003497

effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP." D. Ct. Op. at 27 (emphasis omitted) (quoting AR.7).

b.

Second, the Government argues that the decision to terminate MPP is unreviewable under 5 U.S.C. § 701(a). Stay Mot. at 8. The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). And to vindicate that presumption, the Supreme Court has read § 701(a)(2) "quite narrowly." *Id.* (quotation omitted). The presumption can be overcome "by a showing that the relevant statute precludes review, § 701(a)(1), or that the agency action is committed to agency discretion by law, § 701(a)(2)." *Id.* (quotations and alterations omitted). Here, the Government has tried but failed to make both showings.

The Government argues that 8 U.S.C. § 1225(b)(2)(C) is a "statute[] [that] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 1225(b)(2)(C) provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

That provision does confer the discretion to choose among various detention and non-detention options for aliens placed in § 1229a removal proceedings. But the question presented in the States' complaint is *not* whether a particular alien is subject to detention in any particular set of circumstances. The States are instead challenging DHS's June 1 decision to rescind MPP—

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003498

which is a government program that creates rules and procedures for *entire classes* of aliens. It remains true—with or without MPP—that DHS has discretion to make individualized detention and non-detention decisions in accordance with the strictures of § 1225. What DHS cannot do, the States allege, is rescind the MPP program in a way that is arbitrary, capricious, and contrary to law. DHS cites nothing to suggest that latter decision is committed to agency discretion. In fact, cases like *Regents* prove it is not. *See* 140 S. Ct. at 1905–06 (decision to rescind DACA not committed to agency discretion); *Texas*, 809 F.3d at 168–69 (decision to implement DAPA not committed to agency discretion).

The Government's argument that the decision to rescind MPP is "committed to agency discretion by law" fails for similar reasons. 5 U.S.C. § 701(a)(2); *see Regents*, 140 S. Ct. at 1905. This form of non-reviewability occurs where a statute is "drawn so that it furnishes no meaningful standard by which to judge the [agency's] action." *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2568 (2019); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding a decision is committed to agency discretion when there is "no law to apply" (quotation omitted)). The Government argues that § 1225 provides no standard by which to evaluate DHS's action in this case. Stay Mot. at 8–9.

Once again, Supreme Court precedent undercuts the Government's argument. Even a statute that "leave[s] much to [an agency's] discretion" does not necessarily "leave [that] discretion unbounded." *Dep't of Commerce*, 139 S. Ct. at 2567–68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)). So too here. Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003499

discretion extends beyond the bounds of individualized, case-by-case determinations to begin with. And like the statute in *Department of Commerce*, which included provisions that meaningfully restrained the Secretary of Commerce, *see* 139 S. Ct. at 2568–69, § 1225 includes provisions restraining the DHS in this case. *See* § 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal, but without a credible fear of persecution, "shall be detained pending a final determination of credible fear of persecution"); § 1225(b)(1)(B)(ii) (an alien with a credible fear of persecution "shall be detained for further consideration of the application for asylum"); § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); § 1225(b)(2)(C) (Attorney General "may return" an alien not subject to expedited removal as an alternative to detention). We conclude that this is not a "case in which there is no law to apply." *Dep't of Commerce*, 139 S. Ct. at 2569 (quotation omitted).

c.

The Government's final justiciability argument is that the MPP-termination decision is nothing more than a non-enforcement decision, unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). This argument fails for two reasons. The first is that the termination of MPP is more than a non-enforcement policy, just like the DACA program at issue in *Regents* and the DAPA program at issue in *Texas*. As the district court explained, the termination of MPP will necessarily lead to the release and parole of aliens into the United States. And that will "create affirmative benefits for aliens such as work authorization." D. Ct. Op. at 31; *see also Texas*, 809 F.3d at 167 ("Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003500

thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" (quoting *Chaney*, 470 U.S. at 832)).

Second and independently, the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure. It is precisely because MPP was a government program—and *much more* than a non-enforcement decision—that the Government now claims that it will be difficult to resume it. *See infra* Part III. And the Government cites nothing to suggest that the elimination of a such a program can be dismissed as mere "non-enforcement." The Government therefore has failed to make a strong showing that the States' claims are non-justiciable.

B.

The Government next argues that it is likely to succeed on appeal because the June 1 Memorandum accords with federal law. The district court held otherwise on two independent grounds. First, the district court determined that the termination of MPP violated the APA because the June 1 Memorandum was arbitrary and capricious. D. Ct. Op. at 34–42. Second, the district court concluded that in "these particular circumstances," the termination violated 8 U.S.C. § 1225. *Id.* at 42–44 (emphasis removed). We hold the Government has not come close to showing that it is likely to succeed in challenging either conclusion, let alone both.

1.

First, the APA. The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "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). While applying this "deferential" standard, we must not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003501

"substitute" our "own policy judgment for that of the agency." *Id.* But we must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[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'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). "Put simply, we must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). This review "is not toothless." *Sw. Elec. Power Co. v. United States Env't Prot. Agency*, 920 F.3d 999, 1013 (5th Cir. 2019). And in all events, we can consider only the reasoning "articulated by the agency itself"; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted.").

The Government has not shown a strong chance of success on appeal. That is because when terminating MPP in the June 1 Memorandum, the Secretary failed to consider several "relevant factors" and "'important aspect[s] of the problem.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S. Ct. at 1910. These include (a) the States' legitimate reliance interests, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications. These four omissions likely doom the Government's appeal. The Governments counterarguments (e) are unpersuasive.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003502

a.

DHS "failed to address whether there was 'legitimate reliance' on" MPP. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States. The closest the June 1 Memorandum gets is a reference to "the impact [terminating MPP] could have on border management and border communities." AR5. But the Memorandum makes clear that "border communities" do not include border states. *See id.* ("referring only to "nongovernmental organizations and local officials"). And the vague reference to "border management" is insufficient to show specific, meaningful consideration of the States' reliance interests.

In response, the Government concedes that it failed to consider the States' reliance interests. But it argues that is irrelevant because "the States have no cognizable reliance interest in a *discretionary* program." Stay Mot. at 18. We reject that argument for several reasons.

Most importantly, the Government's contention is squarely foreclosed by *Regents*. There, the Supreme Court acknowledged that the Deferred Action for Childhood Arrivals ("DACA") program was a discretionary program. 140 S. Ct. at 1910. Still, the Court faulted DHS for not considering reliance interests, including in particular those of the states. As the Supreme Court explained, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation omitted). Those reliance interests included states' interests. *See id.* at 1914 (highlighting assertions that "[s]tates and local governments could lose $1.25 billion in tax revenue each year"). So if the termination of DACA—a discretionary, immigration program—must consider states' "potential

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003503

reliance interests," then so does termination of MPP. *Id.* at 1913. That is particularly true here because the district court found as a matter of fact—and the Government does not contest—that states like Texas face fiscal harm from the termination of MPP. *See* D. Ct. Op. at 18–20.

The district court also found that the "termination of MPP has and will continue to increase the number of aliens being released into the United States." *Id.* at 17. The Supreme Court has recognized that border states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It therefore follows that a "potential reliance interest" that DHS must consider includes Texas.

The DHS-Texas Agreement reinforces the Government's awareness of the State's reliance interests. In that Agreement, DHS stipulated:

- "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." Compl., Ex. B at 1.
- "The 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." *Id.*
- "[A]n aggrieved party will be irreparably damaged." *Id.* at 5.

The Agreement further states that it "establishes a binding and enforceable commitment between DHS and Texas." *Id.* at 2. Texas therefore could reasonably rely on the Agreement. And Texas did in fact rely on the Agreement by including DHS's breach as a cause of action in its complaint—filed months before the June 1 Memorandum. And then—despite these reliance interests and despite being on notice of the Agreement from the States' complaint—the June 1 Memorandum said not one word about the Agreement. A "reasonable and reasonably explained" decision would have

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003504

said *something*. *Prometheus*, 141 S. Ct. at 1158. That is why this "omission alone [likely] renders [the Secretary's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.[4]

b.

The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits. In its October 2019 Assessment of MPP, DHS found that "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." D. Ct. Op. at 10. DHS also found that MPP addressed the "perverse incentives" created by allowing "those with non-meritorious claims . . . [to] remain in the country for lengthy periods of time." *Id.* These benefits, DHS emphasized, were a "core component" or "cornerstone" of the agency's prior immigration policy. *Id.* at 12.

Nonetheless, the June 1 Memorandum did not expressly mention, let alone meaningfully discuss, DHS's prior factual findings. Instead, the Secretary changed policies based on his own findings that contradict DHS's October 2019 findings. But an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*,

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[4] As the D.C. Circuit has emphasized in a different APA context, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (Sentelle, C.J.) (quotation omitted). We do not suggest that DHS needed notice-and-comment rulemaking to rescind MPP. But it did need to consider "relevant factors" to that rescission decision. *Id.* And you might reasonably think that one "relevant factor[]" to that decision was DHS's pledge "to consult Texas and consider its views before taking any action, adopting or modify[ing] a policy or procedure, or making any decision that" affects MPP. Compl., Ex. B at 2. Perhaps DHS has a good reason for its action. But it is likely arbitrary and capricious for DHS not even to acknowledge its agreement—let alone do anything to consult Texas or consider its views.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003505

556 U.S. 502, 515 (2009). The Secretary did not provide the required "more detailed justification." *Id.* This further indicates that the termination of MPP was arbitrary and capricious.

c.

The June 1 Memorandum also insufficiently addressed alternatives to terminating MPP. "[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (quotation omitted). While considering alternatives, DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915. As explained above, DHS did not adequately assess reliance interests. So it would be impossible for the June 1 Memorandum to properly weigh the relevant interests against competing policy concerns while considering alternatives.

The June 1 Memorandum offers a single conclusory sentence addressing potential modifications to MPP: "I also considered whether the program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." AR.5. But "belief" that a "total redesign" was required, *id.*, is no substitute for a "reasonable and reasonably explained" decision. *Prometheus*, 141 S. Ct. at 1158.

Of course, "DHS was not required . . . to consider *all* policy alternatives in reaching [its] decision," and the agency has "considerable flexibility" to "wind-down" a program. *Regents*, 140 S. Ct. at 1914 (emphasis added) (quotation omitted). But the problem is that the Secretary failed to mention *any* modification to MPP as a possible alternative, even though "the alternatives . . . are within the ambit of the existing policy." *Id.* at 1913

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003506

(quotations omitted). And merely stating that an alternative was considered is not enough to show reasoned analysis. *Cf. United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)).

The Government's principal counterargument is that DHS considered an alternative *outside* "the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. Specifically, the June 1 Memorandum pointed to a "Dedicated Docket" program designed to provide counsel to aliens in removal proceedings. AR.4–5 & n.6; *see* Stay Mot. at 16; Reply at 7. This argument is unpersuasive for at least two reasons. First, by the Government's own admission, the "Dedicated Docket" is outside the ambit of MPP—and hence it does not count as a reasoned consideration of alternatives "*within* the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (emphasis added). And second, neither the June 1 Memorandum nor the Government in its stay motion explains why MPP and the "Dedicated Docket" are mutually exclusive.

d.

The June 1 Memorandum also failed to consider the legal implications of terminating the policy. After the Government suspended MPP—but before it rescinded the program—Texas filed this lawsuit. In its original complaint, and in its initial motion for preliminary injunction, Texas argued that the suspension of MPP violated § 1225. *See* Compl. at 36–38; Prelim. Inj. Mot., ECF No. 30. About a month and a half later, the Secretary issued the memorandum terminating MPP. So the government was on notice of the legal implications. Yet in the memorandum, the Secretary does not mention the lawfulness concerns involving § 1225—even though, the "natural response" to this "newly identified problem" would be to consider the problem. *Regents*, 140 S. Ct. at 1916. This further indicates that "the process

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003507

by which" the Secretary reached that result was neither "logical" nor "rational." *Michigan*, 576 U.S. at 750.

e.

The Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum's omissions. None is persuasive.

The Government repeatedly argues that DHS's statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems. *See* Stay Mot. at 16. The law says otherwise. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1226 (5th Cir. 1991) ("The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements . . . ."); *United Techs.*, 601 F.3d at 562 ("We do not defer to the agency's conclusory or unsupported suppositions." (quotation omitted)); *cf. Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("And stating that a factor was considered—or found—is not a substitute for considering or finding it." (quotation omitted)); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). This well-established principle makes sense. After all:

> [A]n agency's "experience and expertise" presumably enable the agency to provide the required explanation, but they do not substitute for the explanation, any more than an expert witness's credentials substitute for the substantive requirements applicable to the expert's testimony under Fed. R. Evid. 702. The requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003508

CS Wind Viet. Co. v. United States, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citations omitted).

The Government also points to the June 1 Memorandum's observations on MPP's shortcomings. *See* Stay Mot. at 16–17. Even if creditable, these observations cannot justify the other omissions discussed above. But in any event, many of those observations are neither "logical" nor "rational." *Michigan*, 576 U.S. at 750. Take DHS's termination justification based on *in absentia* removal orders. DHS observed that "the high percentage of cases completed through the entry of *in absentia* removal orders (approximately 44 percent, based on DHS data) *raises questions* for me about the design and operation of the program." AR.4 (emphasis added). The district court found that "[t]he federal government's data shows similarly high rates of *in absentia* removals *prior* to implementation of MPP." D. Ct. Op. at 40. The Government has not said one word to suggest the district court's factual finding was clearly erroneous.[5] We therefore cannot conclude that the Secretary "examine[d] the relevant data and articulate[d] a satisfactory explanation" with "a rational connection between the facts found and the choice" to terminate MPP. *State Farm*, 463 U.S. at 43 (quotation omitted). And even on the Government's own terms—considering *only* half the statistics and ignoring the district court's factual finding—the June 1 Memorandum only said that *in absentia* statistics "raise[d] questions for [DHS] about the design and operation of the

[5] In its reply brief, the Government argues that it need not have commissioned an "in-depth empirical analysis" of the *in absentia* statistics before rescinding MPP. Reply at 9. Of course that is true. But it is equally true that the Government cannot cherry-pick only the statistics it likes in the administrative record. Nor can the Government fail to address statistics that already exist in that record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003509

program." AR.4. But the process required by the APA requires agencies to *seek answers* and reasonably explain the outcome of that effort, including its conclusions.

The June 1 Memorandum places much weight on COVID-19. According to the Memorandum, the pandemic "compounded" "challenges faced by MPP" when "immigration courts designated to hear MPP cases were closed for public health reasons between March 2020 and April 2021." AR.4. But DHS issued its memorandum terminating MPP at least one month *after* courts reopened. As the district court explained: "*Past* problems with *past* closures are irrelevant to the decision to *prospectively* terminate MPP in June 2021. This is especially true when the Secretary admits DHS had maintained the facilities during the pandemic." D. Ct. Op. at 41. The Government challenges this conclusion on the ground that "infrastructure used for MPP remains shuttered." Stay Mot. at 19 n.4. But the Government provides no indication that the facilities are not maintained or are shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP in January 2021.

2.

In addition to the APA, the district court also relied on 8 U.S.C. § 1225. The Government claims that the district court determined that "the Secretary is *required* to return any noncitizen he fails to detain" and that the district court's "core legal analysis" is that DHS has "a binary choice between detention or return to Mexico for noncitizens arriving from Mexico." Stay Mot. at 11–13. In essence, the Government characterizes the district court's decision and injunction as removing the Government's ability to use its discretion under 8 U.S.C. §§ 1182(d)(5)(A) and 1226. But as we explain in Part III, *infra*, the Government has mischaracterized the district

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003510

court's order. This matters because all of the Government's § 1225 arguments hinge on an incorrect premise.

Therefore, we cannot conclude that the Government is likely to succeed on either its APA arguments or its § 1225 arguments—let alone that the Government is likely to succeed on both. The Government therefore has not come close to a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426.

III.

The Government also has not shown that it will be irreparably injured absent a stay pending appeal. The Government's arguments are largely built on two strawmen. We consider and reject those before turning to the Government's other arguments.

First, the Government complains that it will be irreparably harmed absent a stay because DHS is incapable of reinstating MPP "in a matter of days." Stay Mot. at 21; *see also* Decl. of David Shahoulian ¶ 16 (Aug. 16, 2021) (arguing DHS cannot immediately "reestablish the entire infrastructure upon which [MPP] was built"). This is a strawman. The district court did not order the Government to restore MPP's infrastructure overnight. It ordered that, once the injunction takes effect on August 21, DHS must "enforce and implement MPP *in good faith*." D. Ct. Op. at 52. DHS does not argue that good faith is an unreasonably high standard to meet.

Second, the Government asserts it will be irreparably injured because the injunction obligates DHS to detain "every single person described in 8 U.S.C. § 1225," which DHS cannot do because it lacks "sufficient detention capacity." Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021). This is a second strawman. The injunction does not require the Government to detain every alien subject to § 1225. Nor does it order the Government to "build or obtain" additional detention facilities. Stay Mot. at 21. Instead, it requires

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003511

the Government to "enforce and implement MPP *in good faith . . . until such a time* as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention." D. Ct. Op. at 52 (second emphasis added).

And far from ordering the Government to detain "every single person described in 8 U.S.C. § 1225," Decl. of David Shahoulian ¶ 5 (Aug. 16, 2021), the district court specifically acknowledged that the Government has other options. Under § 1225(b)(2)(A), which provides the statutory authority for MPP, an alien arriving on land from a contiguous foreign territory can be returned to that territory. *See* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1182(d)(5)(A), DHS can parole an alien into the United States "on a *case-by-case basis* for urgent humanitarian reasons or significant public benefit." (Emphasis added); *see* D. Ct. Op. at 43 & n.11 (noting this discretion). Under 8 U.S.C. § 1226, DHS can release on "bond" or "conditional parole" an alien arrested on a warrant and detained "pending a decision on whether the alien is to be removed." *See also* Stay Mot. at 12; D. Ct. Op. at 51 (noting this discretion). Last but not least, of course, the Government can choose to detain an alien in accordance with § 1225. *See* D. Ct. Op. at 43 (noting this discretion).

What the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.

Third and finally, we turn to the Government's non-strawmen arguments for its irreparable injuries. Most of these are self-inflicted and therefore do not count. *See* 11A CHARLES ALAN WRIGHT, ET AL.,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003512

FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2021) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). For example, the Government notes that "DHS has been in the process of unwinding MPP and its infrastructure for months," such that restarting the program now would be difficult. Stay Mot. at 21. But as the district court noted, "Texas filed suit challenging the suspension of enrollments in MPP . . . nearly two months *before* DHS purported to terminate the program entirely in the June 1 Memorandum." D. Ct. Op. at 47. Therefore, DHS could have avoided this problem by waiting to unwind MPP until this litigation was resolved. The self-inflicted nature of the government's asserted harm "'severely undermines' its claim for equitable relief." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993)); *accord Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Before the district court, the Government also suggested that it began unwinding MPP four or more months *before* the June 1 Memorandum. *See* D. Ct. Op. at 48. That understandably would make it harder for DHS to restart MPP on Saturday. But it also makes DHS's legal position dramatically weaker. It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later. *See, e.g.*, *Regents*, 140 S. Ct. at 1908–10. Insofar as DHS concedes that its June 1 Memorandum is a *post hoc* rationalization for a decision that it made many months earlier, it has conceded that the June 1 Memorandum is arbitrary, capricious, and not a good faith explanation for its decision. Such inequitable conduct is "sufficient to deny" DHS's request for an equitable stay pending

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003513

appeal. *See In re GGW Brands, LLC*, No. 2:13-bk-15130, 2013 WL 6906375, at *26–*27 (Bankr. C.D. Cal. Nov. 15, 2013).

The Government also asserts that reinstating MPP will cause harm because "DHS cannot restart MPP without significant cooperation with Mexico," and the injunction implicates "delicate and ongoing discussions with Mexico." Stay Mot. at 21. There are at least four problems with that. First, as the district court noted, DHS created MPP unilaterally and without any previous agreement with Mexico. *See* D. Ct. Op. at 49 & n.15. DHS does not explain why it cannot likewise restart MPP unilaterally. Second, the Government does not point to any evidence that Mexico has withdrawn its support for MPP. *See* AR.152–53 (Mexico's December 20, 2018 statement of support). Third, the Government "'could have avoided' any disruptions by simply informing Mexico that termination of MPP would be subject to judicial review." D. Ct. Op. at 47 (quoting *Texas*, 809 F.3d at 187). Insofar as the Government failed to do that, again, its injury is self-inflicted. Fourth, even assuming Mexico's support is required, assuming Mexico has withdrawn its support, and assuming Mexico will not support a new MPP, the injunction *still* does not irreparably harm the Government. The injunction only requires good faith on the part of the United States—if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order, so long as it also adheres to the rest of the statutory requirements.

Finally, because the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*. Even if the Government were correct that long-term compliance with the district court's injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court's requirement of good faith

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003514

while the appeal proceeds. Therefore, the Government has failed to demonstrate that it will be irreparably injured absent a stay pending appeal.

IV.

The final two *Nken* factors also do not warrant a stay. *See Nken*, 556 U.S. at 434.

The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. *See* D. Ct. Op. at 17 ("The termination of MPP has [increased] and will continue to increase the number of aliens being released into the United States and has [imposed] and will continue to impose harms on Plaintiff States Texas and Missouri."). We agree. *See supra* Part II.A.1 (standing). A stay "would enable" aliens released into the interior "to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits." *Texas*, 787 F.3d at 768.

Likewise, the "public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994). Here, the Government has failed to carry its burden to show that its conduct comports with federal law. And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers. All the district court's injunction requires of the Government is that it act in accordance with the INA. And in all events, "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect" principles of "separation of powers and federalism." *Texas*, 787 F.3d at 768.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003515

The DHS-Texas Agreement also suggests the public interest counsels against issuing a stay. That Agreement expressly acknowledged that if DHS failed to comply with the Agreement's terms, Texas would "be irreparably damaged" and would "not have an adequate remedy at law." Compl., Ex. B at 4. The Agreement remained binding until August 1, 2021, and the parties agree DHS violated its terms. *See* D. Ct. Op. at 14 ("The parties agree DHS did not follow the[] procedures" required by the Agreement.). The district court concluded that the expiration of the Agreement mooted Texas's claim under it. *See id.* at 44. As noted in Part II above, however, the States' likelihood of success on the merits of their APA claims means that DHS will have to consider all relevant factors before attempting to rescind MPP—including its effects on the States. The public interest plainly lies in not allowing DHS to circumvent those federalism concerns.

V.

Finally, the Government argues a stay is warranted because the district court should have remanded without vacating the June 1 Memorandum or issuing an injunction. Stay Mot. at 22; *see also* Reply at 12. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). But it is unclear how DHS can substantiate its decision on remand. Neither in its opening stay motion nor in its reply does the Government suggest how it can. *See generally* Stay Mot. at 22–23; Reply at 12. And Supreme Court precedent suggests that any later memorandum on remand elaborating on the June 1 Memorandum would be irrelevant to an arbitrary-and-capricious analysis because it is a *post hoc* rationalization. *See Regents*, 140 S. Ct. at 1907–09. So at this stage, without any argument whatsoever to the contrary, it appears that DHS would have to issue "a *new* rule implementing a *new* policy" that

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003516

"compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (emphases added).

Vacatur, by contrast, would not cause "disruptive consequences". *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (also considering "the disruptive consequences of vacatur" (internal quotation marks omitted)). The Government makes no argument materially different from its irreparable-injury argument. So we reject the Government's arguments here for the same reasons we rejected them in Part III, *supra*.

* * *

The Government has failed to make the requisite showing for all four *Nken* factors. The Government's motion for a stay pending appeal is therefore DENIED. The Government's appeal is hereby EXPEDITED for consideration before the next available oral argument panel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003517

Message

From: Stevens, Cris [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=521151F1306D4EA2AE0C6FA08B7A6293-STEVENS, CRIS]
Sent: 8/20/2021 9:50:10 AM
To: Weaks, Timothy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9796f42ac2b149a99dc0b8f288adf9f3-Weaks, Timothy]; SL-Staff [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a37cdd3e5b6d4c6798cbc5a5d58de75e-SL-Staff]
CC: Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Nuelle, Chris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5f087eebfbb34d7e8854e258b6fd403b-Nuelle, Chris]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Deal, Marianna [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=968ddb64a1194ac4af691d6e90762ec4-Deal, Marianna]; Estep, Robert [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e44f6ef0bb24ecd81753eb8613699d8-Estep, Robert]; Houser, Rachael [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=houser]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Lewis, Jason [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b5c0354b7d8f4ae4b03d7dd0d4144031-Lewis, Jason]; Haywood, Amy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=haywoa]; Foster, Josh [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30031dddc5fd40b0bc03e3a33d8d46b7-Foster, Josh]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Smith, Justin [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=74b249683a0d40e5877f99eea249f1d7-Smith, Justin]
Subject: We Need Players! 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

All,
The softball tournament is tonight. We are the defending champs. **We are critically short on players.** Let's show up and defend our title!
Regardless of ability, please make plans to join the team if at all possible. **Contact Tim Weaks and me by return email by noon today** and we will gladly put you on the team-and you will have my undying admiration for making the defense of our title possible!
Best,
Cris

Cristian M. Stevens | First Assistant Attorney General
Missouri Attorney General's Office
207 West High St
Jefferson City, MO 65101
(573) 690-0223
Cris.Stevens@ago.mo.gov

From: Weaks, Timothy
Sent: Thursday, August 19, 2021 2:39 PM
To: SL-Staff
Cc: Krug, Christine ; Stevens, Cris ; Nuelle, Chris ; Atkins, Jay ; Ebert, Mik ; Deal, Marianna ; Estep, Robert ; Houser,

AMERICAN OVERSIGHT

Rachael ; Morgan, Jeremiah ; Lewis, Jason ; Haywood, Amy ; Foster, Josh ; Goodwin, Gregory
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

All,
Tomorrow evening, the Missouri Attorney General's Office will play in a round-robin softball tournament against the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office.

Unfortunately, I have received a large amount of cancellations this afternoon. So, in order to avoid having to forfeit, I am once again putting out a call for people to play.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing* and have not already responded to me today, please let me know. Please email me separately without replying all, as this is being sent to the entire St. Louis. If not, no need to send regrets. If any Section Chiefs are able to help recruit, I would greatly appreciate it.

If you have any questions, there are more details below, or feel free to contact me directly. Thank you!

Tim

Timothy Weaks | Assistant Attorney General
Missouri Attorney General's Office
815 Olive St, Suite 200
St. Louis, MO 63101
(314) 340-4748
Timothy.Weaks@ago.mo.gov

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:35 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Softball tournament tonight is postponed due to rain.

We will play next Friday, August 20th at 4:00pm at Wilmore Park

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If you are now able or unable to play, please let me know as soon as possible so we can determine if we will have enough to play. Remember, we want to win, but all skill levels are welcome and we would love to have you come out.

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:05 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Happy Friday, everyone. A few updates. Apologies for all of the emails.

1. Softball Tournament is tentative at this point due to all of the rain and more expected this evening. The organizer is waiting to hear from the Parks Department as to whether we can play. I will send a follow-up email either way to let you all know. If we do play, please try to arrive by 4:00pm. We will have a first-round bye so I don't expect to play until 4:30pm, but there is a chance that some offices, perhaps those with a history of not showing up to court, may not show up to play, so we could play sooner.
2. If you ordered merchandise, it is available for pickup from Rachael Houser's office. Please go get it this morning or this afternoon.

Thanks!
Tim Weaks

From: Weaks, Timothy
Sent: Thursday, August 12, 2021 11:38 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

All,
Tomorrow is the day! This casual event is open to both attorneys and support staff (so long as your schedule accommodates), and we would love to see as many people as possible come out. As of now, we have 11 people committed to playing, but we could definitely use more. So if you are on the fence, I urge you to come by even if you are in as bad of shape as I am currently. Especially if you identify as female, your presence would be greatly appreciated, as 4 females are required in the field at all times and the batting order must alternate men and women. If you have not already, please let me know if you are able to play!

If you have a ball glove or bat, please bring it with you. Parking is available in the park and also directly across Hampton on the side of Schnucks. I would encourage you to patronize the store if possible and put the receipt on your dashboard. Please do not park in the Walgreens lot.

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If you ordered a t-shirt through the AGO Pop-Up Shop that Rachael Houser so graciously organized, those will arrive in the St. Louis office tomorrow morning after Rachael picks them up. If you did not order one, I would suggest wearing the blue AGO t-shirts we wore last time (pictured below) or any other shirt with a similar color.

There is a good possibility that it rains and storms tomorrow, unfortunately, so if the tournament is canceled, I will inform everyone as soon as I know, but I would still plan on playing at this point.

Any questions, please feel free to reach out!

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Thursday, July 22, 2021 4:09 PM
To: SL-Staff <SL-Staff@ago.mo.gov>
Subject: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021



Friday, August 13, 2021 at 4:00pm, Wilmore Park (Hampton & Gravois, STL City) - Following last year's cancellation due to COVID, the Missouri Attorney General's Office will fight to defend its title against the likes of the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office in a round-robin softball tournament.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing*, please let me know so that we can get a preliminary head count. Please email me separately without replying all, as this is being sent to the entire St. Louis Office. If not, no need to send regrets.

AMERICAN OVERSIGHT

We will likely order new shirts this year featuring the logo above. More details to come about those from either myself or Rachael Houser, but please let either of us know if you are interested in one.

My apologies if you have already received an email about the tournament from either me or your section chief.

Thanks!

Tim Weaks

Timothy Weaks | Assistant Attorney General
Missouri Attorney General's Office
815 Olive St, Suite 200
St. Louis, MO 63101
(314) 340-4748
Timothy.Weaks@ago.mo.gov

AMERICAN OVERSIGHT



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Message

From: Dolin, Katharine [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DOLINK]
Sent: 8/20/2021 5:08:42 PM
To: Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Bruce, Ted [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=brucet]; Coffin, Jennifer [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7c516bb019ae449591ced2cefc1c2e48-Coffin, Jennifer]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Estep, Tristin [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a883d9c46ba34671b1d10fb04807beff-Estep, Tristin]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]; Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Lankford, George [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=lankfg]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Pierce, Melissa [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=aecb1ad334744b4f80ef65484b457150-Pierce, Melissa]; Wheeler, Paige [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8f9e00a1b0fb41718db804e944b783f3-Wheeler, Paige]
CC: Ramshead, Carla [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ramshc]; Sullivan, Rebecca [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=curtir]; Koetting, Melissa [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=koettm]; Boessen, Carrie [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=boessc]
Subject: Case staffing for next week
Attachments: Nesbitt.docx; Helm.docx

Hello all-
Please see attached staffing forms for next week.
Thanks!

AMERICAN OVERSIGHT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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CINCINNATI, OHIO 45202-3988

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Filed: August 20, 2021

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AMERICAN OVERSIGHT

Re: Case Nos. 99-4317/14-3718, *Danny Hill v. Tim Shoop*
Originating Case No. : 4:96-cv-00795

Dear Counsel,

The court today announced its decision in the above-styled cases.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Sandy Opacich

Enclosures

Mandate to issue.

AMERICAN OVERSIGHT

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0188p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANNY HILL,

Petitioner-Appellant,

v.

TIMOTHY SHOOP, Warden,

Respondent-Appellee.

Nos. 99-4317/14-3718

On Petition for Rehearing En Banc
United States District Court for the Northern District of Ohio at Youngstown.
No. 4:96-cv-00795—Paul R. Matia and John R. Adams, District Judges.

Argued En Banc: December 2, 2020

Decided and Filed: August 20, 2021

Before: SUTTON, Chief Circuit Judge; MERRITT, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEF:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, Stephen E. Maher, Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Sarah K. Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, Kevin J. Truitt, DISABILITY RIGHTS OHIO, Columbus, Ohio, for Amici Curiae.

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Merritt, senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy recused himself from participation in this decision.

AMERICAN OVERSIGHT

GIBBBONS, J., delivered the opinion of the court in which SUTTON, C.J., and GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, JJ., joined. MOORE, J. (pp. 29–63), delivered a separate dissenting opinion, in which MERRITT, COLE, CLAY, WHITE, STRANCH, and DONALD, JJ., joined. An excerpt of the panel's 2018 opinion, *see* 881 F.3d 483 (6th Cir. 2018), is appended, (app. 64–81).

OPINION

JULIA SMITH GIBBONS, Circuit Judge. In this death penalty habeas case, appellant Danny Hill seeks collateral review of his conviction for the murder of Raymond Fife, a twelve-year-old boy. The case has been to the Supreme Court once and before panels of this court twice. The core issue in the underlying state case was whether Hill was ineligible for the death penalty because he is intellectually disabled, a question that became pertinent after the Supreme Court's 2002 decision in *Atkins v. Virginia*. 536 U.S. 304 (2002). Before us, the issues are whether, under governing AEDPA review principles, the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We conclude that the state court's resolution of the issue does not meet either of the criteria that would permit a federal court to disturb a state conviction. Thus, we affirm the district court's denial of Hill's petition for a writ of habeas corpus.

I.

In 1986, a three-judge Ohio state court panel convicted Hill of the murder of Raymond Fife, a twelve-year-old boy. *State v. Hill*, 894 N.E.2d 108, 111 (Ohio Ct. App. 2008). Hill abused and injured Fife in multiple horrible ways. *Id.* Fife was found by his father and died two days later. *Id.* The same panel sentenced Hill to death. *Id.* During the mitigation stage of Hill's sentencing, the court heard testimony from three medical professionals about whether Hill was

AMERICAN OVERSIGHT

intellectually disabled.[1] One found that Hill's intelligence level "fluctuat[ed] between mild retarded and borderline intellectual functioning," another that Hill fell "in the mild range of mental retardation," and the last that Hill's "upper level cortical functioning indicated very poor efficiency." *Id.* at 112 (quoting *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992)). After considering this evidence, the Ohio state court found that the record evidence suggested that Hill had a "diminished mental capacity" and that testimony suggested he would be "categorized as mildly to moderately retarded." *Id.* (quoting *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761, at *32 (Ohio Ct. App. Nov. 27, 1989)). The Ohio Court of Appeals and Ohio Supreme Court both affirmed the trial court's imposition of the death penalty because they found that the aggravating circumstances outweighed any mitigating factors, including Hill's diminished intellectual capacity. *Id.*

In 2002, the Supreme Court decided *Atkins v. Virginia*, which held that it was unconstitutional to execute the intellectually disabled. 536 U.S. 304 (2002). The *Atkins* Court provided some discussion of the clinical definitions of intellectual disability, but it left it to the states to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (second alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). In *State v. Lott*, the Ohio Supreme Court articulated a three-part test for establishing intellectual disability based on *Atkins*: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." 779 N.E.2d 1011, 1014 (Ohio 2002), *overruled by State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

In response to *Atkins*, Hill filed a petition for state post-conviction relief in 2003. *State v. Hill*, 894 N.E.2d at 113. The trial court held an evidentiary hearing, and Hill, the prosecution, and the court each chose a medical expert to evaluate Hill's intellectual capabilities. *Id.* Hill retained Dr. David Hammer, a professor and director of psychology services at the Ohio State University; the prosecution hired Dr. Gregory Olley, a professor and director of the Center for

[1]At the time, the condition was referred to as "mental retardation." While some of the past decisions and material we cite use that outdated terminology, the preferred term in the current lexicon is "intellectual disability." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

AMERICAN OVERSIGHT

the Study of Development and Learning at the University of North Carolina at Chapel Hill; and the court appointed Dr. Nancy Huntsman, a forensic psychologist who worked at the Court Psychiatric Clinic in Cleveland, Ohio. *Id.* The Ohio Court of Appeals, in reviewing Hill's *Atkins* claim, described the trial court proceedings as follows:

> In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the *Atkins* hearing. At this time, Hill was administered the Wechsler Adult Intelligence Scale ("WAIS–III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the Woodcock–Johnson–III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.
>
> The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

Id. at 113–14.

The trial court held that Hill was not intellectually disabled and rejected his *Atkins* claim. *Id.* at 114. The Ohio Court of Appeals affirmed, finding that Hill failed to prove he suffered from two or more significant limitations in adaptive skills that manifested before age 18. *Id.* at 126–27. The Ohio Supreme Court, with two justices dissenting, declined to hear Hill's appeal. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (Table).

Hill then filed a petition for a writ of habeas corpus, which the district court denied. The district court concluded that Hill had not overcome the highly deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[2] *Hill v.*

[2]The district court was critical of the Ohio Court of Appeals opinion. Some of us agree with some of its observations. Here, however, we do not itemize the opinion's possible flaws in order to focus attention on our

AMERICAN OVERSIGHT

Anderson, No. 4:96 CV 00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). The district court explained that while reasonable minds may disagree with the state court's determination and weighing of the evidence, the state court's "conclusion regarding Hill's adaptive behavior *at the time he filed his* Atkins *claim* was supported by sufficient credible evidence and, most importantly, the opinions of two experts." *Id.*

Hill appealed, and a panel of judges on this court reversed the district court's decision on Hill's *Atkins* claim. The panel found that "the state court judgment . . . amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*."[3] *Hill v. Anderson*, 881 F.3d 483, 489 (6th Cir. 2018). In addition to his *Atkins* claim, Hill raised four other issues on appeal: an ineffective assistance of counsel claim related to his *Atkins* hearing, a *Miranda* claim, a claim of prosecutorial misconduct, and a due process claim based on the trial court's alleged failure to hold a pretrial competency hearing. *Id.* at 487. The panel pretermitted Hill's ineffective assistance of counsel claim and affirmed the district court's denial of the other three claims, which Hill has not challenged. *Id.* The Warden filed a petition for rehearing *en banc*, which was denied. He then filed a petition for a writ of certiorari, which the Supreme Court granted.

The Supreme Court vacated and remanded, finding that the panel's "reliance on *Moore* was plainly improper under § 2254(d)(1)." *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam). The Court explained that "habeas relief may be granted only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." *Id.* at 506 (quoting 28 U.S.C. § 2254(d)(1)). Because *Moore* was decided after Hill's state-court proceedings, the Court found that the panel erred by relying on *Moore* when determining whether habeas relief was warranted under § 2254(d)(1). *Id.* at 508–09. The Court ordered that "[o]n remand, the [panel] should determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant

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modest review role: that of determining whether the Ohio Court of Appeals unreasonably concluded that Hill was not intellectually disabled.

[3]*See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S. Ct. 1039 (2017).

AMERICAN OVERSIGHT

time." *Id.* at 509. The Supreme Court did not directly comment on any other part of the panel's decision, including its analysis under § 2254(d)(2) or Hill's other four claims for relief. *See generally id.*

On remand, the panel again granted Hill relief on his *Atkins* claim. *Hill v. Anderson*, 960 F.3d 260, 265 (6th Cir. 2020) (per curiam). The panel also once again pretermitted Hill's ineffective assistance of counsel claim and affirmed the district court's denial of Hill's other three claims, incorporating its prior opinion in full. *Id.* at 265, 283.

The Warden filed a petition for rehearing *en banc* on Hill's *Atkins* claim, arguing that the panel erred under both § 2254(d)(1) and § 2254(d)(2). This court granted *en banc* review, which vacated the prior panel decision. Because we conclude that Hill's *Atkins* claim does not satisfy the demanding AEDPA standard, we affirm the district court's denial of habeas relief. In addition to our discussion of his *Atkins* claim, we find that Hill's ineffective assistance of counsel claim fails on its merits. We also reinstate the panel's prior discussion affirming the district court's denial of Hill's remaining claims to the extent it is consistent with this opinion.

II.

Under 28 U.S.C. § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous"—it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Objective unreasonableness is a higher standard than clear error. *See White v. Woodall*, 572 U.S. 415, 419 (2014). To demonstrate that the state court's decision was objectively unreasonable, the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in

AMERICAN OVERSIGHT

existing law beyond any possibility for fairminded disagreement." *Id.* at 419–20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

A federal court may grant a writ under 28 U.S.C. § 2254(d)(2) if the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under AEDPA, the question for this court to answer "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). Furthermore, "the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). Factual findings made by the state courts based on the trial record are entitled to a presumption of correctness that may be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Warren v. Smith,* 161 F.3d 358, 360–61 (6th Cir. 1998).

This "highly deferential standard" requires that determinations made in state court "be given the benefit of the doubt." *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) *(per curiam)). When applying AEDPA, this court considers* "the decision of 'the last state court to issue a reasoned opinion on the issue[s]' raised in [the] habeas petition." *Shimel v. Warren*, 838 F.3d 685, 696 (6th Cir. 2016) (first alteration in original) (quoting *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006)). Here, that is the Ohio Court of Appeals decision. *See State v. Hill*, 894 N.E.2d at 108.

III.

A.

1.

While Hill's *en banc* supplemental brief only asserts a claim for relief under § 2254(d)(2), in his original appeal Hill also argued that he is entitled to relief under § 2254(d)(1). Specifically, Hill claimed that the state court's decision to evaluate whether Hill

AMERICAN OVERSIGHT

was intellectually disabled at the time of his *Atkins* hearing rather than at the time the crime was committed was an unreasonable application of clearly established federal law.[4]

At the time of the Ohio Court of Appeals decision, the only clearly established Supreme Court precedent was *Atkins* itself.[5] *Atkins* held that the execution of intellectually disabled individuals violated the Eighth Amendment, but it did not provide a "comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop*, 139 S. Ct. at 507. Instead, *Atkins* delegated to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416). *Atkins* did not, as the Warden appears to claim, relinquish all standard-making authority to the states. *Atkins* set out several guideposts for the states' discretion by relying heavily on clinical definitions of intellectual disability and factors such as "subaverage intellectual functioning" and "significant limitations in adaptive skills . . . that became manifest before age 18." *Atkins*, 536 U.S. at 318.

Though *Atkins* took note of "standard definitions of mental retardation," the Court "did not definitively resolve how" those definitions "w[ere] to be evaluated but instead left [their] application in the first instance to the States." *Shoop*, 139 S. Ct. at 508; *see Bobby v. Bies*, 556 U.S. 825, 831 (2009) (explaining that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so

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[4]It is unclear whether Hill has waived this argument. In the district court, Hill argued that "[t]o the extent that the state procedures themselves used to render the factual findings of the mental retardation clinical components contributed to and fostered inaccurate and unreliable factfinding by the trial court, the procedures violated clearly established federal law." DE 94, Petition, Page ID 148. Read in the light most favorable to Hill, Hill's current argument that the Ohio Court of Appeals focused its inquiry on the incorrect time period may be construed as one of the state procedures that Hill claimed before the district court contributed to inaccurate and unreliable factual findings. Given the ambiguity, and because neither party raised the potential waiver issue, we will proceed under the assumption that Hill's argument has not been waived.

[5]The Warden and twelve states as amici urge us to take this opportunity to overrule a line of Sixth Circuit precedent which permits courts to rely on clearly established law from both the United States Supreme Court and state supreme courts when considering an *Atkins* claim under § 2254(d)(1). *See* CA 6 R. 369, Response Br., at 14; CA 6 R. 371, Amicus Br., at 6; *see also Williams v. Mitchell*, 792 F.3d 606, 612 (6th Cir. 2015) ("[I]n the *Atkins* context, 'clearly established governing law' refers to the Supreme Court decisions and controlling state law decisions applying *Atkins*.") However, Hill does not attempt to rely on state court precedent to establish his § 2254(d)(1) claim. *See* CA 6 R. 375, Reply Br., at 7 n.2 ("The amicus brief filed on behalf of various states . . . focuses solely on a 2254(d)(1) argument that petitioner does not raise."). Because Hill does not present this issue to us, it is extraneous to this appeal, and we decline to resolve it here. *See United States v. Asakevich*, 810 F.3d 418, 421 (6th Cir. 2016) ("The federal courts have no license to issue advisory opinions . . . .").

AMERICAN OVERSIGHT

impaired as to fall within *Atkins'* compass" (internal quotations omitted) (alteration adopted)). Therefore, Hill faces the difficult task of showing that the Ohio Court of Appeals applied the highly general holding of *Atkins* in an objectively unreasonable way. *Cf. Parker v. Matthews*, 567 U.S. 37, 49 (2012) (finding no unreasonable application of the "highly generalized standard for evaluating claims of prosecutorial misconduct"); *Lockyer*, 538 U.S. at 73, 76 (finding no unreasonable application of clearly established federal law when the "precise contours" of the constitutional standard at issue were "unclear" (internal quotations omitted)).

While it is possible for state courts to unreasonably apply *Atkins*, evaluating a defendant's intellectual abilities at a later date rather than at the time of the crime is not an unreasonable application of *Atkins*. *Atkins* does not define the time period when the inquiry must be made. Hill argues that because the Court in *Atkins* "list[ed] several common characteristics of those with intellectual disability . . . it contemplated their diminished culpability" which is "a reference to the time the crime was committed. Thus, any assessment of a criminal defendant's intellectual function must derive from that same moment in time." CA 6 R. 295, Petition, at 50. Hill's interpretation of *Atkins*, however, is hardly the only reasonable interpretation. As this court has previously explained, *Atkins* supports the conclusion that intellectual disability is not a transient condition. *See Williams*, 792 F.3d at 619 (concluding that "if an individual is indeed presently intellectually disabled, . . . the disability would have manifested itself before the individual turned eighteen" and "past evidence of intellectual disability . . . is relevant to an analysis of an individual's present intellectual functioning" (emphasis omitted)); *see also id.* at 626 (Gibbons, J., concurring) ("It is clear from the entire thrust of the *Atkins* decision—along with the medical literature that it cites in support—that intellectual disability is a permanent condition."); *Heller v. Doe,* 509 U.S. 312, 323 (1993) (noting, in a different context, that intellectual disability "is a permanent, relatively static condition" (citing S. Brakel et al., The Mentally Disabled and the Law 37 (3d ed. 1985))). If intellectual disability is not a transient condition, then the outcome should not change if the court evaluates a defendant's abilities at the time of the crime or at the time of a later *Atkins* hearing. Thus, we find Hill's argument that *Atkins* requires evaluating a defendant's intellectual abilities at the time of the offense to be unpersuasive.

AMERICAN OVERSIGHT

Here, the Ohio Court of Appeals did not question the trial court's decision to evaluate Hill's intellectual abilities at the time of the *Atkins* proceedings rather than when the crime was committed. Nevertheless, the Ohio court considered evidence of Hill's past abilities including Hill's medical history, public school records, and prior standardized test results. *State v. Hill*, 894 N.E.2d at 123–24. The court also evaluated criteria mentioned in *Atkins* such as intellectual functioning, adaptive skills, and the onset age of disability. We cannot say that the Ohio court's decision was objectively unreasonable given the discretion *Atkins* left to the states.

2.

Next, Hill argues that the Ohio Court of Appeals decision was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, in violation of 28 U.S.C. § 2254(d)(2). Specifically, Hill claims that the state court mischaracterized the record, improperly discounted historical evidence, and unreasonably concluded that Hill failed to establish that his disability manifested before age 18. The Warden argues that the state court's decision was not unreasonable because the court relied on the opinions of two experts and because the court properly evaluated the evidence in the record. We conclude that the Ohio Court of Appeals decision was not based on an unreasonable determination of the facts.

Under Ohio law at the time of Hill's *Atkins* hearing, a defendant had to prove three factors to establish that he was intellectually disabled: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, . . . and (3) onset before the age of 18."[6] *Lott*, 779 N.E.2d at 1014. While courts are to conduct an independent review of the evidence presented, they "should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony." *Id.* at 1015. Both parties agree that Hill satisfied the first factor, that he had significantly subaverage intellectual functioning. The Warden also admits that any adaptive deficits that Hill does have arose before he turned 18. Thus, the only remaining dispute is whether the Ohio Court of Appeals reasonably determined that Hill failed to prove the second *Lott* factor—"significant limitations in two or more adaptive skills, such as

[6]*Lott* has since been overruled, *see Ford*, 140 N.E.3d at 654–55, but it was the controlling state law at the time of the Ohio Court of Appeals decision.

AMERICAN OVERSIGHT

communication, self-care, and self-direction." *Lott*, 779 N.E.2d at 1014; *see also Hill v. Anderson*, 2014 WL 2890416, at *22.

As an initial matter, the Warden argues that the Ohio Court of Appeals opinion is per se reasonable because two experts concluded that Hill did not have significant adaptive deficits. CA 6 R. 369, Response Br., at 11–12, 17 (citing *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013); *Carter v. Bogan*, 900 F.3d 754, 771 (6th Cir. 2018); *Apelt v. Ryan*, 878 F.3d 800, 837 (9th Cir. 2017); *Larry v. Branker*, 552 F.3d 356, 370 (4th Cir. 2009)). None of the four cases cited by the Warden, however, suggests such a per se rule. Instead, the court in each case based its conclusion on the content of the expert testimony and overall evidence before it. *See O'Neal*, 743 F.3d at 1023 ("With expert testimony split, . . . we cannot say from this vantage that [the state court decision to credit two experts over another] was unreasonable . . . ."); *Carter*, 900 F.3d at 771; *Apelt*, 878 F.3d at 837; *Larry*, 552 F.3d at 370. The Warden claims that "[w]hen a credible expert conducts an analysis—and when the defendant failed to put on evidence contradicting that analysis beyond reasonable debate—it is not *unreasonable* for the trial court to rely on that expert testimony." CA 6 R. 369, Response Br., at 17. But that statement itself is inconsistent with a per se rule. A per se rule would eliminate the need to ask whether the defendant "put on evidence contradicting [the] analysis [of the state's experts] beyond reasonable debate." CA 6 R. 369, Response Br., at 17; *cf. Rice v. Collins*, 546 U.S. 333, 341–42 (2006). Accordingly, this court must consider whether, based on the evidence presented, the Ohio Court of Appeals's determination that Hill did not suffer from significant limitations in two or more adaptive skills was unreasonable.

Our resolution of this case turns on the Ohio Court of Appeals consideration of the expert testimony presented at the *Atkins* hearing. Nevertheless, we outline the Court of Appeals's analysis in some detail before turning to the expert opinions, following the order in which the state appellate court considered various portions of the factual record.

AMERICAN OVERSIGHT

The Ohio Court of Appeals began its review of the record by analyzing the standardized adaptive behavior tests performed on Hill at various stages of his life.[7] *State v. Hill*, 894 N.E.2d at 122. First, the court noted that the three experts assigned to evaluate Hill's ability at the time of the *Atkins* hearing—Drs. Hammer, Olley, and Huntsman—could not obtain "reliable [standardized test] results . . . on account of Hill's lack of effort." *Id.* The court considered standardized adaptive behavior tests Hill had completed in the past but concluded that they were unreliable because the methods used had later been discredited. *Id.* at 122–23. A voluminous 6,000 page record contains reports from Hill's teachers, school psychologists, medical experts, and prison officials about Hill's adaptive abilities. *See Hill v. Anderson*, 2014 WL 2890416, at *24.

The Ohio Court of Appeals next separated this factual record into four categories of largely anecdotal evidence: public school records, reports around the time of the trial for the killing of Raymond Fife, records from Hill's time in prison, and Hill's appearances before the trial court itself. *State v. Hill*, 894 N.E.2d at 124–25. After summarizing each category and considering the expert opinions, the court found that Hill had not met the second *Lott* factor. *Id.* at 126.

First, the Ohio Court of Appeals considered Hill's school records. *Id.* at 124. In one paragraph, the court stated:

> Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

Id.

[7]The Ohio Court of Appeals reviewed the trial court's decision for abuse of discretion and stated that the trial court must be affirmed if its decision is supported by competent and credible evidence. *State v. Hill*, 894 N.E.2d at 121.

AMERICAN OVERSIGHT

This characterization of Hill's school records represents a short summary of the records. There are multiple accounts in Hill's records of his lying, stealing, and struggling to interact appropriately with his peers. *See, e.g.*, DE 97, Supp. Appendix, Page 530 ("Lying needs to be confronted."); *id.* at Page 568 ("Danny often manipulates the truth to his own advantage."); *id.* at Page 584 (describing an incident where Hill stole money from teachers' wallets); *id.* at Page 558 (listing one of Hill's annual goals when he was twelve as "improve peer-group relations"). Hill's behavioral problems, however, do not necessarily correlate with an absence of intellectual disability. *See Atkins*, 536 U.S. at 306 ("Because of their disabilities in areas of reasoning, judgment, and control of their impulses . . . [intellectually disabled individuals] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."). Each of the three experts who testified at Hill's *Atkins* proceeding agreed that Hill's behavioral problems during childhood did not necessarily contradict a finding of significant adaptive limitations. In addition to the accounts of behavioral problems, multiple evaluators also reported that Hill attempted to follow instructions and behaved well, particularly when dealing with adults. *See, e.g.*, DE 97, Supp. Appendix, Page 513 (school psychologist reported that, when given a test, Hill "did cooperate and accepted all tasks presented to him."); *id.* at Page 524 (court liaison officer describing Hill as a "personable black child who has good rapport with staff as well as the other residents" in a group home where he was placed when he was sixteen); *id.* at Page 568 ("Danny is a very affectionate child. He often expresses the desire to be hugged and will often rest his head on the teachers shoulder.").

Hill's school records suggest that he struggled academically as a child. *See, e.g.*, DE 97, Supp. Appendix, Page 515 (reporting that at age thirteen Hill's relative weaknesses included "not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, perceive patterns, and to reproduce symbols using psychomotor speed and coordination"); *id.* at Page 569 (describing how at age thirteen, Hill was working on spelling words with more than four letters, learning to tell time, "ha[d] just begun working on subtraction," and "[w]hen given sentences, he [could] write them with assistance"); *id.* at Page 594 (listing one of Hill's goals for ninth grade as being able to "read a one page story and . . . answer comprehension questions with 80% accuracy").

AMERICAN OVERSIGHT

There is also evidence that Hill needed reminders to perform basic personal hygiene and lacked self-direction. *See, e.g.*, *id.* at Page 511 (describing one of Hill's weaknesses as "self-direction"); *id.* at Page 524 ("[Hill] needs constant reminder to shower, brush his teeth, etc., [but] he does attempt to do a [more] thorough job than when he first came to the program."); *id.* at Page 578 (reporting that Hill was still learning "to shower[] regularly, use[] deodorant regularly, [and] maintain[] a neat appearance" at the age of fourteen); *id.* at Page 575 (listing one of Hill's goals for ninth grade as being able to "learn to maintain[] a clean, neat, appearance" throughout the day). All of this additional evidence, not included in the Court of Appeals summary, may be relevant to determining whether Hill had significant limitations in two or more adaptive skills.

Second, the Ohio Court of Appeals considered Hill's conduct during the time period surrounding the trial for the killing of Fife:

> *Hill's Trial for the Murder of Raymond Fife.* The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."

State v. Hill, 894 N.E.2d at 124 (alterations in original).

In looking at the evidence, it is unclear that Hill's conduct demonstrated self-direction or self-preservation. As the district court explained, under the prevailing medical guidelines at the time, self-direction was defined as:

> skills related to making choices; learning and following a schedule; initiating activities appropriate to the setting, conditions, schedule, and personal interests; completing necessary or required tasks; seeking assistance when needed; resolving problems confronted in familiar and novel situations; and demonstrating appropriate assertiveness and self-advocacy skills.

Hill v. Anderson, 2014 WL 2890416, at *33 (quoting AAMR 1992 Manual, 40). While the trial court's assessment of Hill's conduct is one reasonable interpretation, a reasonable person might

AMERICAN OVERSIGHT

also interpret Hill's conduct as evidence of a lack of self-direction. For example, before Hill came forward to the police with information about the crime, the police were not pursuing Hill. Thus, coming forward does not necessarily demonstrate appropriate self-advocacy skills since it drew more attention to Hill and linked him to the crime. But faced with two reasonable interpretations of evidence, we cannot say that the state court's decision to go with one over the other was unreasonable.

The Ohio Court of Appeals does not mention the testimony of three experts—Dr. Douglas Darnall, Dr. Nancy Schmidtgoessling, and Dr. Douglas Crush—who found that Hill was intellectually disabled at the time of the 1986 trial, *see Hill*, 595 N.E.2d at 901, though the court recognized that "several of the experts pointed out . . . [that Hill] knew right from wrong," *Hill*, 894 N.E.2d at 118 (quoting *Hill*, 595 N.E.2d at 901). On direct appeal, the Ohio Supreme Court accepted these experts' conclusion that Hill was intellectually disabled. *Hill*, 595 N.E.2d at 901. Although the experts at the mitigation stage were not using the definition of intellectual disability that was later articulated in *Lott* and *Atkins*, their testimony focused on similar characteristics such as Hill's intelligence level and adaptive skills, including whether Hill was a follower or a leader and whether he acted appropriately in different situations. *See, e.g.*, *id.* (describing Hill's moral development as "'primitive,' a level at which 'one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2-year old is.'" (alterations in original)). Failure to grapple with the expert reports from the time of the Fife trial that found Hill to be intellectually disabled is concerning, particularly given *Lott*'s direction that courts should rely on professional evaluations of the defendant's mental state. *Lott*, 779 N.E.2d at 1015.

Third, the Ohio Court of Appeals examined the records from Hill's time on death row:

> *Death Row Records.* At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

AMERICAN OVERSIGHT

> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.

Hill, 894 N.E.2d at 124–25.

While Hill's conduct in prison is relevant to an analysis of his adaptive skills, his time incarcerated may be an imperfect indicator of his functional abilities. Both Dr. Olley and Dr. Huntsman, who later concluded that Hill was not intellectually disabled, conceded that Hill's conduct in the highly-regulated prison environment was not a good indicator of his adaptive skills. Some courts have also discounted prison records, reasoning that they provide little insight into how the defendant would function in the general community. *See Hill v. Anderson*, 2014 WL 2890416, at *42 (collecting cases).

Additionally, Hill's prison record is not neat. Describing Hill as an average death row inmate is ambiguous without additional context about the average inmate's adaptive functioning level, particularly if some inmates, such as Hill, had been committed to death row before *Atkins* was decided. Prison officials are also not trained to diagnose intellectual disability, and, as the district court explained in detail, there were multiple inconsistencies within the prison employees' reports. *See Hill v. Anderson*, 2014 WL 2890416, at *43–44. The Ohio Court of Appeals, however, accurately described the accounts of some prison officials who reported that Hill did not appear to have significant limitations functioning on death row. *See, e.g.*, DE 97, Atkins Hr'g Tr., Page 787–89 (Hill did not need special accommodations to perform his prison job); *id.* at Page 793 (Hill would inform the prison staff when he had a medical problem); *id.* at Page 815 ("[Hill was] slow when he want[ed] to be slow.").

Fourth, the Ohio Court of Appeals considered the trial court's conclusion that "as a lay observer, [he] did not perceive anything about Hill's conduct or demeanor [during the court

AMERICAN OVERSIGHT

proceedings] suggesting that he suffers from mental retardation." *Hill*, 894 N.E.2d at 125. While the Ohio Court of Appeals conceded that trial courts should not rely solely on their own perception of the defendant in court to determine whether the defendant is intellectually disabled, the Ohio Court of Appeals still utilized the trial court's perception here because it aligned with the conclusions of two experts. *Id.* at 125–26.

The last, and most important, type of evidence the Ohio Court of Appeals considered was the opinions of three medical experts who evaluated Hill in preparation for the *Atkins* hearing: Dr. Hammer (selected by Hill), Dr. Olley (selected by the prosecution), and Dr. Huntsman (selected by the court). *State v. Hill*, 894 N.E.2d at 113. All three experts relied on a comprehensive record of Hill's history, including his past medical reports, school records, transcripts and videos from the time of the Fife trial, accounts from prison officials, and their own evaluation of Hill. Dr. Hammer concluded that Hill was intellectually disabled, and Drs. Olley and Huntsman found that he was not. The Ohio Court of Appeals described Drs. Olley's and Huntsman's findings in detail. *Id.* at 125.

Dr. Hammer was licensed to practice psychology in the state of Ohio and was the director of psychology services at the Nisonger Center at the Ohio State University. During his career, he had specialized in behavioral pediatrics, which included working with children, adolescents, and adults with intellectual disabilities. As part of his evaluation, Dr. Hammer reviewed an extensive list of Hill's relevant history including evaluations from school officials, transcripts from Hill's past court proceedings, and prison records. Hammer concluded that "[o]verall, these records provide an extensive and consistent documentation that Mr. Hill has demonstrated, from an early age, sufficient intellectual and adaptive behavior deficits to qualify for a diagnosis of Mild Mental Retardation." DE 97, Supp. Appendix, Page 1110. Hammer noted that "the records also indicate that [Hill] was generally regarded as mentally retarded by nearly all the psychological, psychiatric, educational, and youth authority professionals he encountered over the years." *Id.*

Hammer, along with Olley and Huntsman, interviewed Hill himself. The three doctors performed a series of tests to evaluate Hill's intellectual abilities but could not complete the testing. *Id.* at Page 1111–12. Hammer reported that Hill "appeared to be quite disinterested and unmotivated" during some of the testing but was unable to determine whether Hill "was trying to

AMERICAN OVERSIGHT

deliberately do poorly on the test or whether the significant cognitive demands of the test, especially following the extensive demands of [previous testing] may have caused him to give up and shut down." *Id.* at Page 1111. However, Hammer also testified at the *Atkins* hearing that all three experts "agreed that [Hill] was trying to fake bad." DE 97, Atkins Hr'g Tr., Page 264. Because of the difficulties with testing and the inability to measure several adaptive abilities in a prison setting, "all three psychologists agreed that an independent, valid standardized adaptive behavior instrument could not be completed for Mr. Hill." DE 97, Supp. Appendix, Page 1112.

In his report, Hammer weighed the opinions of prison officials who interacted with Hill. Hammer concluded that the officials' descriptions of Hill:

> [W]ere relatively consistent in describing Mr. Hill across some areas (e.g., average compared to other inmates, helping others, no 'falling out' episodes) and strikingly discrepant in others (e.g., energy level, getting along with other inmates, hygiene and self-care problems.) Overall, the description of Mr. Hill's adaptive and social behavior on Death Row was not inconsistent with that of a person with mild mental retardation and conduct problems and it was not generally contradictory of information in Mr. Hill's historical records.

Id. at Page 1115. In conclusion, Hammer found that "records, observations and interviews indicate adaptive behavior functioning consistent with the Mild Retardation range" and concluded that Hill had "significant deficits in functional academic, social-emotional functioning, self-care and work habits over the years." *Id.* at Page 1116–17.

Like Hammer, Dr. Olley was a licensed psychologist who specialized in working with individuals who have intellectual disabilities. He had previously testified on behalf of a defendant in nine other capital cases involving claims of intellectual disability. When making his evaluation, Olley considered Hill's historical records including evaluations performed at school, evidence from around the time of the Fife trial, and interviews with Hill and prison officials. Olley testified that "this [was] the most thorough evaluation of a death row inmate that [he] ha[d] been involved with." DE 97, Atkins Hr'g Tr., Page 773. Unlike Hammer, Olley concluded that "[r]ecords regarding Mr. Hill's adaptive behavior before age 18 [were] less extensive." DE 97, Supp. Appendix., Page 1119. But Olley acknowledged that Hill had undergone two formal adaptive behavior tests during childhood, one "yield[ing] a score in the average range, and another yield[ing] a score in the range of mild mental retardation." *Id.* at

AMERICAN OVERSIGHT

Page 1119. Olley stated that Hill "had consistently low academic performance," and his "records indicate significant behavior problems from an early age and a history of lying." *Id.*

Olley also analyzed more recent evidence of Hill's intellectual abilities. He emphasized Hill's latest court appearance where he showed his "ability to orally express his claim of innocence" and "used vocabulary and sentence structure and complex reasoning that, in [Olley's] opinion, indicate[d] intellectual ability above the level of mental retardation." *Id.* Olley testified that "the way that Mr. Hill presents himself in his language, in his arguing on his own behalf and his assertiveness about his case is substantially more sophisticated than any of the other defendants with whom [he] ha[d] worked."[8] DE 97, Atkins Hr'g Tr., Page 1763. Like Hammer, Olley also interviewed several prison employees and compared their descriptions of Hill against Hill's own description of his abilities. In general, the prison officials reported that Hill had a higher adaptive capability than Hill reported having himself, which Olley stated "further support[ed] the conclusion that Mr. Hill tried to portray himself as having mental retardation." DE 97, Supp. Appendix., Page 1125. In sum, Olley held that there was "[t]oo little information . . . available about adaptive behavior in childhood to make a confident retrospective diagnosis of mental retardation" and that "[t]he available information on Mr. Hill's current functioning [did] not allow a diagnosis of mental retardation." *Id.* at Page 1124–25; *see also* DE 97, Atkins Hr'g Tr., Page 1785 (testifying that "this hits me between the eyeballs that this is not a man with mental retardation").

The third expert to testify at Hill's *Atkins* proceeding was Dr. Huntsman. Unlike Hammer and Olley, Huntsman's work focused on diagnosing defendants who suffered from serious mental disorders rather than intellectual disabilities. She had limited experience working with defendants who had intellectual disabilities and had only administered an adaptive-skills test a handful of times, the last time being several years before Hill's *Atkins* hearing. *Id.* at Page 980–81, 992. Like Hammer and Olley, Huntsman considered Hill's past school records,

[8]Hammer testified that sometimes individuals with intellectual disabilities will learn "sort of scripts or scenarios that they can kind of pull out and go through when they encounter a situation" to make it appear that they are more competent or well-spoken than they truly are. DE 97, Atkins Hr'g Tr., Page 192–93. Olley, however, did not address this cloak-of-competency theory, and Hammer himself did not verify that Hill was attempting to don a "cloak of competence" when speaking about his past conduct, *see* DE 97, Atkins Hr'g Tr., Page 191–93.

AMERICAN OVERSIGHT

evidence from around the time of the Fife trial, and contemporary evidence when assessing Hill's intellectual abilities.

Huntsman concluded that Hill fell in the "[b]orderline" range of intellectual functioning and his "level of adaptive behavior certainly exceeds the level expected of a mildly mentally retarded individual." DE 97, Supp. Appendix., Page 1140–41. Huntsman stated that "in many respects [the] most persuasive[]" evidence was the prison officials' "consistent descriptions of [Hill] as 'average' within the death row population at Mansfield." *Id.* at Page 1141. Huntsman, however, testified that it was difficult to assess adaptive behaviors in the prison setting. And as we previously explained, describing Hill as the "average" inmate is ambiguous without additional context. Huntsman also appears to have relied heavily on her own conversations with Hill, where she said Hill "demonstrated a remarkable memory for the history of his case." DE 97, Supp. Appendix., Page 1141. She emphasized that she believed Hill was malingering during standardized testing, trying "to appear less competent than he is." *Id.* at Page 1140. Huntsman concluded that in her opinion, "when one takes both his probable performance on the formal assessment of I.Q. and his level of adaptive behavior into account, [Hill's] overall level of intellectual functioning falls within the borderline range" rather than intellectually disabled. *Id.* at Page 1141.

Olley and Huntsman focused on whether Hill was intellectually disabled at the time of the evaluation rather than at the time of the Fife trial or during his childhood. *See* DE 97, Supp. Appendix, Page 1125 (Dr. Olley opining that "[t]he available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation."). Both, however, grappled with the historical evidence of Hill's intellectual functioning and reviewed records from Hill's childhood when making their determinations.

Olley testified that "[b]ased upon the available information," including records from Hill's time in school, it was his opinion that "Hill did not have mental retardation *at the time of the offense*." DE 97, Atkins Hr'g Tr., Page 779 (emphasis added). Olley did not dismiss Hill's past anecdotal evidence; rather, he concluded after reviewing the record that "there was inadequate information about adaptive behavior that would allow [him] to conclude that there was a significant impairment in adaptive behavior" at the time of the offense. *Id.* at Page 780.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003546

Olley explained that while there were numerous IQ tests from Hill's childhood that satisfied the first requirement of *Lott*, there was insufficient evidence to find that Hill had significant adaptive deficits. *Id.* at Page 783. Olley testified that Hill "certainly did function low in academic skills" but that none of the four formal evaluations Hill had taken during childhood "confirmed adaptive behavior overall at a significantly subaverage level" and the "[o]ther information was anecdotal." *Id.* Huntsman also testified that she thought Hill probably was not intellectually disabled at the time of the offense. *Id.* at Page 1051. When making her assessment, Huntsman weighed Hill's past records including formal testing done by psychologists and the evaluations done by school officials. *Id.* at Page 1046–50. She explained that she gave less weight to school assessments because they "were being done for a very different purpose," namely to create educational interventions rather than determine whether Hill was intellectually disabled under clinical guidelines. *Id.* at Page 1046. Both doctors weighed the available evidence of Hill's past and present adaptive abilities when reaching their conclusions.

In view of this expert testimony, the Ohio Court of Appeals reasonably concluded that Hill is not intellectually disabled. Three credentialed and independent physicians met with Hill, thoroughly reviewed the evidence—including records dating back to Hill's childhood—and conveyed their findings in detailed reports. Two of those experts found that Hill is not intellectually disabled.

In conclusion, the Ohio Court of Appeals did not act unreasonably in relying on the opinions of Olley and Huntsman, trained medical professionals who had full access to the extensive record in this case. The question before us is narrow, and the AEDPA standard is demanding. The law does not allow us to weigh the evidence according to a modern understanding of intellectual disability or to engage in de novo factfinding. To prevail, Hill must demonstrate that "in light of the evidence presented" before it, the Ohio Court of Appeals's determination that he did not have significant limitations in two or more adaptive skills was unreasonable. *Schriro*, 550 U.S. at 473 ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). Hill has not cleared this high hurdle.

AMERICAN OVERSIGHT

Admittedly, there is evidence in the record that shows Hill has limitations in some adaptive skills such as self-care, functional academics, and self-direction. But there is also evidence that Hill's adaptive abilities were not as lacking as several of the anecdotal accounts suggest. Importantly, two medical experts, including Dr. Olley who had significant experience working with individuals with intellectual disabilities, concluded after looking at Hill's entire record that he did not have significant limitations in two or more adaptive skills, and, thus, was not intellectually disabled. In light of the evidence presented, it was not unreasonable for the Ohio Court of Appeals to rely on the reasoned judgment of two experts over another. *See O'Neal*, 743 F.3d at 1023; *see also Lott*, 779 N.E.2d at 1015 ("The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony . . . in deciding this matter."). While another judge could have reasonably reached the opposite conclusion, the determination of the Ohio Court of Appeals was not unreasonable. Accordingly, Hill cannot succeed on his *Atkins* claim. The district court properly denied Hill relief under § 2254(d)(2).

B.

Hill's ineffective assistance of counsel claim also remains unresolved. In his first habeas petition after his *Atkins* hearing, Hill argued that his *Atkins* counsel provided ineffective assistance. The district court held that Hill's claim was barred by 28 U.S.C. § 2254(i) and failed on its merits. *Hill*, 2014 WL 2890416, at *53–57. The panel twice pretermitted the ineffective assistance of counsel claim after granting Hill relief on his *Atkins* claim, *Hill*, 881 F.3d at 487; *Hill*, 960 F.3d at 265, and the Supreme Court did not address the issue, *see Shoop*, 139 S. Ct. at 505–09. The Warden now asks this court to affirm the district court's dismissal of Hill's ineffective assistance of counsel claim under § 2254(i). While Hill does not present a full argument in his supplemental *en banc* briefing, he notes that "whether *Atkins* counsel provided ineffective assistance has not been fully adjudicated." CA 6 R. 362, Supp. Br., at 3 n.2. Because we find that Hill's claim fails on the merits, we affirm the district court.

As a preliminary matter, the parties dispute whether Hill's ineffective assistance of counsel claim is barred by § 2254(i), which provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground

AMERICAN OVERSIGHT

for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Hill argues that his claim is not barred by § 2254(i) because defendants like him, who were convicted before *Atkins* was decided have a constitutional right to counsel during their postconviction *Atkins* hearings. One circuit agrees with Hill, *see Hooks v. Workman*, 689 F.3d 1148, 1183–84 (10th Cir. 2012), and the Supreme Court has left open the possibility that a right to counsel exists during initial-review collateral proceedings, *see Martinez v. Ryan*, 566 U.S. 1, 8 (2012) (stating, without deciding, that "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction'" (alteration and omission in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991))). *But see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that the right to counsel generally does not extend to collateral proceedings); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) (applying *Finley* to capital cases);); *id.* at 14 (Kennedy, J., concurring in the judgment) (agreeing that the Constitution does not require the appointment of counsel for capital defendants in state collateral proceedings). We need not address Hill's constitutional argument here, however, because even if Hill had a right to the effective assistance of post-conviction counsel during his *Atkins* proceedings, his *Atkins* counsel provided effective assistance. *See Hooks*, 689 F.3d at 1208 (Gorsuch, J., concurring in part and dissenting in part) ("Caution is always warranted when venturing down the road of deciding a weighty question of first impression and recognizing a previously unrecognized constitutional right. And surely caution must be doubly warranted when nothing turns on it.").

To prevail on his ineffective assistance of counsel claim, Hill must first "show that counsel's performance was deficient" by "an objective standard of reasonableness," meaning that his *Atkins* counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Second, the defendant must show that the deficient performance prejudiced the defense," meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at

AMERICAN OVERSIGHT

687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Because the Ohio state courts did not address the potential ineffectiveness of Hill's *Atkins* counsel, AEDPA deference does not apply, and we review the district court's findings de novo. *Hill v. Mitchell*, 842 F.3d 910, 919–20 (6th Cir. 2016).[9]

Hill argues that his *Atkins* counsel's performance was deficient in four ways: (1) failing to object to the presence of James Teeple during Hill's psychological evaluation; (2) failing to properly investigate Hill's adaptive functioning with school officials, prison psychologists, family members, and death row inmates; (3) failing to object to the *Atkins* proceeding on competency grounds; and (4) failing to withdraw as counsel given his antagonistic relationship with Hill.

1.

First, Hill claims that his *Atkins* counsel, Gregory Meyers, was ineffective for failing to object to James Teeple's presence during Hill's psychological evaluation on April 26, 2004, with Drs. Hammer, Olley, and Huntsman. Teeple was one of the detectives who was involved in the initial 1985 investigation into Hill after the killing of Fife, and Hill wrongly believed that Teeple was part of a conspiracy to frame him for Fife's murder. Because Meyers was aware that Hill distrusted Teeple, Hill argues that Meyers should have objected to Teeple's presence during the evaluation after the trial court issued an order on April 15, 2004, stating, among other things, that Teeple would be present to record the April 26 evaluation.[10]

Assuming, without deciding, that Hill is correct that Meyers should have objected to Teeple's presence, Hill has not demonstrated prejudice. To establish prejudice Hill "must show a substantial, not just conceivable, likelihood of a different result." *Campbell v. Bradshaw*, 674 F.3d 578, 586 (6th Cir. 2012) (internal quotation marks omitted) (quoting *Pinholster*, 563 U.S. at

[9]The Warden argues that Hill's claim is procedurally defaulted because he may have been able to raise a claim of ineffective assistance of *Atkins* counsel in state court. We decline to review this procedural question because Hill's claim fails on the merits. 28 U.S.C. § 2254(b)(2); *see also Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Cyars v. Hofbauer*, 383 F.3d 485, 486 n.1 (6th Cir. 2004) ("We need not delve into the morass of procedural bar, however, because Petitioner's claim fails on the merits even *assuming* he properly exhausted available state court remedies." (emphasis omitted)).

[10]In a rare misreading of the record, the district court incorrectly found that Meyers did not have notice that Teeple would be present at the April 26 evaluation. *Hill*, 2014 WL 2890416, at *57.

AMERICAN OVERSIGHT

189). Both Drs. Huntsman and Olley acknowledged during 2011 depositions that the presence of the three medical experts and Teeple may have negatively impacted Hill's performance during the psychological testing. Hill argues that this calls into doubt the experts' determination that he intentionally performed poorly during testing. However, neither Olley nor Huntsman stated that they believed there is a substantial likelihood that their ultimate conclusion that Hill was not intellectual disabled would have been different if Teeple had not been present. Furthermore, neither expert could say that Teeple's presence on the first of three days of testing was the only possible cause for Hill's performance. For example, Huntsman acknowledged that she did not set a proper tone at the beginning of the evaluation and that could have influenced Hill's performance. While Teeple's presence may have made Hill uncomfortable during the first day of the psychological evaluation, Hill has not proven that there is a reasonable probability that the outcome of his *Atkins* proceeding would have been different had Meyers objected to Teeple videotaping the evaluation.

2.

Second, Hill argues that Meyers failed to investigate and fully prepare for the *Atkins* hearing because he only presented one witness, Dr. Hammer. Hill claims Meyers should have also presented testimony during the *Atkins* hearing from: (1) school psychologists Karen Weiselberg-Ross and Annette Campbell; (2) Dr. John Vermeulen, who evaluated Hill when he was incarcerated in 1986; (3) Dr. James Spindler, who evaluated Hill in 2000; (4) other death-row inmates; and (5) Hill's family members, including his mother. Hill argues that "[t]he failure to investigate the issue of [Hill's] mental retardation more thoroughly and to present these additional witnesses . . . was deficient performance by Meyers which prejudiced [Hill] beyond measure." CA 6 R. 295, Petition, 73.

Failure to reasonably investigate a defendant's background and medical history or present mitigating evidence may establish ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003). However, a counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*,

AMERICAN OVERSIGHT

466 U.S. at 690–91. While counsel may be deficient for failing to investigate a "known and potentially important witness," *United States v. Arny*, 831 F.3d 725, 732 (6th Cir. 2016) (quoting *Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (quotation omitted)), a "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Meyers's decision to rely solely on Dr. Hammer's testimony and the factual record was a reasonable professional judgment. Medical expert testimony is key to determining whether a defendant is intellectually disabled under Ohio law. *See Lott*, 779 N.E.2d at 1015 ("The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter."). A trial court "may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave." *State v. White*, 885 N.E.2d 905, 915 (Ohio 2008). Given the importance of medical testimony, Meyers's choice to focus on Hammer, an expert in intellectual disabilities, was reasonable. Hammer had reviewed Hill's past school records and medical evaluations as part of his evaluation process, which included reports from many of the individuals Hill argues Meyers should have called as witnesses. Because, as Hill concedes, Hammer's evaluation and testimony "w[ere] thorough and compelling in [their] own right," CA 6 R. 295, Petition, 73, Meyers had good reason to think that further investigation would be a waste. Meyers's decision not to continue the investigation was a reasonable professional judgment. Since Meyers's performance was not deficient, we need not address the prejudice prong of *Strickland*.

3.

Third, Hill argues that Meyers was deficient for failing to formally raise concerns about Hill's competency. In a preliminary hearing on April 15, 2004, Meyers told the court that he had "deep professional concerns about Mr. Hill's competence" because Hill was considering not continuing his *Atkins* claim. DE 97, Supp. Appendix, Page 1192. Hill claims that based on this one statement, Meyers should have petitioned the court to evaluate Hill's competency before proceeding. Hill does not point to any evidence beyond Meyers's statement, however, that suggests that he was incompetent at the time of his *Atkins* proceeding. Particularly given the fact

AMERICAN OVERSIGHT

that Hill continued to pursue his *Atkins* claim after Meyers's statement on April 15, 2004, there is insufficient evidence to prove either that Meyers's decision not to file a motion to evaluate Hill's competency was deficient or to demonstrate that there was a reasonable probability that, had Hill been evaluated at that time, he would have been found incompetent.

4.

Finally, Hill claims that Meyers should have done more to withdraw as his attorney considering Hill's distrust of Meyers and the Office of the Ohio Public Defender ("OPD"). Hill had a "deep and abiding antipathy towards lawyers affiliated with the [OPD]," which began before Meyers agreed to represent Hill during his *Atkins* proceeding. DE 97, Supp. Appendix, Page 461, 464. Hill believed that the OPD had misrepresented him during his first, pre-*Atkins*, postconviction litigation and was suspicious of the OPD because his uncle, Morris Hill, who Hill believed had tried to wrongly frame him for the Fife murder while working as a police officer, was an OPD investigator during his *Atkins* proceeding. Hill was also unhappy that OPD attorneys would not pursue an actual innocence claim in conjunction with his *Atkins* proceeding. According to Meyers, these longstanding issues made it impossible for him to maintain a productive attorney-client relationship with Hill.

Hill argues that Meyers had a "duty to use any means available to get off the case" once he realized the severity of the breakdown in the attorney-client relationship. CA 6 R. 295, Petition, 95. The record demonstrates, however, that Meyers did use any means available to attempt to withdraw after his relationship with Hill deteriorated. Meyers submitted two written motions and one oral motion to withdraw as Hill's counsel. DE 97, Supp. Appendix, Page 461. In his second written motion, Meyers clearly asked to be removed as counsel because he believed Hill's misguided ideas that Meyers was conspiring against him had "utterly destroyed anything akin to an attorney-client relationship" and, in his professional opinion, "no viable attorney-client relationship exist[ed] between" himself and Hill. *Id.* at Page 467. Despite Meyers's appeals, the trial court denied his motions to withdraw as counsel, citing Meyers's experience as "probably the foremost capital jurisprudence public defender in the State of Ohio" and the complicated nature of Hill's case. *Id.* at 1178; *see also id.* at 1219–20 (finding no

AMERICAN OVERSIGHT

conflict of interest with respect to Meyers's representation of Hill).[11] Hill has not demonstrated that Meyers was deficient for failing to bring a fourth motion to withdraw or that further attempts by Meyers would have affected the outcome of the proceeding given the trial court's consistent refusal to allow Meyers to withdraw.

Alternatively, Hill claims that Meyers should never have accepted the appointment to represent Hill in the first place because he knew that Hill had conflicts with the OPD during his trial and initial appeals. When questioned by the trial court, however, Meyers explained that he only agreed to represent Hill after carefully considering whether he could provide effective representation given Hill's past conflict with the OPD. Hill has not demonstrated that Meyers, who was not employed by the OPD during Hill's trial and first state postconviction appeal, should have realized before he filed his initial appearance that Hill's past disagreements with OPD lawyers could have prevented Meyers from developing a working attorney-client relationship with Hill. Additionally, Hill has not established a reasonable probability that the outcome of his *Atkins* proceeding would have been different had Meyers not entered his initial appearance. In sum, Hill's arguments that Meyers provided ineffective assistance of counsel are without merit. Accordingly, we affirm the district court's denial of his claim.

C.

Hill's remaining issues were correctly resolved in the panel's 2018 opinion, *see* 881 F.3d 483 (6th Cir. 2018), and we reinstate those portions of the opinion to the extent they are consistent with this opinion. For the convenience of the reader, they are attached as an appendix to this opinion.

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[11]Hill appears to suggest that his right to counsel was violated by the district court's denial of Meyers's motions to withdraw. A trial court's "decision to deny a motion to withdraw or for substitute counsel is reviewed for abuse of discretion." *United States v. Powell*, 847 F.3d 760, 778 (6th Cir. 2017); *see also id.* ("Appellate courts reviewing the denial of such a motion generally consider four factors: 'the timeliness of the motion'; 'the adequacy of the court's inquiry into the matter'; 'the extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense'; and 'the balancing of these factors with the public's interest in the prompt and efficient administration of justice.'" (quoting *United States v. Mack*, 258 F.3d 548, 556 (6th Cir. 2001)). Hill has not put forth any developed argument supporting his argument that the trial court's decision not to remove Meyers in this case was an abuse of discretion. Accordingly, Hill has waived this argument. *See United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006).

AMERICAN OVERSIGHT

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. Danny Hill asserts in his habeas petition that the State of Ohio may not execute him because he is intellectually disabled.[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins*, the case that bars the execution of intellectually disabled defendants, was decided and made retroactive after Hill was convicted of murder and sentenced to death. Before *Atkins* was decided, Hill had been diagnosed as intellectually disabled approximately ten times over the course of his life, R. 97 [disc 1] (Suppl. App.) (Pages 61–76, 513–530, 592–621), including during the penalty phase of his trial when three psychological experts testified that Hill was intellectually disabled. *See State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). The Ohio courts agreed, stating that Hill "suffers from some mental retardation" and is "mildly to moderately retarded." *See id.* at *6; *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (discussing the experts' testimony). But ultimately, Hill was sentenced to death because all that his intellectual disability counted for at the time was a point in his favor in the sentencing calculation—not a bar to his execution. *See Hill*, 1989 WL 142761, at *4. When *Atkins* came down, our court issued a remand order directing the Ohio courts formally to assess Hill's intellectual functioning under *Atkins*. *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002). Even "[t]hough Ohio courts reviewing his case have concluded that Danny Hill is retarded, and voluminous expert testimony supported this conclusion," we issued a remand because Hill's *Atkins* claim "ha[d] not been exhausted or conceded." *Id.* (citations omitted). This time around, the Ohio courts decided that Hill was *not* intellectually disabled. *See State v. Hill*, 894 N.E.2d 108, 127 (Ohio Ct. App. 2008).

No person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*. In holding otherwise, the Ohio courts avoided giving serious consideration to past evidence of Hill's intellectual disability. Doing so amounted to an unreasonable determination of the facts and an unreasonable application of even the general *Atkins* standard. Because *Atkins*

[1]I will use the medical community's preferred term of "intellectually disabled" in place of "mentally retarded" except where the term is in quoted material.

AMERICAN OVERSIGHT

and the record inescapably mandate, even under AEDPA deference, that Ohio cannot execute Hill due to his intellectual disability, I dissent.

I. BACKGROUND

The facts and legal proceedings surrounding Hill's conviction and death sentence in 1986 are set out in an earlier opinion. *See Hill*, 300 F.3d at 680–81. Because this case centers on the issue of intellectual disability, what follows is an account of the facts and proceedings relevant to that question in this case.

Several evaluations conducted around the time of Hill's trial in 1986 reveal that Hill "has a diminished mental capacity," *Hill*, 1989 WL 142761, at *32, a fact acknowledged by the state court after Hill's *Atkins* hearing. *See Hill*, 894 N.E.2d at 112 (summarizing the testimony of the three experts who testified during the mitigation phase of the initial trial that Hill was mentally "retarded"). Hill's IQ at the time of trial ranged from 55 to 68, and his moral development was "primitive"—essentially that of a two-year-old. *Id.* There is no dispute that Hill's IQ is so low that he easily meets the first element of the clinical definition of intellectual disability.

Since his earliest days in school, Hill has struggled with academics. At the age of six, a school psychologist noted that Hill was "a slower learning child" and recommended that his teachers "make his work as concrete as possible" without "talking about abstract ideas." R. 97 [disc 1] (Suppl. App.) (Pages 489–91). After kindergarten, Hill was placed into special education classes for the remainder of his time in the public school system. R. 29 (Suppression Hr'g Tr.) (Page ID #3081–92).[2] Hill struggled to keep up academically even in his special education classes and had difficulty remembering even the simplest of instructions. R. 31 (Mitigation Hr'g Tr. at 173–74) (Page ID #3485–86).[3] At the age of thirteen, his academic and social skills were at a first-grade level. R. 97 [disc 1] (Suppl. App.) (Page 568). At the age of fifteen, Hill could barely read or write, and he was noted to have deficits in adaptive behavior, specifically in the areas of self-direction, socialization, and communication. R. 31 (Mitigation

[2]Because the pagination in the original transcript of the suppression hearing is unclear, I will cite the pagination used by the district court.

[3]The Mitigation Hearing Transcript can be found in the district court record at R. 31 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997).

AMERICAN OVERSIGHT

Hr'g Tr. at 79–89) (Page ID #3391–401); R. 97 [disc 1] (Suppl. App.) (Pages 592–93). Those problems persist today.

Hill has also been unable to take care of his hygiene independently from a young age. During his time in a home for children with behavioral issues, Hill could not remember to comb his hair, brush his teeth, or take a shower without daily reminders. R. 31 (Mitigation Hr'g Tr. at 88) (Page ID #3400). Even in the highly structured environment of death row, Hill would not shower without reminders.

After receiving two convictions for rape at age seventeen, Hill was assessed for intellectual disability by the juvenile court. R. 97 [disc 1] (Suppl. App.) (Page 527). He was diagnosed as "mildly retarded" with very poor adaptive functioning. *Id.* at 527–28. Before *Atkins* was decided, Hill had been diagnosed as intellectually disabled approximately ten times over the course of his life. *Id.* at 61–76, 513–30, 592–621. During the mitigation phase of his trial for the Fife murder, the psychological experts and the Ohio courts decided that Hill was intellectually disabled and had significant adaptive deficits. *Hill*, 1989 WL 142761, at *6; *Hill*, 595 N.E.2d at 901. Nevertheless, the Ohio Supreme Court upheld his death sentence because it was then constitutional to execute intellectually disabled defendants. *See Hill*, 1989 WL 142761, at *4.

The Supreme Court decided *Atkins* in 2002 while Hill's appeal from the district court's denial of his habeas petition was pending before this court. We remanded the case to the district court with instructions to remand Hill's unexhausted *Atkins* claim to the state court and to stay the remaining claims pending resolution of the *Atkins* claim. *Hill*, 300 F.3d at 683. After the case was returned to the state court, three experts—Drs. David Hammer, J. Gregory Olley, and Nancy Huntsman—examined Hill and testified over the course of several evidentiary hearings on Hill's *Atkins* claim. Hill retained Dr. Hammer, Dr. Olley acted as the state's expert, and Dr. Huntsman was appointed by the trial court. Dr. Hammer concluded that Hill met all three prongs for a diagnosis of intellectual disability. However, Drs. Olley and Huntsman concluded that Hill was not intellectually disabled.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003557

The state trial court denied Hill's petition for relief under *Atkins*, finding that Hill did not exhibit significant adaptive deficits and that any deficits that he did have did not manifest before the age of 18. *State v. Hill*, No. 85-CR-317 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3399–482)]. The Ohio Court of Appeals affirmed that decision, over a dissent, holding in the first instance that issue preclusion did not require a different result "because the finding that he was mentally retarded was not essential to the imposition of the death penalty in the same way that it is essential in the *Atkins/Lott* context." *Hill*, 894 N.E.2d at 116, 127. The Ohio Supreme Court declined to review the case, with two justices dissenting. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (table).

With the conclusion of his state-court proceedings, Hill moved to reopen and amend his habeas petition in this case to include claims under *Atkins*. There is no dispute that Hill's IQ is so low (ranging from a low of 48 to a high of 71) that he easily meets the first element of the clinical definition of intellectual disability. The parties disagree, however, on the propriety of the state courts' holdings that Hill did not exhibit sufficient adaptive deficits (the second element).[4] Thus, the issue before us is whether it was unreasonable for the Ohio courts to decide that Hill did not exhibit significant adaptive deficits.

II. STANDARD OF REVIEW

In his opening brief, Hill argued that we should review the state courts' determinations on adaptive deficits as both legal and factual conclusions under 28 U.S.C. § 2254(d)(1) and (2). *See* Hill Opening Br. at 34 ("The state courts' application of the law and the determination of the facts were unreasonable, and therefore habeas relief is warranted under 28 U.S.C. § 2254(d)(1) and (2)."). That would mean that we ask whether, under § 2254(d)(1), those decisions amount to an unreasonable application of *Atkins* and whether, under §§ 2254(d)(2) and 2254(e)(1), there is clear and convincing evidence that the state courts' findings amounted to an unreasonable determination of the facts.

[4]The Warden concedes that Hill's "adaptive deficits (the second element) arose before age eighteen (the third element) if they arose at all." Warden Supp. En Banc Br. at 16.

AMERICAN OVERSIGHT

I agree with Hill that the state courts' determination on adaptive deficits should be analyzed as both legal and factual conclusions under § 2254(d)(1) and (2). Hill's arguments attack the reliability of the state courts' determination of the facts and their interpretation of *Atkins*. But, at the same time, his case partly turns on what a court must consider under *Atkins* in testing for intellectual disability, which we have recognized is a question of law. Moreover, Hill presented a § 2254(d)(1) argument in his opening brief. Hill's strategic decision to focus on § 2254(d)(2) in his en banc brief does not waive the prior arguments raised in his opening brief. And the Warden does not argue that Hill has waived his § 2254(d)(1) argument. Warden Supp. En Banc Br. at 12. Accordingly, I will analyze Hill's adaptive-deficits argument under both § 2254(d)(1) and (2), keeping in mind that Hill's arguments draw heavily on the facts.

Under § 2254(d)(1), we must decide whether the state courts' conclusion that Hill did not exhibit significant adaptive limitations was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Section 2254(d)(1) applies when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). Under § 2254(d)(2), our review is limited to the question of whether the state court's findings amount to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In making that assessment, we are mindful that AEDPA directs us to presume that facts decided by the state court are correct absent "clear and convincing evidence" to the contrary. § 2254(e)(1).

"As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 419–20 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). We recognize, of course, that state court determinations are entitled to a great deal of deference. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003559

III. DISCUSSION

A. *Atkins* Claim

The Supreme Court held in *Atkins* that the Eighth Amendment prohibits the execution of intellectually disabled individuals. 536 U.S. at 314–17. Although it ultimately left the development of the test for intellectual disability up to the states, *id.* at 317, the Supreme Court noted that two diagnostic manuals of the psychiatric profession require three separate findings before a diagnosis of intellectual disability is appropriate.[5] *Id.* at 308 n.3. Those findings are: (1) "significantly subaverage intellectual functioning";—typically indicated by an IQ level at or below 70; (2) "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety"; and (3) manifestation or onset before the age of 18. *Id*.

Ohio adopted the three-prong standard set forth in *Atkins* for evaluating a claim of intellectual disability in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002).[6] The Supreme Court of Ohio specifically approved the definition of intellectual disability set forth in the then current editions of the diagnostic manuals. *Id.* at 1014. Applying the standards in those manuals, individuals had significant limitations in adaptive skills if they exhibited deficits in at least two of the skill areas set out in *Atkins*. *Id.*

Hill disputes the Ohio courts' finding that he did not exhibit significant adaptive limitations, and he emphasizes that he has been diagnosed as intellectually disabled and lacking in adaptive skills from a young age. I agree: Hill has exhibited significant adaptive limitations since childhood and cannot justifiably be executed even under the general *Atkins* standard. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("[E]ven a general standard may be applied in an unreasonable manner."); *see e.g.*, *Williams*, 529 U.S. at 367 (finding that a state-court

[5]Prior to 2007, the American Association on Intellectual and Developmental Disabilities (AAIDD) was known as the American Association on Mental Retardation (AAMR).

[6]Ohio later overruled *Lott* and substantially amended its standard for evaluating intellectual disability in *State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

AMERICAN OVERSIGHT

decision was both contrary to and an unreasonable application of the generalized standard for evaluating whether a petitioner's right to effective assistance of counsel was violated).

A state court decision is not entitled to AEDPA deference when "the factfinding procedures upon which the [state] court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Panetti*, 551 U.S. at 954 (quoting *Ford v. Wainwright*, 477 U.S. 399, 423–24 (1986) (Powell, J., concurring in part and concurring in the judgment)). Here, the state trial court ruled that the focus of the evaluation would be Hill's present functioning, and therefore that contemporary evidence was what was primarily relevant—not historical accounts. The Ohio courts failed seriously to contend with the extensive past evidence of Hill's intellectual disability. *Atkins* cannot reasonably be interpreted to permit state courts to exclude or discount past evidence of intellectual disability. And the Ohio courts' cafeteria-style selection of some evidence from Hill's behavior during the proceedings in this case and while incarcerated, over evidence from his special education classes, resulted in an unreasonable determination of the facts.

The Supreme Court stated in *Atkins* that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also *significant limitations in adaptive skills* such as communication, self-care, and self-direction *that became manifest before age 18*." 536 U.S. at 318 (emphasis added). Accordingly, in *Williams v. Mitchell*, we held that the "refusal to consider past evidence of intellectual disability in determining whether [the petitioner] has significantly subaverage mental functioning and adaptive skills limitations" contravenes "clearly established Supreme Court precedent." 792 F.3d 606, 617, 619 (6th Cir. 2015). "[T]he clinical definitions cited with approval by *Atkins* and adopted by *Lott* do not treat present functioning and early onset as unrelated parts of a disconnected three-part test." *Id.* at 619. Intellectual disability must manifest before age eighteen. *Id.* Based on a "plain reading" of *Atkins*, "past evidence of intellectual disability—including evidence of intellectual disability from an individual's childhood—is relevant to an analysis of an individual's present intellectual functioning." *Id.*; *see also id.* at 626 (Gibbons, J., concurring in part and concurring in the judgment) (noting that *Atkins* "plainly require[s]" the consideration of past evidence of

AMERICAN OVERSIGHT

intellectual disability, including evidence of a defendant's functioning pre-incarceration, "[g]iven the enduring nature of intellectual disability").

We also noted in *Williams* that, prior to *Atkins*, the Supreme Court had recognized that past evidence of intellectual disability is relevant to present or future functioning. *See id.* at 620 (majority opinion) (citing *Heller v. Doe*, 509 U.S. 312, 321–23 (1993)). In *Heller*, the Supreme Court held that civilly committing people with intellectual disabilities based on clear and convincing evidence of future dangerousness was constitutional because intellectual disability manifests during childhood and "is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior." 509 U.S. at 321–23 (citation omitted). "Thus, 'almost by definition in the case of the retarded [adult] there is an 18-year record upon which to rely' when assessing the individual's *future intellectual functioning*." *Williams*, 792 F.3d at 620 (alteration in original) (quoting *Heller*, 509 U.S. at 323). Although *Atkins* left to the states the job of delineating the precise contours of how to evaluate intellectual disability, clearly established law mandates that courts cannot, under any reasonable interpretation of *Atkins*'s general standard, discount or ignore evidence of intellectual disability from an individual's childhood.

In Hill's case, the Ohio Court of Appeals correctly set forth the three-prong *Atkins* standard as adopted by the Ohio Supreme Court in *Lott*. It also correctly noted that the second criterion under *Lott* requires the defendant to demonstrate "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction." *Hill*, 894 N.E.2d at 113 (quoting *Lott*, 779 N.E.2d at 1014). Then it veered off track. Focusing mostly on Hill's interactions with law enforcement, prison officials, and the courts, the Ohio courts discounted extensive past evidence of intellectual disability—including multiple diagnoses of intellectual disability and numerous comments on Hill's adaptive deficiencies made while Hill was in school. The two experts who concluded that Hill did not exhibit significant adaptive deficits did the same. In the few instances where the Ohio courts did confront Hill's school records, they grossly misrepresented the contents. The Ohio courts' decision to focus on and privilege contemporary evidence over historical accounts is contrary to clearly established Supreme Court precedent in *Atkins* and *Heller* and seriously undermined the courts' ability to make an accurate

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003562

assessment of Hill's intellectual disability. These errors amount to an unreasonable application of *Atkins* and an unreasonable finding of fact. *See Williams*, 792 F.3d at 626 (Gibbons, J., concurring in part and concurring in the judgment) ("By excluding the pre–1989 evidence, the state court severely limited its own ability to make a reasoned assessment of Williams's condition according to the legal and medical standard that *Atkins* . . . plainly require[s]."); *see also Panetti*, 551 U.S. at 953 (recognizing that "a general standard may be applied in an unreasonable manner," especially when a reviewing court faces "a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling"). The majority, in concluding otherwise, refuses to acknowledge the significance, and in some cases the very existence, of these failures, misrepresentations, and omissions.

1. Significant Limitations

The history of Hill's diagnoses and adaptive limitations was given short shrift in the Ohio courts. According to the Ohio courts, the anecdotal evidence in the record "constituted a 'thin reed' on which to make conclusions about Hill's diagnosis." *Hill*, 894 N.E.2d at 124. Yet, as the district court noted, "the state-court record was hardly a 'thin reed.' At well over 6,000 pages, it was voluminous." *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *24 (N.D. Ohio June 25, 2014). "[T]he true 'thin reed' in this case was the information that was available concerning Hill's adaptive functioning at the time he filed his *Atkins* claim," which, for whatever reason, was "the focus of the evaluation." *Id.*

Of the criteria for adaptive deficits set out in *Lott*, it is clear from the record that Hill displayed significant limitations, at the very least, in functional academics, hygiene/self-care, social skills, and self-direction. With respect to functional academics, Hill was considered "mentally retarded" by the Warren City Schools. He was diagnosed as "mildly retarded," "trainable mentally retarded," or "educable mentally retarded" several times before he turned 18, beginning with the recognition that he was a "slower learning child" when he began formal schooling at age 6. *See* R. 97 [disc 1] (Suppl. App.) (Pages 489–91). He scored 70 or below on every IQ test administered during his school years. *Id.* at 489–94, 511–19. He attended special

AMERICAN OVERSIGHT

education classes for the entirety of his school career. R. 29 (Suppression Hr'g Tr.) (Page ID #3081–88).[7]

At age six, Hill did not know his age, but thought he was nine. R. 97 [disc 1] (Suppl. App.) (Page 489). His visual-motor coordination was at the three-year-old level, his reading and verbal skills were at the five-year-old level, and he had a mental age of four years and six months. *Id.* at 490. At age 8 years and 8 months, Hill was considered functioning at a "mid-kindergarten to beginning first grade level." *Id.* at 493. At age thirteen, he was functioning at the "mid-2nd grade level" in reading and the "mid-1st grade level" in arithmetic. *Id.* at 515. His psychologist noted that his learning abilities "ha[d] fallen 22 points" in the last five years, and that his relative weaknesses lie "in not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, [and] perceive patterns." *Id.* At the same age, he was sent to a school for intellectually disabled children to continue his special education. *See id.* at 513–19. A school psychologist set out instructional goals that included teaching Hill his address and phone number, as well as how to tell time. *Id.* at 578. He exhibited weaknesses in reasoning ability, originality, verbal interaction, and a lack of intellectual independence.

By age fourteen, Hill was reading at a first-grade level and his math skills were at a third-grade level. He still had not mastered writing his own signature. *Id.* His teacher was working on self-control skills that should generally be mastered by a kindergarten student, including "working without being disruptive" and not touching other students inappropriately. *Id.* Teachers set academic objectives like learning to: tell time in five-minute intervals; write his own signature; shower regularly; put soiled clothing in the appropriate place; and eat and drink in a manner appropriate in a school setting.

Hill was transferred to another, similar school at fifteen because of poor academic achievement and behavior. R. 31 (Mitigation Hr'g Tr. at 77–79) (Page ID #3389–91). He received tutoring at a first-grade level for reading and a second-grade level for math. R. 97

[7]Hill was "mainstreamed" only in physical education and music, and struggled even there to keep up with and socialize normally with his peer group. R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 247–49). There is no record of him taking "mainstream" classes in any academic subject area, i.e., math, reading, or history. *See id.*

AMERICAN OVERSIGHT MO-AG-22-0644-A-003564

[disc 1] (Suppl. App.) (Page 525). At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed youth offenders with mental disabilities or emotional problems. R. 31 (Mitigation Hr'g Tr. at 120–23) (Page ID #3432–35). There, Hill completed ninth grade in special education classes at age 18. R. 97 [disc 1] (Suppl. App.) (Page 533). After being released, he returned to high school, and testing indicated Hill was at a second-grade level for reading and math. *Id.* at 1109. Fife's murder occurred six months later.

The record also demonstrates that Hill was deficient in hygiene and self-care. At the age of fourteen, he still needed to be told to shower regularly, brush his teeth, and apply deodorant every day. He would not independently follow through and take care of his hygiene unless he was told to do so. At approximately age sixteen, a group home officer noted that although Hill was "improving in his personal hygiene," he still "need[ed] constant reminder[s] to shower, brush his teeth, etc." *Id.* at 524. Hill continued to have problems with his hygiene in prison and had to be reminded frequently to groom himself.

The record also demonstrates that Hill had limitations in the area of social skills. For example, the district court pointed to the testimony of psychologists who spoke to Hill's "poor self-esteem, inability to interpret social situations and create positive relationships, and [the fact] that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures." *Hill*, 2014 WL 2890416, at *38. Hill's school and court records demonstrate that he had trouble making friends. At seventeen, Hill was described as "socially constricted" and possessing "very few interpersonal coping skills." R. 97 [disc 1] (Suppl. App.) (Page 530).

Hill also showed limitations in at least one more area—self-direction. Hill was described as "easily led" in both his school and court records, during periods both before and after he committed serious crimes while apparently acting alone. In school, Hill was described as immature and "easily led by others into trouble around school," like fighting. *Id.* at 515. He was vulnerable to exploitation by older individuals, displayed inappropriate and immature behaviors in class, rarely considered the consequences before acting, and had trouble conforming his behavior to the rules or the law. When Hill was thirteen, he was described as exhibiting a "great

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003565

deal of impulsivity." *Id.* When Hill was seventeen, he was evaluated by a psychologist who concluded that he had poor judgment, "d[id] not think of consequences," was "highly suggestable," and "was 'likely to be exploited'" if placed in a halfway home for adults "[b]ecause of his passivity and limited intellectual ability." *Id.* at 527–28. Another report from that same time expressed concern about his tendency to follow others. Even when he was in prison at age twenty-one, a correctional officer reported that Hill was easily led by other inmates and had to be told how to do his job at every step of the way. *See* R. 97 [disc 1] (*Atkins* Hr'g Tr.) (Pages 437–39).

Time after time, psychologists examined Hill and diagnosed him as intellectually disabled. R. 97 [disc 1] (Suppl. App.) (Pages 61–76, 513–30, 592–621). These psychologists assessed Hill's IQ and his adaptive skills. During one of the earliest assessments, his school's psychologist noted that Hill was limited in functional academics and self-direction. *Id.* at 63–65 (noting that Hill is "limited in his ability to generalize, to transfer learning from one situation to another, . . . or to do much self-evaluation"). Later assessments consistently detailed the same issues and deficits in social skills, communication, and self-care as well. *See, e.g.*, *id.* at 69, 71, 516, 519, 527–28, 530, 592.

In addition to his significant limitations in functional academics, self-care, social skills, and self-direction, the record also demonstrates that Hill never has lived independently, never had a driver's license or a bank account, never has been able to perform a job without substantial guidance from supervisors, was labeled "functionally illiterate" at school and in prison, could never read or write above a third-grade level, and could never adequately sign his own name.

Even if Hill appeared to be functioning at an average skill level to a layperson's eyes, it is common for someone with mild intellectual disability to present as functioning. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 189). That is why the impressions of schoolteachers are critical—because children often are not diagnosed "until they get to school and teachers who are familiar with kids at various cognitive abilities discover that this child is, No. 1, not where they should be for their age in terms of their current [intellectual] functioning . . . . And, two, that as they try to teach them they learn at a much slower rate." *Id.* Comments from Hill's schoolteachers were largely left unaddressed—or were distorted—in the Ohio courts' analysis.

AMERICAN OVERSIGHT

2. Unreliable Experts

Nevertheless, it might seem that the Ohio courts rendered a reasonable decision because they relied on the opinions of two psychological experts who found that Hill did not exhibit significant adaptive deficits. The majority here certainly takes that stance. Maj. Op. at 21–22. According to the Ohio Court of Appeals, the experts *and* the record provided "competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation." *Hill*, 894 N.E.2d at 126. But both experts, at the trial court's direction, ignored evidence of adaptive deficiencies from Hill's school years, or set it aside as irrelevant to the task at hand. Anecdotal evidence, such as comments and records from schoolteachers and others who have interacted with or evaluated the subject, is key to the adaptive-deficits analysis. *See Hill*, 894 N.E.2d at 124–25 (discussing anecdotal evidence); R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84) (stating that the psychological profession values "collateral information"); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 696) (stating the importance of "drawing information from many different sources of functioning in every day life under every day circumstances").

Two experts testified in Hill's *Atkins* proceedings that Hill did not display significant adaptive limitations. *State v. Hill*, No. 85-CR-317, at 79–80 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3477–78)]. The state trial court relied upon their opinions to conclude that Hill had failed to demonstrate significant adaptive deficits. *Id.* at 81 (Page 3479).[8] All three experts, including Dr. Hammer (Hill's expert), found that Hill malingered or tried to "fake bad" on the adaptive skills tests given to him in 2004. *Id.* at

[8]We have previously denied *Atkins* relief in an AEDPA case arising out of Ohio where, as here, two of the three mental-health experts testified that the petitioner was not intellectually disabled. *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) ("With expert testimony split, as it often is, the state court chose to credit Dr. Chiappone and Dr. Nelson over Dr. Tureen, and we cannot say from this vantage that it was unreasonable to do so."). However, *O'Neal* is distinguishable on its facts, and Hill's claim for *Atkins* relief is much stronger than the petitioner's claim in *O'Neal*. For example, in *O'Neal* there was insufficient evidence to prove that the petitioner met the first prong in demonstrating "significantly subaverage intellectual functioning." *Id.* at 1022. Here, by contrast, Hill's IQ is so low that the Warden concedes that Hill satisfies the first prong. Additionally, O'Neal's claim for *Atkins* relief also failed because his adaptive deficits may well have been better explained by his drug abuse and personality disorder rather than organic mental illness. *Id.* at 1022–23. Furthermore, we have never held that a reliance on an expert witness's conclusion makes a state court's determination reasonable per se. Instead, we consider whether "the record read as a whole" allows a reviewing court to conclude that the state court's determination was unreasonable. *Id.* at 1022; *see also Carter v. Bogan*, 900 F.3d 754, 768, 771 (6th Cir. 2018).

AMERICAN OVERSIGHT

53, 81 (Pages 3451, 3479). In coming to their decision that Hill was not, at present, intellectually disabled, Drs. Olley (the state's expert) and Huntsman (the trial court's expert) heavily weighed the fact that Hill malingered. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 781); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1050–51). *But see* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 211) (stating that a person with intellectual disability can still lie, manipulate, and cheat). Drs. Olley and Huntsman also emphasized the sophistication of Hill's crimes and his interactions with prison, law-enforcement, and court officials. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 726–31, 737–50, 770–75); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1027, 1034–35, 1040–44). Dr. Hammer, on the other hand, based his diagnosis on all types of anecdotal evidence, including Hill's records from school, and concluded that Hill satisfied all three prongs for a diagnosis of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84); *id.* at 156 ("My opinion is that [Hill] falls within the high end of the mild retardation range."); *see also id.* at 190 (describing mild intellectual disability as "significant" or "severe" impairment in the ability to function).

Dr. Olley (the state's expert) stated that Hill's memory was very good in court on April 15, 2004, when he provided details of events. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 744). Dr. Olley also stated, based on an interview with Hill, that Hill was able "to express a complex explanation of the crime in order to support his claim of innocence." R. 97 [disc 1] (Suppl. App.) (Page 1125). Although Dr. Olley admitted that Hill's case was a "close call," R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 861), he nevertheless concluded that Hill's "way of presenting himself," both in his police interrogation and before the court, was inconsistent with an intellectual-disability diagnosis, *id.* at 718–19, 726–27. Dr. Olley said that he had never heard of an intellectually disabled inmate calling the media to arrange an interview, as Hill did in this case by reaching out to the *Tribune Chronicle*. *Id.* at 763. Dr. Olley noted that Hill was able to tell an elaborate "conspiracy" theory about the events leading to his capital trial for Fife's murder, which echoed a "very similar" soliloquy he made before the trial court on April 15, 2004. *Id.* at 770–72. Dr. Olley characterized this soliloquy as "long," "rambling," and ultimately implausible—but he testified that he was nonetheless "struck" by Hill's "sophisticated memory and reasoning." *Id.* at 744, 771–72.

AMERICAN OVERSIGHT

Dr. Huntsman (the trial court's expert) similarly focused in her report on Hill's "remarkable memory for the history of his case," his detailed and "very complex explanation for how Raymond Fife came to be killed," as well as the "competencies" observed by staff members in prison. R. 97 [disc 1] (Suppl. App.) (Page 1141). Dr. Huntsman described Hill's story as "bouncing around in time," and she initially "couldn't keep track of what [they] were talking about." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1021). She characterized the conspiracy story as "remarkable and not likely, not very plausible." *Id.* at 1025. Still, despite the story's apparent lack of "logic," Dr. Huntsman noted "the degree of organization, the degree of complexity[,] and the degree of memory that he displayed as [they] talked." *Id.* at 1025–26, 1031. She testified that it was not the story Hill told, but his "process of telling the story"—which demonstrated complexity, "sophistication," a noteworthy vocabulary, and a "general ability to communicate"—that led to her conclusion that he was not intellectually disabled. *Id.* at 1190.

In the end, Drs. Olley and Huntsman each opined that Hill was "borderline intellectual functioning" as defined in the DSM-IV. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1044); *id.* at 1049 (stating that "what makes me say that I believe that in my opinion he falls within the borderline range of intellectual functioning has to do with his adaptive behavior"). Dr. Olley described borderline intellectual functioning as "no mental retardation but it is the . . . functioning that is . . . between one standard deviation below the mean and two standard deviations below the mean," *i.e.*, an IQ range between "71 to 85." R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936). Drs. Olley and Huntsman came to this conclusion even though people at the lower end of borderline intellectual functioning and the higher end of intellectual disability are "going to be quite similar . . . in some regards," R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 465), including in their ability to create a "script" involving various people and events, *id.* at 537–38.

In the opinion of Dr. Hammer (Hill's expert), Hill's behavior was not inconsistent with that of a person with mild intellectual disability because those persons often attempt to don a "cloak of competence." *Id.* at 191–92. "[M]any people with mild [intellectual disability]," he explained, "are quite aware of their deficits in learning and functioning and are somewhat

AMERICAN OVERSIGHT

worried that other people will find that also. So they oftentimes will develop certain skill areas that they can hold out as indicating that they have a competence in a certain area and, therefore, are trying to mask . . . what their deficits actually are." *Id.* This frequently involves "learning sort of . . . scripts or scenarios that they can kind of pull out." *Id.* at 192–93. The trial court, which adopted the opinions of Drs. Olley and Huntsman, but made no reference to Dr. Hammer's cloak of competence discussion in its opinion, apparently did not afford this concept much weight.

Drs. Olley and Huntsman also placed significant weight on the testimony of prison officials about Hill's recent behavior in the prison environment. These officials considered Hill "average" in intelligence compared to other death row inmates. "They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules." *Hill*, 2014 WL 2890416, at *39 (quoting *Hill*, 894 N.E.2d at 124). One official said that Hill was feigning intellectual disability for his *Atkins* claim, and another said that Hill's hygiene was "poor but not terrible." *Id.* (quoting *Hill*, 894 N.E.2d at 125).

As the district court noted, all of the experts conceded that relying on Hill's behavior in prison to assess adaptive skills is problematic because "death row is a segregated, highly structured and regulated environment." *Id.* at *42.[9] Evidence of adaptive functioning in this kind of controlled setting is of limited value because inmates do not have the same opportunities to acquire new skills or show weaknesses in existing skills. Assessing Hill's adaptive deficits as an adult is particularly challenging given the absence of any reliable testing to measure Hill's adaptive functioning and the lack of reliable evidence of how Hill would have functioned as an adult in general society as he has been incarcerated for all but six months of his adult life. Given the lack of evidence regarding Hill's likely adaptive performance as an adult in the general community, the experts should have utilized all available evidence.

[9]The medical literature available in 2008 prohibited the assessment of adaptive skills in atypical environments like prison. For example, the 2002 AAMR Manual says "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 13 (10th ed. 2002). It explains: "[t]his means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id.* at 8.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003570

The majority acknowledges that Dr. Huntsman, in particular, considered prison officials' descriptions of Hill's adaptive behavior as "'[the] most persuasive[]' evidence" of Hill's adaptive functioning. Maj. Op. at 22 (alterations in original) (quoting R. 97 [disc 1] (Suppl. App.) (Page 1141)). Given that the existing medical guidelines prohibited measuring an individual's functioning based on their behaviors in a prison setting, Dr. Huntsman's weighty reliance on this evidence in coming to her conclusion about Hill's intellectual disability casts serious doubt on its reasonableness. The same is true for Dr. Olley, especially in light of his own admission that "[i]t is impossible to assess all of Mr. Hill's adaptive behavior while he is in prison." R. 97 [disc 1] (Suppl. App.) (Page 1124).

Drs. Olley and Huntsman leaned heavily on these prison officials' testimony rather than treating them with the degree of skepticism mandated by the medical literature. As the district court noted, the weight of the testimony from various death-row prison officials was limited by their potential bias against the inmates they were charged with guarding, as well as the shortcomings affecting lay opinions about intellectual disability generally. *Hill*, 2014 WL 2890416, at *42–43. And many of the specific prison officials' statements were "rife with contradictions, with themselves and each other." *Id.* at *43.

These flaws might be forgivable under AEDPA deference, but there is one problem with Drs. Olley's and Huntsman's testimony that we cannot overlook: neither of them grappled with the extensive past evidence of Hill's intellectual disability. Both experts, instead, assessed Hill's adaptive skills "as they existed at the time of the hearing"—even though intellectual disability is a static condition. *Id.* at *23; *see Heller*, 509 U.S. at 323; *Williams*, 792 F.3d at 617–19; R. 97 [disc 1] (Suppl. App.) (Page 1125) (Dr. Olley reporting that "[t]he available information on Mr. Hill's *current functioning* does not allow a diagnosis of mental retardation") (emphasis added). At the State's urging, the trial court ruled that it would focus the *Atkins* inquiry on Hill's current functioning, but noted that it would not preclude historical evidence from coming in. R. 97 [disc 1] (Suppl. App.) (Pages 175–81, 217–23, 247–50). As a result, the opinions of Drs. Olley and Huntsman, like the Ohio courts' own assessments, lack a credible foundation.

Dr. Olley recognized the importance of anecdotal evidence when he relied on testimony from prison guards to assess Hill's adaptive skills. But when it came to past anecdotal evidence

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003571

of Hill's adaptive deficits, Dr. Olley dismissed it as evidence of low *academic* skills only. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 783). Acknowledging that Hill's schoolteachers thought he was intellectually disabled, Dr. Olley said that he could not say the same because "[t]he information is simply not available." *Id.* As detailed extensively above, that is simply not true.

The majority finds Dr. Olley's determination to be reliable because Dr. Olley "did not dismiss Hill's past anecdotal evidence; rather, he concluded after reviewing the record that 'there was inadequate information about adaptive behavior that would allow [him] to conclude that there was a significant impairment in adaptive behavior' at the time of the offense." Maj. Op. at 20 (alteration in original) (quoting R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 780)). But that conclusion ignores Dr. Olley's failure to engage with or consider the numerous reports from teachers, mental health professionals, and other relevant observers of Hill's adaptive behavior, directly contravening Dr. Olley's admitted methodology for determining intellectual disability and what constitutes adequate information. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 696–97) (noting that for retrospective determinations of intellectual disability, experts should rely on records and statements from "teachers," "mental health professionals," and "other people who know the individual well").[10] Those records are replete with observations and diagnoses of significant limitations in adaptive behavior that Dr. Olley never mentioned or explained away as irrelevant or inadequate in the areas of self-care or self-direction. For example, in the area of self-direction, Dr. Olley failed to contextualize the results of the standardized tests administered by mental health professionals with the numerous accounts throughout Hill's childhood and teenage years from teachers, psychologists, and social workers who testified that Hill was easily led and a follower. *Hill*, 2014 WL 2890416, at *30–33. More importantly, Dr. Olley admitted that Dr. Nancy Schmidtgoessling, one of the psychologists who testified during the mitigation phase of Hill's trial, assessed Hill's adaptive behavior when she diagnosed him as intellectually disabled. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 941–42). But Dr. Olley never explained why he found that diagnosis unreliable.

[10]Dr. Olley explained to the trial court that "our protocol was different" from other cases for which he had served as an expert "in the sense that in speaking among the three psychologists, we were aware of your order to look at Mr. Hill's present functioning." R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 862). He further explained that it was because of the trial court's order that the experts focused on Hill's adaptation to prison life. *Id.*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003572

As for Dr. Huntsman, she, too, did not give much thought to the past anecdotal evidence of Hill's adaptive deficits. She stated that she was retained to decide "whether [Hill] is *now* a mentally retarded individual." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1052) (emphasis added). When prompted for her opinion of Hill's school records, she stated that these records were not as reliable as the court-conducted tests because teachers' assessments "were being done for a very different purpose." *Id.* at 1046. Never mind that the Ohio Supreme Court had already decided in *White* that school records *are* relevant for an adaptive-deficits analysis. *State v. White*, 885 N.E.2d 905, 916 (Ohio 2008); *see also Heller*, 509 U.S. at 323 (noting that for intellectual disability determinations "there is an 18-year record [of past behavior] upon which to rely"). Never mind that several of the assessments used to evaluate Hill relied on definitions of intellectual disability that match *Lott*'s factors. *See e.g.*, R. 97 [disc 1] (Suppl. App.) (Page 592–93) (finding that Hill qualified for placement into a special education program for intellectually disabled students because he exhibited "significant subaverage intellectual functioning" and deficiencies in at least two areas of adaptive behavior as determined by a multidisciplinary team that included a qualified psychologist). Dr. Huntsman also speculated that Hill had not tried his hardest in school. R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1048).[11] In fact, at one point Dr. Huntsman dismissed the evidence of Hill's adaptive deficits during his teenage years as Hill being "a pretty troubled and pretty troublesome youth" due to his school system record. *Id.* at 1047. Despite Dr. Huntsman's detailed analysis of the reports from prison guards, there is no comparable analysis of the overwhelming historical records detailing Hill's struggles with self-care, self-direction, and academic functioning. Dr. Huntsman testified that, excluding Hill's mother, the record did not contain any non-school records providing evidence of Hill's adaptive skills or deficits. *Id.* at 1090, 1098.[12] This completely ignores the highly relevant non-school records and testimony from Brinkhaven, where social workers observed Hill at all times and noted significant limitations in self-care, academic functioning, and self-direction. *See Hill*, 2014 WL 2890416, at *31. Having disregarded much of the past anecdotal evidence, Dr. Huntsman stated that Hill

[11]Dr. Huntsman did not point to, nor have we been able to discover, any evidence in Hill's school records demonstrating that he intentionally performed poorly in school.

[12]The record also indicates that, if anything, Hill's mother "overestimated [Hill's] adaptive behavior." R. 97 (Suppl. App.) (Page 527).

AMERICAN OVERSIGHT

"probably" was not intellectually disabled at the time of the offense. R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1052) ("I think that the only thing that I've said today that I didn't say previously in my report, because I wasn't asked to address it in my report, is that my opinion is that he was probably not retarded at the time of the offense.").

Even though Drs. Olley and Huntsman conceded that this was a close case, they made no real attempt to reconcile their outcome with Hill's past diagnoses of intellectual disability and the voluminous relevant evidence of Hill's significant adaptive limitations—and in fact, they were effectively told not to do so. As we held in *Williams*, *Atkins* and *Lott* recognized that intellectual disability presents itself in childhood and is a permanent condition. *See Williams*, 792 F.3d at 619–20. Under *Atkins*, courts cannot limit their focus to contemporary accounts while discounting past evidence of intellectual disability. The Ohio trial court's erroneous instruction substantially undermined the Ohio courts' ability to rely reasonably on Dr. Olley's and Dr. Huntsman's conclusions regarding Hill's intellectual disability.

Having set their gaze on Hill's interactions with prison, court, and police officials, Drs. Olley and Huntsman said next to nothing about the substantial evidence in the record from Hill's time both in school and in prison that Hill was easily led, struggled to communicate, struggled with his personal hygiene, and struggled to read. These failures only encouraged the Ohio courts to do the same. Rather than grapple with the extensive record of Hill's intellectual disability, the state trial court made its findings based on Hill's scattered and scripted conspiracy story of the Fife murder, his demeanor in interacting with law enforcement and the legal system, and the supposed sophistication of his crimes. *State v. Hill*, No. 85-CR-317, at 73–77 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3471–76)]. Those "adaptive strengths" convinced the state trial court that Hill could not be intellectually disabled because he had "remarkable" communication and vocabulary skills and was self-directed. *Id*. at 74 (Page 3472). As shown throughout this discussion, there is substantial evidence in the record to contradict these findings, which are based on evidence—Hill's functioning in a prison setting—prohibited by existing medical guidelines. *See, e.g.*, discussion *infra* Section III.A.3. Unlike the Ohio courts and Drs. Olley and Huntsman, I cannot cast aside years of highly probative evidence and repeated diagnoses of intellectual disability. To do so

AMERICAN OVERSIGHT

flies in the face of then-prevailing medical standards, relevant guidance from the Ohio Supreme Court, and the doctors' own methodologies. Viewed in the context of the entire record and based on clearly established Supreme Court precedent, no fairminded jurist could find their factual determinations to be reasonable.

3. Myths and Misrepresentations

To the extent that the Ohio courts addressed past evidence of Hill's adaptive deficits, they misconstrued it or tried to offset it with irrelevant facts. Rather than take this evidence seriously, the Ohio Court of Appeals adopted the trial court's analysis as consistent with its own perception of the record:

> *Public School Records*. Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."
>
> *Hill's Trial for the Murder of Raymond Fife*. The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."
>
> *Death Row Records*. At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

AMERICAN OVERSIGHT

> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.
>
> *Hill's Appearances in Court*. The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

Hill, 894 N.E.2d at 124–25.

These findings are deeply troubling. To start, the Ohio courts' finding "that Hill 'underachieved' academically or in any other adaptive skill as a child is," as the district court remarked, "squarely contradicted by the record." *Hill*, 2014 WL 2890416, at *26. The district court could not find, and neither could I, "one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to." *Id.* (footnote omitted). And as the experts in this case testified, evidence of behavioral problems or a conduct disorder simply does not undermine a simultaneous finding of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 612); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 713) ("[I]f he's having conduct problems in school, that's neither here nor there to a diagnosis of mental retardation."); (R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1102–03). While conceding that "there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone." *Hill*, 894 N.E.2d at 124.[13] The state courts incorrectly discounted the numerous reports that Hill was easily led because he committed

[13]The Ohio courts' use of the word "references" is also a serious mischaracterization of the record. As the district court found, almost every evaluation of Hill in his school records described Hill's tendency to be "easily influenced" by others. *Hill*, 2014 WL 2890416, at *26 n.19. These consistent assessments amount to much more than fleeting "references."

AMERICAN OVERSIGHT

crimes on his own. Under then-prevailing medical standards, Hill's prior criminal behavior is completely irrelevant to any determination of whether he exhibited deficits in adaptive skills. *See Hill*, 2014 WL 2890416, at *26.

The Ohio courts' focus on a note drafted by a teacher *in a school for intellectually disabled children* describing Hill as "'bright' and 'perceptive,' with 'high reasoning ability'" was, as the district court put it, "almost cynical in its selective misrepresentation of the facts." *Hill*, 2014 WL 2890416, at *27. In the same report, Hill's special education teacher noted that Hill, who was thirteen at the time, had the reading skills of a first-grader and the math skills of a third-grader. R. 97 [disc 1] (Suppl. App.) (Page 578). Her proposed goals for Hill were for him to shower regularly, eat and drink in a manner appropriate to school, blend letter sounds to say words altogether out loud, tell time in five-minute intervals, and count change up to $1.00. *Id.* The Ohio courts' statement that Hill knew how to write suffers from the same flaw. At best, it is an erroneous description of Hill's abilities; at worst, it purposefully distorts the record. *See Hill*, 2014 WL 2890416, at *27 (finding that there is "no evidence in the record that Hill could write much more than his name during his school years, and struggled even with that"). More importantly, the Ohio Court of Appeals blatantly omits the uncontradicted evidence from Hill's childhood through teenage years detailing Hill's consistent academic struggles. *See* discussion *supra* Section III.A.1.

The Ohio courts' handling of evidence regarding self-care is equally troubling. The Ohio Court of Appeals's sole reference to Hill's deficits with regard to self-care was its summary of testimony provided by a prison official "that Hill's self-care was 'poor but not terrible' and that Hill had to be reminded sometimes about his hygiene." *Hill*, 894 N.E.2d at 125. Such a statement downplays the record's extensive chronicling of Hill's struggles with hygiene, including the fact that an individual education plan established for Hill when he was nearly fourteen years old included an "[a]nnual [g]oal and [o]bjective" of helping Hill "learn to shower when necessary" and to "put soiled clothing in the appropriate place." R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 280–81, 327). In short, the Ohio Court of Appeals's description of Hill's school records does not contain a single accurate characterization of the evidence that is relevant to determining whether Hill exhibits significant limitations in adaptive behavior.

AMERICAN OVERSIGHT

Instead, we are left to assume that the appellate court and also the trial court were all but oblivious to the ample amount of evidence that credibly establishes Hill's limitations in functional academics, self-care, social skills, and self-direction.

The state trial court also unduly relied on Hill's "initiative in coming to the police" after Fife's death, as well as his alleged efforts to misdirect the investigation and fabricate an alibi while under interrogation, as "evidence of Hill's ability concerning self-direction and self-preservation." *Hill*, 894 N.E.2d at 124. But Hill was not even a suspect before he went to the police, and his statements are what aroused their suspicion. Incriminating oneself is hardly self-preservation. And as the district court noted, "'[s]elf-preservation' is not [even] among the adaptive skills measured under the clinical definitions of intellectual disability." *Hill*, 2014 WL 2890416, at *33. And "self-direction" covers a host of behaviors—including "initiating activities appropriate to the setting" and "demonstrating appropriate assertiveness and self-advocacy skills"—that are either unrelated or directly contrary to Hill's decision to make contact with the police. *Id.* (quoting AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 40 (9th ed. 1992)).

Moreover, contrary to the Ohio courts' findings, Hill's "performance" during the police interrogation revealed him to be "childlike, confused, often irrational, and primarily self-defeating," and Hill's attempts to change his story under pressure failed to "skillfully hid[e] his part" in Fife's death. *Id.* at *34. The police even stated that Hill was suggestible, telling him that "Everytime [*sic*] we suggest something to you, you have a tendency to agree with us." R. 26 (Trial Tr. at 30) (Page ID #2105). Hill often changed his story or "embellished his statement[s] at the slightest suggestion by the police, even when the information at issue was irrelevant or incriminating." *Hill*, 2014 WL 2890416, at *35. These actions "were quite the opposite of adaptive." *Id.* at *34. This is especially true where Hill's decision to approach the police did not "resolve his problems," but "succeeded only in immediately drawing the police's attention to himself." *Id.* I fail to see how such behavior reasonably could be interpreted as exhibiting *skills* in "making choices," "resolving problems," and "demonstrating appropriate assertiveness and self-advocacy skills." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 40 (9th ed. 1992).

AMERICAN OVERSIGHT

While purportedly relying on prison accounts, the Ohio courts made no mention of Hill's prison *records*. Those records reflect that prison officials always understood Hill to be mentally incapacitated or "slow." As when he was in school, Hill was considered to be illiterate in prison. He was understood to have a "very limited writing ability," and he had other inmates write for him. R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 439). Notes written from Hill to prison officials make clear that he had trouble keeping track of his prison account balance. According to fellow inmates, when Hill was given a task, he had to be carefully supervised because he could not remember how to complete the assigned task. At least one prison official reported that Hill was able to perform his job as a porter because the cleaning supplies were sorted by color, so Hill was not required to read the supplies' instructions. *Id.* at 363, 1381.

Rather than credit the ten intellectual-disability diagnoses that Hill received prior to *Atkins* even being decided, the trial court made its own lay judgment that "there is nothing about [Hill's] general appearance—facial expressions or conduct—suggesting . . . that the Petitioner is mentally retarded." *State v. Hill*, No. 85-CR-317, at 76 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Page 3474)]. The Ohio Court of Appeals defended that lay judgment on the basis that the experts also believed that Hill failed to exhibit significant adaptive deficiencies. *See Hill*, 894 N.E.2d at 125–26.

Perhaps most disturbing, three psychologists who testified at Hill's pre-*Atkins* mitigation hearing concluded that Hill was intellectually disabled and had extremely poor adaptive functioning. On appeal, the Ohio Supreme Court and Court of Appeals found these psychologists' testimony credible and concluded that Hill was intellectually disabled. *See State v. Hill,* 595 N.E.2d 884, 901 (Ohio 1992); *State v. Hill*, Nos. 3720, 2745, 1989 WL 142761, at *6, *32 (Ohio Ct. App. Nov. 27, 1989). It was only after *Atkins* came down, and Hill was again assessed for intellectual disability in renewed state-court proceedings, that the Ohio courts reversed course. *See Hill*, 300 F.3d at 682 (remanding this case to the Ohio courts so that Hill could exhaust his *Atkins* claim, while recognizing that the "Ohio courts reviewing his case have [already] concluded that Danny Hill is retarded and voluminous expert testimony supported this conclusion" (citation omitted)). Yet the Ohio Court of Appeals does not attempt to address this highly relevant evidence. *See* Maj. Op. at 15.

AMERICAN OVERSIGHT

Unfortunately, the majority papers over, when it does not outright ignore, the Ohio Court of Appeals's egregious mischaracterizations and omissions of probative favorable evidence. Like the Ohio courts, the majority flagrantly downplays the overwhelming evidence in Hill's juvenile records that sets out Hill's limitations in adaptive functioning. For example, the majority describes Hill's school records as merely "suggest[ing] that [Hill] struggled academically as a child." Maj. Op. at 13. But unanimous observations from teachers, social workers, and psychologists that Hill consistently performed far below his age-level in almost every academic arena do not constitute a "suggestion" of a deficit. They are uncontradicted evidence of a significant limitation. The majority admits that the Ohio Court of Appeals's "short summary of [Hill's school records]" omits evidence concerning Hill's skills in academics, self-direction, and self-care. *Id.* at 12. But again, it attempts to erase the significance of this error by portraying the evidence as only possibly "relevant to determining whether Hill had significant limitations in two or more adaptive skills." *Id.* at 14. That characterization cannot stand in the face of clearly established law that instructs us to rely on "the documentation and other evidence of [intellectual disability]" that has accumulated during the individual's first eighteen years when assessing intellectual functioning. *Williams*, 792 F.3d at 620 & n.4 (quoting *Heller*, 509 U.S. at 322) ("[E]vidence of intellectual disability from earlier in life is directly relevant to present-day intellectual disability determinations.").

The majority refuses to recognize the substantial effect of these errors on our determination of whether the Ohio Court of Appeals's conclusion that Hill did not have significant limitations in two or more adaptive skills was more than just incorrect but was unreasonable. Several courts have recognized that errors of this magnitude can fatally undermine the factfinding process, rendering the resulting factual finding unreasonable. *See Taylor v. Maddox*, 366 F.3d 992, 999–1001 (9th Cir. 2004) (holding that a state court's clear misapprehension or misstatement of the record that "goes to a material factual issue that is central to petitioner's claim" and a state court's "failure to consider and weigh relevant evidence" that is "highly probative and central to the petitioner's claim" can render "the resulting factual finding unreasonable"), *abrogated on other grounds by Cullen v. Pinholster*, 563 U.S. 170 (2011); *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011) (following *Taylor*); *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015) ("When a state court apparently ignores a

AMERICAN OVERSIGHT

petitioner's properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)."); *see also Miller-El*, 537 U.S. at 346 (finding it concerning under § 2254(d)(2) that a "state court also had before it, and apparently ignored" probative evidence that was central to a petitioner's claim of a constitutional violation). The Ohio Court of Appeals did not just plainly misstate and grossly mischaracterize the record. Its misstatements and mischaracterizations are of highly probative evidence related to Hill's adaptive functioning, which is central to his *Atkins* claim. Furthermore, the Ohio Court of Appeals's treatment of the historical record and of Hill's functioning in prison contained inexcusable omissions of evidence that not only are inconsistent with its findings but also are "sufficient to support [Hill's *Atkins*] claim when considered in the context of the full record." *Taylor*, 366 F.3d at 1001, 1007–08. As detailed above, the Ohio courts' reliance on the conclusions of Drs. Olley and Huntsman cannot serve to mitigate or cure these errors.

***

The evidence that Hill is intellectually disabled is overwhelming. It is clear from the record that Hill was universally considered to be intellectually disabled and seriously lacking in adaptive skills by schoolteachers, administrators, social workers, psychologists, the juvenile court system, and even (previously) the Ohio Supreme Court. Hill consistently performed very poorly in school (functional academics); there was consistent documentation that he had trouble maintaining proper hygiene despite reminders (self-care); he had trouble making friends and responding appropriately to authority figures (social and communication); and he was described as a follower, easily led, and vulnerable to exploitation by adults (self-direction). The record shows that these deficits largely continued into adulthood, particularly with respect to self-care and functional academics. Nevertheless, the state courts and the experts they retained failed to grapple with this extensive social history, choosing instead to favor the accounts of prison guards and personal observations.

The Ohio courts' legal conclusions breach the most basic tenets of *Atkins*, and their factual findings cannot be sustained on this record. *Atkins*, on its most basic level, forbids the execution of persons who are intellectually disabled. It requires courts to look at all relevant evidence of intellectual disability—and certainly evidence of manifestations before the age of 18.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003581

This is not a case where evidence of intellectual disability comes out after conviction. Hill was diagnosed as intellectually disabled from a very young age. He attended special education classes. He could not be counted on to bathe. Yet, the Ohio courts were impressed by his ability to incriminate himself to the police and to rehash a scripted story in a cloak of competency. They valued the conflicting opinions of prison guards interacting with Hill in a highly structured setting over professional reports and diagnoses recorded over a lifetime. Even if *Atkins* alone poses no bar to offsetting adaptive deficiencies with adaptive strengths, the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses. As the Ohio Court of Appeals itself stated at the penalty phase, "The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills." *Hill*, 1989 WL 142761, at *32. There is no getting around it—Hill is intellectually disabled. To deny the obvious is unreasonable. Thus, respectfully, I dissent.

B. Ineffective Assistance of Counsel

Because I believe that we should grant habeas relief on Hill's *Atkins* claim, I would pretermit Hill's claim of ineffective assistance by his *Atkins* counsel. However, because the majority reaches Hill's ineffective-assistance-of-counsel claim, I write to express my views on its analysis. The district court held that Hill's ineffective-assistance-of-counsel claim is barred by 28 U.S.C. § 2254(i), which prohibits a petitioner from seeking habeas relief because of the ineffectiveness of his counsel at a post-conviction proceeding. *Hill*, 2014 WL 2890416, at *52–53. At the heart of this issue is a deeply important constitutional question: whether petitioners bringing *Atkins* claims that arise after their initial appeals due to the retroactivity of *Atkins* have a Sixth Amendment right to the effective assistance of counsel. An answer in the affirmative would trump any statutory instruction that seemingly bars such a claim. The majority, in denying Hill's claim on the merits, decides not to resolve this issue. Maj. Op. at 23. However, I believe that the importance of the issue warrants addressing why we should conclude that Hill had the right to effective assistance of counsel during his *Atkins* hearing.

The Warden's argument and the district court's conclusion that § 2254(i) prevents Hill from bringing a habeas claim based on the ineffectiveness of his *Atkins* counsel rests on the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003582

foundation that Hill's *Atkins* hearing qualifies as a post-conviction proceeding. Thus, under the Supreme Court's general rule, Hill had "no constitutional right to an attorney" and consequently "cannot claim constitutionally ineffective assistance of counsel in such [a] proceeding[]." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). However, in *Hooks v. Workman*, the Tenth Circuit, the only other circuit to review this issue, "concluded that defendants in *Atkins* proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments" even when the *Atkins* proceeding takes place after a defendant's conviction due to the retroactivity of *Atkins*. 689 F.3d 1148, 1183–84 (10th Cir. 2012). Consequently, the Tenth Circuit held that, in such circumstances, a defendant's ineffective-assistance-of-counsel claim "[was] properly . . . subject to federal habeas review under 28 U.S.C. § 2254." *Id.* at 1174. I find the Tenth Circuit's reasoning to be persuasive. The Supreme Court's fundamental-fairness jurisprudence also mandates that we conclude that Hill's claim is cognizable under § 2254. When examined in the context of Supreme Court habeas and capital-punishment caselaw, *Atkins* should be read as establishing a special exception regarding the right to counsel for intellectual-disability determinations due to the high stakes of the penalty involved: the irrevocable taking of a person's life.

First, as *Hooks* makes clear, the nature of an *Atkins* proceeding clearly compels a determination that the Sixth Amendment's guarantee of effective assistance of counsel attaches to the proceeding. For petitioners like Hill, an *Atkins* proceeding is "'postconviction' only in the strict chronological sense." *Id.* at 1183. Because *Atkins* was decided in 2002, after Hill had been convicted and sentenced in 1986, Hill's *Atkins* hearing was "'the first designated proceeding' at which he could raise a claim of mental retardation." *Id.* (quoting *Martinez v. Ryan*, 566 U.S. 1, 11 (2012)). That Hill had not and could not previously litigate his substantive constitutional right not to be executed due to his intellectual disability "underscores the importance of providing a capital defendant with the opportunity to fully present his constitutional issue, even in the postconviction context." *State v. Lorraine*, No. 2003-T-0159, 2005 WL 1208119, at *6 (Ohio Ct. App. May 20, 2005). Moreover, because the *Atkins* hearing was Hill's first time arguing the merits of his constitutional claim, Hill did not "have a brief from counsel or an opinion of the court" on the issue, rendering Hill "ill equipped to represent [himself]." *Martinez*,

AMERICAN OVERSIGHT

566 U.S. at 11 (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)).[14] Consequently, "the usual rationale for denying a right to counsel in postconviction proceedings is inapposite." *Hooks*, 689 F.3d at 1183.[15] In the death-penalty context, a defendant's first opportunity to argue that the State should not impose a capital sentence is always accompanied by the Sixth Amendment right to effective assistance of counsel. There is no reason why that should not be the case here.

Although initiated by a civil petition in cases like Hill's, an *Atkins* claim is intimately associated with a capital criminal prosecution and its sentencing proceeding. Both the Supreme Court and the Sixth Circuit recognize that an Eighth Amendment prohibition on the execution of intellectually disabled persons imposes a substantive restriction on "the State's power to punish." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins*, 536 U.S. at 304; *see Atkins*, 536 U.S. at 321; *Hill*, 300 F.3d at 681–82. Because an *Atkins* hearing goes to the essential question of whether the State can impose the death penalty at all, it is "inextricably intertwined with sentencing" and therefore cannot simply be categorized as a civil proceeding. *Hooks*, 689 F.3d at 1184; *see also Montgomery*, 577 U.S. at 205–06; *Austin v. United States*, 509 U.S. 602, 608–09 n.4 (1993) (noting that "protections associated with criminal cases may apply to a [civil proceeding] if it is so punitive that the proceeding must reasonably be considered criminal"). And it is beyond question that an *Atkins* hearing is a critical stage of a criminal proceeding, holding "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696 (2002); *Hooks*, 689 F.3d at 1184 ("We are hard-pressed to imagine a more 'significant consequence[] for the accused' than a determination of whether the State has the power to take his life." (alteration in original) (quoting *Bell*, 535 U.S. at 696)). Thus, in his *Atkins* proceeding, Hill has the Sixth Amendment right to effective assistance of counsel guaranteed to all critical

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[14]The trial court also suggested that Hill's "case may present a first time opportunity for an Ohio common pleas court to determine whether the *Atkins* decision bars the execution of a particular Death Row Inmate." R. 97 [disc 1] (Suppl. App.) (Page 177).

[15]I join the Tenth Circuit in querying "whether the retroactive applicability of *Atkins* to cases on collateral review . . . makes void, as a matter of law, any '*post* conviction' character that an *Atkins* proceeding might have." *Hooks*, 689 F.3d at 1183–84 n.18; *see also Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016) (noting "that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring finality of convictions and sentences" because "no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose").

AMERICAN OVERSIGHT

stages of criminal proceedings, including sentencing proceedings. *See Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Additionally, the Fourteenth Amendment's fundamental-fairness jurisprudence compels us to conclude that *Atkins* hearings occurring due to retroactivity require effective assistance of counsel. Importantly, neither *Martinez* nor *Coleman* forecloses applying the Fourteenth Amendment's fundamental-fairness concerns to this issue. As *Martinez* notes, "*Coleman v. Thompson*, left open . . . a question of constitutional law" and "suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Martinez*, 566 U.S. at 8 (second and third alterations in original) (quoting *Coleman*, 501 U.S. at 755). And *Martinez* declined to answer that constitutional question. *Id.* at 9.

As discussed above, Hill's *Atkins* posture is akin, but not identical, to an initial-review collateral proceeding. No Supreme Court caselaw explicitly precludes applying due-process considerations to this issue. In fact, the Supreme Court's Due Process jurisprudence implicitly and explicitly mandates that fundamental fairness requires the effective assistance of counsel as a procedural safeguard in *Atkins* proceedings, even if they occur after a petitioner's conviction and initial sentencing due to chronological happenstance. In assessing what due process requires for the post-conviction collateral proceedings at issue in *Coleman*, *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, the Supreme Court held that "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer." 481 U.S. 551, 557 (1987). Unlike the discretionary post-conviction collateral proceedings at issue in those cases, "the Constitution requires state collateral review courts to give retroactive effect to [substantive rules]," which includes any procedural requirements, such as hearings, that "give[] effect" to the Supreme Court's "substantive holding." *Montgomery*, 577 U.S. at 200, 210. Unlike other post-conviction claims that states are allowed to bar, states are constitutionally required to provide hearings for non-frivolous *Atkins* claims. Unlike collateral attacks that attempt to "upset the prior determination of guilt," *Finley*, 481 U.S. at 555 (quoting *Ross v. Moffit*, 417 U.S. 600, 611 (1974)), an *Atkins* claim seeks to demonstrate that the imposed

AMERICAN OVERSIGHT

sentence is in fact void. *See Montgomery*, 577 U.S. at 203 ("[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced."). Defendants like Hill are in a "fundamentally different position." *Finley*, 481 U.S. at 559. They seek to vindicate a constitutionally mandated right and to litigate their first opportunity to challenge the State's effort to deprive them of their life.

Due to Hill's unique position, at the very least, fundamental fairness mandates that he receives effective assistance of counsel. "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Ross*, 417 U.S. at 612). "[T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination." *Ford*, 477 U.S. at 417 (Marshall, J.) (plurality opinion). This is particularly so in the Eighth Amendment context where "[t]he stakes are high." *Id.*; *see also id.* at 425 (Powell, J., concurring in part and concurring in the judgment) ("Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976))).

The nature of an *Atkins* hearing evinces a clear need for effective assistance of counsel. One reason is because of the penalty at issue. The Supreme Court has consistently recognized the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In turn, the Court has held that determining "whether [a] petitioner should be executed at all," requires "heightened procedural requirements." *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment); *see Murray*, 492 U.S. at 8–9 (noting that heightened protections are needed when a court and jury "decide the question[] of . . . punishment"). Among the myriad of procedural protections afforded to defendants in capital proceedings to ensure fairness and reliability, the most basic and fundamental is the right to effective counsel. As the Supreme Court explained in *Powell v. Alabama*, "[t]he right to be heard," especially for "those of feeble intellect," "would be, in many cases, of little avail if it did not comprehend the

AMERICAN OVERSIGHT

right to be heard by counsel." 287 U.S. 45, 68–69 (1932); *see also Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (stating that the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). Without the assistance of counsel, in cases like Hill's, the defendant often remains unequipped to develop and litigate effectively the factual and legal basis for an *Atkins* claim and already is at a disadvantage due to confinement and intellectual disabilities. Under these conditions, when the defendant has the burden of proof, the fairness and reliability of an *Atkins* proceeding must be called into question. To hold that defendants do not have a right to counsel in an *Atkins* hearing, when it is the first opportunity to determine whether the State has the power to execute a petitioner under the applicable law, would require us to ignore the great weight of Supreme Court precedent that instructs us that a proceeding determining the irreversible punishment of death necessitates additional procedural protections. The loss of the right to counsel would ensure that "justice will not 'still be done.'" *Johnson*, 304 U.S. at 462 (citation omitted).

Second, a claim of intellectual disability makes defendants like Hill different from other petitioners, even other capital petitioners, because "some characteristics of [intellectual disability] undermine the strength of the procedural protections that [the Supreme Court's] capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317. Persons with intellectual disabilities "have diminished capacities to understand and process information, to communicate, . . . [and] engage in logical reasoning." *Id.* at 318. To force them to litigate their condition without the aid of counsel by definition leaves them subject to an increased risk of wrongful execution. *See id.* at 306–07 (noting that these "impairments can jeopardize the reliability and fairness of capital proceedings"). And any perceived competence could lead judges and juries to find a lack of a disability, just as the Ohio courts did with Hill. Furthermore, due to the infirmities of those who are intellectually disabled, the risk that they might be executed in violation of the Eighth Amendment is heightened if their counsel provides ineffective assistance. For an action in which the State's legitimacy must be unassailable, the failure to recognize a constitutional right to counsel in *Atkins* hearings occurring post-conviction would inflict grievous doubts on the legitimacy of the State to take the life of one of its citizens.

AMERICAN OVERSIGHT

Whatever procedures a state devises to give effect to the Supreme Court's substantive holding in *Atkins*, the Supreme Court's reasoning in *Atkins* and its fundamental fairness jurisprudence already have established a constitutional floor, which includes effective assistance of counsel. Due to the nature of the penalty and the "special risk of wrongful execution" that intellectually disabled defendants face, *Atkins*, 536 U.S. at 321, the risk of a wrongful sentence is intolerably high without the assistance of counsel. That is a risk that the Due Process Clause cannot tolerate. And it is a risk that we, as a society, cannot tolerate. *See Gardner*, 430 U.S. at 357–58.

Following *Hooks* and based on the above discussion, it is clear that "the right to counsel flows directly from, and is a *necessary* corollary to, the clearly established law of *Atkins*." *Hooks*, 689 F.3d at 1184. I acknowledge, as does the Tenth Circuit, that the Supreme Court has never explicitly said that defendants have a right to counsel in *Atkins* proceedings or identified an *Atkins* proceeding as a critical stage. *Id.* But the Court's recognition in *Atkins* of the impairments caused by intellectual disability and their effects on the reliability and fairness of capital proceedings, as well as the Court's Due Process jurisprudence at the time of *Atkins*, dictate only one conclusion. In a proceeding in which one of our fundamental rights, the right to life, can be extinguished by the State, the Sixth Amendment and due process demand, at the very least, the right to effective assistance of counsel as a safeguard to ensure a court's determination in an *Atkins* proceeding is fundamentally fair. *See id.* at 1185. I see no other constitutionally permitted outcome.

"[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In this context, not only would § 2554(i) curtail a constitutional right, but also it would run afoul of the central purpose of the constitutional writ that it governs. For these reasons, we should conclude that Hill had a right to effective assistance of counsel during his *Atkins* hearing and thus § 2254(i) does not bar his claim.

AMERICAN OVERSIGHT

IV. CONCLUSION

Long before the Supreme Court decided *Atkins*, teachers, administrators, psychologists, and even the Ohio courts all determined that Danny Hill is intellectually disabled. Voluminous records and observations detail Hill's significant struggles with academics, self-care, and other adaptive skills. At the time of Hill's sentencing, none of those determinations carried any constitutional significance in barring the State from imposing the death penalty as Hill's sentence for his conviction. But they mattered. That changed after *Atkins* held that the Eighth Amendment bars the execution of intellectually disabled defendants. Now their consequence also carried constitutional heft. Faced with a potential restriction on the ability of Ohio to execute Hill, the Ohio courts reversed course and heedlessly discounted or disregarded the historical evidence they once respected and considered. The question before us is whether this sea change was an unreasonable application of *Atkins* and resulted in an unreasonable factual determination. Somehow, the majority here answers no, brushing a thin veneer of deference over the Ohio courts' glaring omissions and mischaracterizations of the record and blatant alteration of *Atkins*'s requirements. But the basic tenets of *Atkins* and the record evidence compel us not to discount or disregard the Ohio courts' unreasonable determinations. They matter. Respectfully, I dissent.

AMERICAN OVERSIGHT

APPENDIX

V. Suppression of Pretrial Statements to the Police

In addition to challenging his eligibility for the death penalty after *Atkins*, Hill raised several challenges to his conviction in his habeas petition. Because we remanded his case to the state court after *Atkins* was decided in 2002, we did not reach the merits of those claims. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). We do so now and **AFFIRM** his conviction.

Hill contends that the Ohio courts unreasonably applied clearly established federal law in determining that Hill's statements to police were admissible. Hill maintains that his statements were "involuntary and false" because: his intellectual disability made him especially vulnerable to police coercion; his intellectual deficiencies were known by the police, including interrogators Sergeant Thomas Stewart, Sergeant Dennis Steinbeck, and his physically abusive uncle, Detective Morris Hill; the police made statements to Hill that led him to believe that denying guilt was "hopeless"; and Hill lacked the intellectual capacity to understand the legal consequences of the statements he made (and the police recorded) while he was at the Warren police station.

Because the Ohio courts rejected this claim on the merits as part of Hill's direct appeal, *see Hill*, 595 N.E.2d at 890-91; *Hill*, 1989 WL 142761, at **5-8, Hill must show that the state courts' decisions involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application of th[e Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and quotation marks omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "[a] suspect in custody must be advised . . .[,] 'prior to any questioning[,] that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010)

AMERICAN OVERSIGHT

(quoting *Miranda*, 384 U.S. at 479). This holding was necessitated by the Supreme Court's acknowledgement that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (citation, quotation marks, and ellipses omitted). Thus, "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *see also Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) ("[*Miranda*] excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained.").

In this case, it is undisputed that Hill was given *Miranda* warnings and signed a waiver prior to making the recorded statements that he sought to suppress at trial. Hill's challenge, then, is to the validity of that waiver. He argues that because his waiver was not knowing, intelligent, and voluntary, it was invalid.

A suspect may waive his *Miranda* rights only if "the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and quotation marks omitted).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation [reveals] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citations and quotation marks omitted). For a waiver to be knowing and intelligent, the suspect must be "fully advised of [his] constitutional privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To be voluntary, a confession may not be "the product of coercion, either physical or psychological." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). However, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of

AMERICAN OVERSIGHT

compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.") (citation omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary . . . .'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Although a suspect's mental condition may be a "significant factor in the 'voluntariness' calculus," that "mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'"[11] *Id.* at 164.

On December 16, 1985, the Ohio state trial court held a hearing on Hill's motion to suppress his audio- and video-taped statements to the police.[12] At the suppression hearing, witnesses testified to the following facts.

On September 12, 1985, two days after Fife was attacked, Hill went to the Warren Police Department and approached Sergeant Stewart to talk about that "boy being beat up in the field." R. 28, PageID# 2748-49. Stewart, who was a friend of Detective Hill and had known (Danny) Hill since he was approximately six years old, agreed to talk to Hill in the "Narcotics Room." *Id.* at 2750-51, 2782. Stewart testified that Hill had come to the police station voluntarily, i.e., that no one had "brought him in," and Hill's testimony corroborated this assertion. *Id.* at 2751; R. 29, PageID# 3130.

Once in the Narcotics Room, Hill told Stewart that he had seen another boy, Reecie Lowery, riding the bike of the boy "who was beat up." R. 28, PageID# 2751-52. When Stewart asked Hill, "How do you know it's the boy's bike?", Hill responded, "I know it is." *Id.* at 2752.

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[11]Under Supreme Court precedent, a person who meets the standard for intellectual disability may not be executed. As discussed extensively above, we find that Hill is intellectually disabled and is entitled to have the writ issue with respect to his sentence. However, the requirements for determining whether someone is intellectually disabled under *Atkins* and *Lott* are different from the requirements for determining whether a waiver is knowing and voluntary under *Miranda*. And a person who is intellectually disabled may still be able to knowingly and voluntarily waive his *Miranda* rights.

[12]The transcript of the suppression hearing can be found in the district court record at R. 28 and R. 29 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997). Because the pagination in the original transcript is unclear, we will cite to the pagination used by the district court.

AMERICAN OVERSIGHT

Hill then told Stewart about the bike's location and encouraged Stewart to "go out and get the bike" before Lowery put it back in the wooded field where Fife was attacked. *Id.* After Hill told Stewart that he was willing to show him where the bike was located, Stewart and Hill began talking about various persons, including Tim Collins and Tim Combs (Hill's co-defendant). Hill insinuated that both Collins and Combs liked boys and might have been the ones who attacked Fife. At some point during their talk, Hill mentioned that Fife was choked with his underwear. *Id*. at 2756-57.

Eventually, Stewart drove Hill to look for the bike, but because it was raining and visibility was poor, Stewart and Hill did not go to the wooded field. Instead, Hill showed Stewart where Combs lived. *Id*. at 2753-54. After dropping Hill off at his house, Stewart compiled a report that he shared with his fellow officers, including Sergeant Steinbeck. *Id*. at 2755, 2757-58.

The next day, September 13, 1985, Steinbeck went to Hill's home around 9:30 or 10:00 in the morning to follow-up on the information that Hill had given to Stewart. Steinbeck asked Hill to come talk to him at the police station and Hill agreed. *Id*. at 2762-63, 2881. Hill was driven to the police station in the front seat of Steinbeck's police cruiser and was not booked, fingerprinted, or placed under arrest. Steinbeck read Hill his *Miranda* rights aloud, asked Hill if he understood those rights, and had Hill sign a waiver of his *Miranda* rights before questioning Hill off and on for approximately three hours. *Id*. at 2863-64, 2882-84. During those three hours, Hill never asked for the questioning to stop, tried to leave, or asked to see an attorney. *Id.* at 2865-66, 2885-89. After talking to Hill, Steinbeck transcribed a copy of Hill's statement, which also included a recital of his *Miranda* rights. However, Hill did not sign the statement that day because Steinbeck had forgotten to ask him to do so after telling Hill he could go home with his mother. *Id*. at 2866-69, 2889-90.

On September 16, 1985, both Steinbeck and Detective Hill went to Hill's home, ostensibly to ask Hill to sign his statement from September 13 and to ask Hill's mother for a written statement regarding Hill's alleged alibi. After putting up some initial resistance to speaking to the police again, Hill, at the behest of his mother, agreed to come down to the police

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003593

station, this time accompanied by his mother. Hill was not placed under arrest, booked, fingerprinted, or handcuffed. *Id*. at 2869-70, 2890-92, 2899-2901, 2930-32.

In the interrogation room, and apparently separated from his mother, Hill was verbally advised of his *Miranda* rights by Detective Hill. *Id*. at 2871, 2901-02, 2933. Hill indicated that he understood his rights. *Id*. at 2902. Although not initially present, Sergeant Stewart eventually encountered Sergeant Steinbeck and Detective Hill in the interrogation room with (Danny) Hill. *Id*. at 2758, 2872, 2908. At some point, officers told Hill they did not believe he was telling the truth, and Stewart told Hill that he needed to be honest if he had "anything to do with [Fife's murder]." *Id*. at 2872, 2909-10. Officers also told Hill that it would "benefit him" to tell them the truth, believing that Combs would likely blame the attack on Hill alone. *Id*. at 2909.

Apparently at Hill's request, Detective Hill was left alone with his nephew. According to (Danny) Hill, while he and Detective Hill were alone, Detective Hill "threw [him] against the wall," slapped him across the face, and told him that he "better tell" the police what happened. *Id*. at 2759, 2810-11, 2859, 2910, 2936-37, 2953. Hill also testified that his uncle kicked him under the table in order to prompt Hill to (1) consent to his statement being taped and (2) begin talking to police at the beginning of the taping.

Detective Hill, unsurprisingly, described the time he spent alone with his nephew very differently, testifying:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone [sic] going to hurt him. No one was going to do anything to him, but [I also told him] the fact that I kn[e]w that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me . . . , "I was there. I was in the field when he got murdered." When the young Fife kid got murdered.[13]

R. 28, PageID# 2937. When Detective Hill emerged from the interrogation room a few minutes later, he told the other officers that Hill was going to cooperate and tell them what happened. At the time Detective Hill made this announcement, Hill was either crying or had tears in his eyes. *Id*. at 2759, 2811, 2839, 2873, 2937-38.

[13]Detective Hill also denied kicking his nephew.

AMERICAN OVERSIGHT

At Stewart's suggestion, Hill gave the police permission to tape his statement. *Id.* at 2759-60, 2873-76, 2912. Sergeant Steinbeck, Sergeant Stewart, and Detective Hill were all present when Hill gave this initial audiotaped statement, as well as when Hill gave a second statement that was videotaped by Detective James Teeple. *Id.* at 2874-75. According to Stewart, Hill was not crying during the taped statement itself. About halfway through the audio-taping, the police asked Hill to sign the statement he had given to Steinbeck on September 13. *Id.* at 2903. Hill was also read his *Miranda* rights once more at some point prior to giving the second, videotaped statement. *Id.* at 2876, 2923, 2963-64. While giving his statements, Hill never asked to stop the interrogation, requested an attorney, or asked to leave. Sometime after the interrogation, Hill was placed under arrest based on the details included in his statements. *Id.* at 2776.

When asked questions about the nature of the interrogation generally, both Detective Hill and Sergeant Stewart denied that the police threatened or made promises to Hill during the interrogation, and asserted that Hill never asked for a lawyer. *Id.* at 2760, 2772, 2935, 2938. When prompted by the prosecutor about Hill's previous encounters with the police, Detective Hill estimated that by the date of the September 16, 1985 interrogation, Hill had been arrested by the Warren Police Department "[a]pproximately 15 to 20 times." *Id.* at 2929. Both Detective Hill and Sergeant Steinbeck testified that they had arrested Hill on prior occasions and had read him his *Miranda* rights "[m]any times." *Id.* at 2876, 2928-29. And two of the prosecution's exhibits at the suppression hearing included a waiver form and voluntary statement—both of which included a recitation of *Miranda* rights—signed by Hill on March 6, 1984, which was approximately a year-and-a-half before the September 16, 1985 interrogation.

In adjudicating this claim, the state appellate court rejected Hill's argument that his waiver of his *Miranda* rights was invalid. *Hill*, 1989 WL 142761, at *5. Acknowledging that it needed to make "discrete inquiries" as to both the "knowing and intelligent" and "voluntary" aspects of Hill's waiver, the appellate court considered these criteria in turn.

With regard to the knowing and intelligent factor, the appellate court noted that although the "lack of mental acuity . . . can interfere with an accused's ability to give a knowing and intelligent waiver," there is no bright line rule for distinguishing between "those capable of an

AMERICAN OVERSIGHT

intelligent waiver from those who lack the ability to do so." *Id.* The appellate court also acknowledged the Supreme Court's admonition in *Connelly* that a suspect's mental condition, by itself, does not necessarily prevent him from effectively waiving his *Miranda* rights. *Id.* In analyzing the facts of Hill's case specifically, the appellate court opined:

> [Hill] admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond [Hill's] mental comprehensive capacity.
>
> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multi-faceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evident from the exchange that occurred during the audio and video tape sessions. The officers who interrogated [Hill] had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to [Hill's] ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of [Hill's] interrogations disclose that [Hill] was capable of understanding the questions put to him and of responding intelligently.
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers' misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers' direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. Based on the aforementioned concerns, and citing the Supreme Court's decisions in *Miranda* and *Lego* in support, the state appellate concluded that Hill's waiver was knowing and intelligent. *Id.*

In addressing voluntariness, the appellate court rejected Hill's argument that his waiver was involuntary "as a result of his mental [infirmities] and the coercive action of the police." *Id.* First, the court noted that Hill's IQ was not necessarily dispositive as to whether he was

AMERICAN OVERSIGHT

incapable of voluntarily waiving his *Miranda* rights, particularly since he had been read those rights in his many prior encounters with police. *Id.* at **6-7. In addressing Hill's argument that his intellectual deficiencies made him vulnerable to the police officers' "psychological ploys," the appellate court noted that Hill was read his *Miranda* rights multiple times on September 13 and 16, 1985, and "appeared articulate and coherent as he answered questions." *Id.* at *8. Finally, in concluding that the record was "devoid of evidence indicating that the custodial interrogation of [Hill] violated his constitutional rights," the appellate court reasoned that because (among other things): (1) Hill originally approached the police on September 12 of his own accord; (2) Hill was read his *Miranda* rights numerous times without ever being placed under arrest; and (3) "[t]he recorded conversations [between Hill and the police] d[id] not suggest the use of any improprieties by the police," Hill's *Miranda* claim was without merit. *Id.* at **9-10.

The Ohio Supreme Court ruled similarly, stating: "Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning." *Hill*, 595 N.E.2d at 890. In making this finding, the court explicitly acknowledged that before Hill turned 18, Detective Hill "would at times physically discipline [his nephew] at the request of [Hill's] mother."[14] *Id.* In fact, the court appeared to credit Detective Hill's version of events—i.e., that "[Hill] stated to [Detective] Hill that he was 'in the field behind Valu King when the young Fife boy got murdered.'" *Id.* The court also found, based on the Supreme Court's ruling in *Connelly* and Hill's "his prior dealings with the criminal process as a juvenile," that Hill's "mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id.* Finally, the Ohio Supreme Court rejected Hill's contention that his waiver was rendered involuntary by virtue of the police's tactics during the interrogation. *Id.* at 891 ("Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that the interrogation tactics used by the police officers, even in light of [Hill's] mental capacity, rendered the statements involuntary, or that the officers improperly induced [Hill] to make incriminating statements.").

[14]Hill was 18 at the time of the September 16, 1985 interrogation, and Detective Hill testified at the suppression hearing that he had not physically disciplined his nephew since at least six to eight months prior. R. 28, PageID# 2976.

AMERICAN OVERSIGHT

Reviewing the state courts' decisions under § 2254(d)(1), the district court found that Hill's arguments that he should be granted habeas relief on this claim were without merit. *Hill v. Anderson*, No. 4:96-cv-00795, 1999 U.S. Dist. LEXIS 23332, at **78-92 (N. D. Ohio Sept. 29, 1999).

Applying AEDPA's deferential review standard, we ask whether the state courts unreasonably applied Supreme Court precedent in finding that Hill's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See* 28 U.S.C. § 2254(d)(1). *Connelly* tells us that a compromised mental state does not, "by itself and apart from its relation to official coercion," vitiate a defendant's ability to waive his *Miranda* protections. *See* 479 U.S. at 164. And *Miller v. Fenton*, 474 U.S. 104 (1985), directs us to treat state-court findings on "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as "conclusive" on habeas review if they are "fairly supported in the record." *Id.* at 117.

In light of these admonitions, the state courts' conclusion that Hill effectively waived his *Miranda* rights was not "unreasonable" as that term has been defined by the Supreme Court. The state courts could plausibly credit Detective Hill's account of his interrogation techniques over Hill's allegations of physical abuse to find a lack of undue coercion and could point to Hill's prior experiences with the criminal justice system and the *Miranda* process as evidence that Hill understood the nature of his waiver.

Although the required deference to the state courts' finding compels our holding on this issue, we wish to express our consternation with this result. The record contains ample evidence demonstrating that Hill's waiver was neither voluntary nor knowing. Hill was interrogated, in private, by a police-officer uncle who admitted to disciplining Hill physically in the past, and who allegedly "'threw [Hill] against the wall,' slapped him across the face, and told him that he 'better tell' the police what happened" during the course of the interrogation. *Supra* p. 28. Hill's uncle then purportedly kicked Hill under the table to induce his consent to a videotaped confession and kicked Hill again when he was reluctant to begin the confession. When considered alongside Hill's intellectual disabilities, Detective Hill's behavior raises grave questions about the voluntariness of Hill's waiver.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003598

And while Hill was certainly exposed several times to *Miranda* warnings, we are not convinced that he ever registered the warnings' meaning. During the suppression hearing the state trial court held in 1985, Hill's attorney asked Hill a number of basic questions about his understanding of *Miranda*:

> Q: [W]hat are your Constitutional Rights?
> A: I don't know.
> Q: What's the word constitution mean?
> A: I don't know.
> Q: What's the word appointed—
> A: When you point at somebody.
> Q: You point at somebody?
> A: Yeah.
>
> . . . .
>
> Q: When the police talked to you, did you go ahead and talk to them?
> A: Yes.
> Q: Why?
> A: They police. [sic] You're supposed to talk to them.
> Q: You have to talk to them?
> A: Yep!
> Q: Do you know what's an attorney? [sic]
> A: I don't know.

R.29, PageID# 3114-16.

It is difficult, in light of this testimony, to accept the state courts' determination that Hill "exhibited a functional capacity to understand [his] rights." *Hill*, 1989 WL 142761, at *6. Nevertheless, because of the procedural posture of this case, we are compelled to affirm the district court.

Accordingly, we **AFFIRM** the district court's denial of habeas relief as to his suppression claim.

VI. Inflammatory Statements by the Prosecutor During Hill's Bench Trial

Hill also makes a prosecutorial misconduct claim based on the prosecutor's allegedly inflammatory statements to the three-judge panel that convicted Hill and sentenced him to death.

AMERICAN OVERSIGHT

This claim is governed by § 2254(d)(1). As indicated above, Hill must show that the state court's decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The full-text of the "inflammatory statements" challenged by Hill may be found in his opening brief. Some of those comments included:

- A reference to Raymond Fife being a 12-year-old boy from the community who had a "right to live," a right to "be in school," and a right "to be here today";
- Statements that Hill was an "animal," who "destroyed and devoured" Fife, and "would make the Marquis de Sade proud";
- A statement that "you don't necessarily have fingerprints on everything" with reference to the apparent lack of Fife's fingerprints on his bike;
- The prosecutor's opinion about which expert witness on a particular issue was "more qualified";
- A statement that Detective Hill did not want to testify against his nephew;
- A reference to Hill being a "poor, dumb boy" who nonetheless violently raped two women and therefore "relishe[d] . . . inflicting pain and torture [on] other human beings";
- A statement that Hill put Fife through a "living hell," that Fife "had no justice while he was living," and that justice demanded a guilty verdict;
- The prosecutor's opinion that defense counsel had not shown "any mitigating factors" and that the aggravated factors "clearly outweigh[ed] the absence of any mitigation";
- Two more references to Hill's history of sexual assault, which the prosecution argued belied the idea that Hill had "difficulty with his motors skills";
- A rambling soliloquy about how the prosecution would have liked to called Fife as a witness so he could describe the beating, strangulation, and sexual assault he endured, but Fife was "not here to testify about that thanks to [Hill]." The prosecutor also stated that Fife, if alive, would have testified about how he missed his family and his friends;
- A reference to Hill as "this manifestation of evil, this anomaly to mankind, this disgrace to mankind."

In adjudicating this claim as part of Hill's direct appeal, the Ohio Supreme Court (1) noted that trial counsel never objected to any of the "complained-of comments," (2) opined that those comments were therefore subject to plain error review only, and (3) concluded that the prosecutor's statements amount to "neither prejudicial error nor plain error[.]" *Hill*, 595 N.E.2d at 898. The Ohio Supreme Court also noted that in Ohio, "[courts] indulge in the usual

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003600

presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Hill*, 595 N.E.2d at 898 (quoting *State v. White*, 239 N.E.2d 65, 70 (1968)).

The district court rejected Hill's prosecutorial misconduct claim as well, reasoning that:

> [Hill's] case was tried before a three judge panel [that] presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless . . . . Three judges should have been able to disregard any intended undue influence.[15]

1999 U.S. Dist. LEXIS 23332, at *110. Accordingly, the district court concluded that the Ohio Supreme Court's determination that "no prejudicial or plain error occurred . . . was not an unreasonable application of clearly established law." *Id.* at **110-11.

In assessing whether the Ohio Supreme Court's decision involved an unreasonable application of federal law, the relevant Supreme Court holding is the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which held that "a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 576 U.S. 37, 45 (2012) (quoting *Darden*, 477 U.S. at 181). The Supreme Court has also held that "the *Darden* standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations.'" *Id.* at 48 (citation, quotation marks, and ellipses omitted).

In *Darden*, the Supreme Court found that comments similar to some of those made by the prosecutor in this case—particularly allusions to the death penalty and the defendant being an "animal"—were improper. 477 U.S. at 179-80. Those comments, unlike the comments in this case, were made before a jury, not a three-judge panel. *Id.* at 170-71. Nonetheless, the Supreme Court noted that these improper statements did not "manipulate or misstate the evidence, [or] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182.

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[15]The state appellate court, in adjudicating this claim, similarly noted that although some of the prosecutor's comments would have "perhaps [been] prejudicially erroneous in a jury trial, [that] was not so [in Hill's case]." *Hill*, 1989 WL 142761, at *15.

AMERICAN OVERSIGHT

In this case, it is clear that the prosecutor's comments were emotionally charged and designed to paint Hill in a bad light. However, it does not appear that they misstated the evidence in the case or implicated Hill's constitutional rights. Further, any efforts to play on the emotions of the three-judge panel would likely have been futile. Although they may not adopt a presumption as strong as the one "indulged" by the Ohio courts, federal courts similarly presume that a judge, as the trier of fact, can readily identify credible evidence, *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), give proper weight to the evidence, *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984), and understand what law is relevant to his or her deliberations, *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). And Hill has put forth no evidence indicating that the three-judge panel that tried his case was incapable of discerning what constitutes admissible evidence and parsing such evidence out from any inflammatory or irrelevant[16] comments by the prosecutor.[17] For these reasons, we conclude that the decision by the Ohio Supreme Court was not an unreasonable application of clearly established law.

We **AFFIRM** the district court's denial of habeas relief as to Hill's prosecutorial misconduct claim.

VII. The Trial Court's Failure to Hold a Pretrial Competency Hearing

Lastly, Hill argues that the trial court's failure to inquire about Hill's competency denied him a fair trial under the due process clause of the Fourteenth Amendment. Here, the term "trial court" refers to the court that tried Hill's underlying offenses in 1985 and 1986.

This claim is governed by § 2254(d)(1). As indicated above, the Supreme Court has held that to obtain relief under § 2254(d)(1), the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error

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[16]For example, the three-judge panel disclaimed any reliance on Hill's "prior crimes . . . in reaching its verdict." *See Hill*, 595 N.E.2d at 893.

[17]Hill's reference to a single line in the panel's opinion that referred to Hill and Combs' "blood lust characterized by a series of acts of torture, rape, and murder," does not change this conclusion. The rest of the opinion describes Fife's injuries, and the means by which they were inflicted (based on the evidence at trial), in great detail. The opinion also indicates that the judges were struck by the "total lack of remorse" shown by Hill appearing at the police station to seek a reward after Fife's death. Looking at the document as a whole, there is no indication that the comment with which Hill takes issue was derived from the prosecutor's statements rather than the judges' own assessments of the offenses.

AMERICAN OVERSIGHT

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In assessing competence, the relevant question is whether the defendant's "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). If the defendant's mental condition meets this description, the courts may not try him.[18] *Id.*

Hill maintains that because the trial court knew that he had "limitations in vocabulary, ability to calculate, and ability to draw" and "could not recognize or understand a majority of the words on the *Miranda* waiver form," the trial court should have "conduct[ed] further inquiry into [Hill's] competency to stand trial." Hill's Br. at 124-25. With regard to this final issue, Hill requests that this Court determine "not whether the state court was unreasonable in finding Danny competent to stand trial, but whether it was unreasonable under *Pate*[19] and *Drope*[20] not to make such an inquiry in the first instance." *Id.* at 124. Hill also argues, with no elaboration and minimal citation to the record,[21] that the Ohio Supreme Court "unreasonably applied *Pate* and *Drope*" in determining that Hill was competent to stand trial. *Id.* at 125.

The Warden, for his part, asserts that "[a]lthough Hill is intellectually limited, his demeanor at trial was such that the trial court had no reason to *sua sponte* assess Hill for competence to stand [trial]." The Warden also argues that:

> The trial record gives every indication that Hill was compliant, cooperative and appropriately attentive to the proceedings. Moreover, the trial judge had ample opportunity to assess Hill's ability to navigate through the trial proceedings, where Hill testified extensively during a pre-trial suppression hearing, and also had a direct colloquy with the trial court for acceptance of the jury waiver. In

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[18] Again, our conclusion that Hill is intellectually disabled and thus ineligible for execution under *Atkins* does not mean that Hill was incompetent to stand trial or that the trial court should have presumed his incompetence and ordered a competency hearing *sua sponte*. The two inquiries are different, and even *Atkins* recognizes that "[m]entally retarded persons frequently . . . are competent to stand trial." 536 U.S. at 318.

[19] *Pate v. Robinson*, 383 U.S. 375 (1966).

[20] *Drope v. Missouri*, 420 U.S. 162 (1975).

[21] This issue occupies three pages in Hill's opening brief and just over a page in his reply brief. The only record citation in the opening brief seeks to demonstrate that Hill "could not recognize or understand a majority of the words on the *Miranda* waiver form."

AMERICAN OVERSIGHT

> addition, none of the three mental health experts who testified for the defense at trial expressed a concern about Hill's competence to stand trial.

Warden's Br. at 97. Hill's reply brief does not address these contentions.

Neither the state appellate court nor the Ohio Supreme Court opinions from Hill's direct appeal noted Hill's competency argument as one of his nineteen assignments of error and twenty-five propositions of law, respectively. *See generally State v. Hill*, 595 N.E.2d 884 (Ohio 1992); *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Instead, the only similar claims addressed by these courts pertained to Hill's arguments that he could not knowingly and voluntarily waive his right to counsel or his right to a jury trial due to his alleged intellectual disability. *See, e.g.*, *Hill*, 595 N.E.2d at 890-91, 895; *Hill*, 1989 WL 142761, at **3, 5-7, 13-14. The district court found that Hill raised the issue of competency only under state law, not federal law, and that Hill did not raise the competency claim under federal law until filing for state post-conviction relief. *Hill*, 1999 U.S. Dist. LEXIS 23332, at **92-93. On this basis, the district court concluded that Hill's competency claim was procedurally defaulted. *Id.* at **93-94 (citing *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995)). The Warden argues that even if Hill's claim was not procedurally defaulted, it fails on the merits. We agree.

On December 16, 1985, the trial court held a hearing on Hill's motion to suppress his statements to the police. Defense counsel called Hill as a witness to testify with respect to "the circumstances under which [he] gave statements to the police department." R. 29, PageID# 3101. In response to the trial court's questions, Hill indicated that he understood the purpose and nature of the hearing. *Id.* at 3103-04. He went on to testify about the means by which he arrived at the police station, as well as his inability to leave police custody prior to the arrival of his mother on Friday, September 13, 1985. On Monday, September 16, 1984, Hill returned to the police station at his mother's behest with his uncle, Detective Hill, and another police officer, Sergeant Steinbeck. As discussed earlier, Hill testified that while he and Detective Hill were alone, Detective Hill threw Hill against the wall, slapped him, and told him to tell the police what had happened. Hill also claimed that after being physically abused by his uncle, he told the

AMERICAN OVERSIGHT

police what they wanted to hear because he was afraid of both Detective Hill and the other officers. *Id*. at 3114, 3118-19.

Defense counsel, for his part, attempted to demonstrate that Hill could neither read nor write and that Hill signed the *Miranda* waiver without understanding its contents or knowing what it meant; meanwhile, the prosecutor attempted to demonstrate that Hill had been to the Warren police department many times before based on theft-related crimes and was therefore familiar with the department's *Miranda* form. *Id*. at 3107-09, 3115, 3121-23, 3152-53, 3155. On cross-examination, Hill testified that he signed the *Miranda* waiver because the police told him to do so. *Id*. at 3135-37. Hill's testimony ended following questions from the trial court about Hill's alleged physical abuse at the hands of Detective Hill.

Hill appeared before the trial court once more on January 7, 1986, this time to waive his right to a jury trial. *See Hill*, 595 N.E.2d at 889. The trial court's colloquy with Hill, which was designed to determine whether Hill's waiver was knowing and voluntary, included an explanation of the jury selection system, the role of the jury, the jury waiver's effect on some of Hill's pending motions, defense counsel's possible motives for seeking to waive Hill's right to a jury trial, and the differences between a jury and three-judge panel in terms of number of persons, familiarity with the law and the facts of the case, and demographic composition. The trial court read the waiver aloud to Hill and suggested the Hill go over the waiver with his attorney. Waiver of Jury Trial Hr'g Tr. at 10-11.[22] Hill indicated that he had discussed the issue of waiver with both his attorney and his mother, and there was a 25-minute recess in which the attorney and Hill's mother apparently discussed the waiver with him further. *Id*. at 5-6. After the recess, Hill affirmatively stated that he wanted to be tried by the three-judge panel. *Id*. at 12.

A review of Hill's testimony during the December 16, 1985, suppression hearing reveals that Hill claimed to understand the nature of the hearing and was able to answer questions posed by the prosecutor, defense counsel, and the trial court. Hill stated more than once when he did not understand or did not know the answer to a question, either on his own or with attorney prompting. He also appeared to understand the role of the trial judge. Hill's interactions with

[22]The transcript of the jury waiver hearing can be found in the district court record at R. 30 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28. 1997).

AMERICAN OVERSIGHT

the trial court at the January 7, 1986 hearing on his waiver of jury trial also failed to raise any red flags regarding competence. Although the trial court did most of the talking, Hill did not express any confusion about the nature of the waiver, and was given an opportunity to go over the considerations discussed by the trial court with his attorney and mother before and during the hearing. After Hill conferred with his attorney, the following exchange took place:

> COURT: All right. Danny, you've been talking with your lawyer now, have you not, for the last 25 minutes or so?
> DEFENDANT HILL: Yeah.
> COURT: And did he go over this matter of a jury trial with you?
> DEFENDANT HILL: Yeah.
> COURT: And you want to tell me now what decision you've made after talking this over.
> DEFENDANT HILL: I want to have—
> COURT: What do you want to do? Who do you want to try it? Three judges—
> DEFENDANT HILL: Three judges.
> COURT: —or do you want the jury?
> DEFENDANT HILL: You.
> COURT: I hope you understand—you mean myself and two other judges?
> DEFENDANT HILL: (Nods head affirmatively.)

Id. At no point during the hearing did Hill behave in a manner, or make a statement indicating, that he did not understand the nature of the waiver.

On this record, there is no indication that Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel to assist in his case. *See Edwards*, 554 U.S. at 170. Although Hill is correct that the record suggests that he was functionally illiterate at the time of the suppression hearing, Hill cites no authority for the proposition that trial courts should equate illiteracy to incompetence. He also cites no authority for the proposition that because there were other signs that he was intellectually limited, i.e., his limited vocabulary or "ability to draw similarities," the trial court should have doubted his competence to stand trial and ordered a competency hearing *sua sponte*. As indicated above, the trial court had at least two opportunities to observe Hill and interact with him directly, and these incidents did not suggest that Hill was incompetent to stand trial under *Pate*, *Drope*, or the more recent Supreme Court case, *Edwards*.

AMERICAN OVERSIGHT

For the aforementioned reasons, we **AFFIRM** the district court's denial of habeas relief as to Hill's due process claim.

AMERICAN OVERSIGHT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-4317/14-3718

DANNY HILL,

Petitioner - Appellant,

v.

TIMOTHY SHOOP, Warden,

Respondent - Appellee.

FILED
Aug 20, 2021
DEBORAH S. HUNT, Clerk

Before: SUTTON, Chief Judge; MERRITT, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN and READLER, Circuit Judges.*

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs and arguments of counsel,

IT IS ORDERED that the district court's denial of Danny Hill's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Merritt, senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy recused himself from participation in this decision.

AMERICAN OVERSIGHT

Delivery Report

From: postmaster@ago.mo.gov [postmaster@ago.mo.gov]
Sent: 8/20/2021 4:50:12 PM
To: justin.smith@ago.mo.gov
Subject: Undeliverable: Challenge to recent Dep't of Ed and EEOC transgender guidance
Attachments: Challenge to recent Dep't of Ed and EEOC transgender guidance

Your message

To: 'cori.mills@alaska.gov'; Alloway, Jessie M (LAW); 'LaCour, Edmund'; Robertson, Katherine; 'nicholas.bronni@arkansasag.gov'; Vincent Wagner; Roysden, Beau; kate.sawyer@azag.gov; Henry.Whitaker@myfloridalegal.com; john.guard@myfloridalegal.com; Andrew Pinson; tjohnson@law.ga.gov; Kane, Brian; Tom Fisher (tom.fisher@atg.in.gov); lori.torres@atg.in.gov; brant.laue@ag.ks.gov; 'jeff.chanay@ag.ks.gov'; Meredith, Chad (Gov Office); Dunn, Barry (KYOAG); Murrill, Elizabeth; 'St. John, Joseph'; Sauer, John; Smith, Justin; Scott Stewart; Justin Matheny; 'Dewhirst, David'; masagsve@nd.gov; 'Seibel, Troy T.'; Jim.Campbell@nebraska.gov; Dave Bydalek; Benjamin Flowers; Jonathan Blanton; 'mithun.mansinghani@oag.ok.gov'; Zach West; Emory Smith; mgates@scag.gov; Stone, Judd; Webster, Brent; melissaholyoak@agutah.gov; Lindsay S. See; ryan.schelhaas@wyo.gov
CC: Andree S. Blumstein; Jonathan Skrmetti; Brandon J. Smith
Subject: Challenge to recent Dep't of Ed and EEOC transgender guidance
Sent: 8/20/2021 4:47:49 PM

Delivery has failed to these recipients or groups:

justin.smith@ago.mo.gov (justin.smith@ago.mo.gov)
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
For more information about this error, see DSN code 5.7.1 in Exchange Online - Office 365.

Diagnostic information for administrators:

Generating server: AGOPMAIL01.ago.state.mo.us

justin.smith@ago.mo.gov
Remote Server returned '550 5.7.1 TRANSPORT.RULES.RejectMessage; the message was rejected by organization policy'

Original message headers:

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From: "Sarah K. Campbell"
To: "'cori.mills@alaska.gov'" , "Alloway, Jessie M
 (LAW)" , "'LaCour, Edmund'"
        , "Robertson, Katherine"
        , "'nicholas.bronni@arkansasag.gov'"
        , Vincent Wagner
        , "Roysden, Beau" ,
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        "kate.sawyer@azag.gov" ,
        "Henry.Whitaker@myfloridalegal.com" ,
        "john.guard@myfloridalegal.com" , "Andrew
 Pinson" , "tjohnson@law.ga.gov" ,
        "Kane, Brian" , "Tom Fisher (tom.fisher@atg.in.gov)"
        , "lori.torres@atg.in.gov" ,
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 Elizabeth" , "'St. John, Joseph'"
        , "Sauer, John (John.Sauer@ago.mo.gov)"
        , "justin.smith@ago.mo.gov" ,
        Scott Stewart , Justin Matheny
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        , "Lindsay S. See" ,
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Subject: Challenge to recent Dep't of Ed and EEOC transgender guidance
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Return-Path: sarah.campbell@ag.tn.gov

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Message

From: Weaks, Timothy [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9796F42AC2B149A99DC0B8F288ADF9F3-WEAKS, TIMOTHY]
Sent: 8/23/2021 11:08:57 AM
To: SL-Staff [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a37cdd3e5b6d4c6798cbc5a5d58de75e-SL-Staff]
CC: Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Nuelle, Chris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5f087eebfbb34d7e8854e258b6fd403b-Nuelle, Chris]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Deal, Marianna [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=968ddb64a1194ac4af691d6e90762ec4-Deal, Marianna]; Estep, Robert [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e44f6ef0bb24ecd81753eb8613699d8-Estep, Robert]; Houser, Rachael [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=houser]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Lewis, Jason [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b5c0354b7d8f4ae4b03d7dd0d4144031-Lewis, Jason]; Haywood, Amy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=haywoa]; Foster, Josh [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30031dddc5fd40b0bc03e3a33d8d46b7-Foster, Josh]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Stevens, Cris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=521151f1306d4ea2ae0c6fa08b7a6293-Stevens, Cris]
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

Good morning everyone,
I just wanted to share that our AGO Softball Team competed hard Friday afternoon and defeated the St. Louis County Prosecutor's Office in our first game. Unfortunately, we fell just short in the championship game to the Eastern District of MO US Attorney's Office. I was real proud of the squad that we were able to put together at the last minute on Friday and how hard everyone played in the blinding sun and dead heat.
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Until next year, thanks.
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AMERICAN OVERSIGHT



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Sent: Friday, August 20, 2021 9:50 AM
To: Weaks, Timothy ; SL-Staff
Cc: Krug, Christine ; Nuelle, Chris ; Atkins, Jay ; Ebert, Mik ; Deal, Marianna ; Estep, Robert ; Houser, Rachael ; Morgan, Jeremiah ; Lewis, Jason ; Haywood, Amy ; Foster, Josh ; Goodwin, Gregory ; Atkins, Jay ; Smith, Justin
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AMERICAN OVERSIGHT

Message

From: Stevens, Cris [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=521151F1306D4EA2AE0C6FA08B7A6293-STEVENS, CRIS]
Sent: 8/23/2021 11:15:01 AM
To: Weaks, Timothy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9796f42ac2b149a99dc0b8f288adf9f3-Weaks, Timothy]; SL-Staff [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a37cdd3e5b6d4c6798cbc5a5d58de75e-SL-Staff]
CC: Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Nuelle, Chris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5f087eebfbb34d7e8854e258b6fd403b-Nuelle, Chris]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Deal, Marianna [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=968ddb64a1194ac4af691d6e90762ec4-Deal, Marianna]; Estep, Robert [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e44f6ef0bb24ecd81753eb8613699d8-Estep, Robert]; Houser, Rachael [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=houser]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Lewis, Jason [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b5c0354b7d8f4ae4b03d7dd0d4144031-Lewis, Jason]; Haywood, Amy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=haywoa]; Foster, Josh [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30031dddc5fd40b0bc03e3a33d8d46b7-Foster, Josh]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]
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Well said Tim. Thanks again to everyone who came out to represent the AGO. You did so admirably. We had a lot of fun and went down fighting!
Cris

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AMERICAN OVERSIGHT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

STATE OF LOUISIANA, ET. AL.	**:**	**CIVIL ACTION NO. 2:21-cv-778**
VERSUS	**:**	**JUDGE TERRY A. DOUGHTY**
JOSEPH R. BIDEN, JR., ET. AL.	**:**	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is defendants' Motion to Dismiss all Claims except for Count VI of the plaintiffs' complaint, a Motion to Dismiss for Lack of Jurisdiction, and a Motion to Dismiss the President of the United States as a defendant. Doc. 128. The motions have been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636. The plaintiffs oppose the motions and the defendants have replied. Docs. 124 and 145.

For the reasons stated herein, we **RECOMMEND** that the court **DENY** defendants' Motions to Dismiss.

I.
BACKGROUND

The present suit arises from the issuance of a pause[1] on offshore oil and gas lease sales by President Joseph Biden ("the President"). On January 27, 2021, President Joseph Biden issued Executive Order 14008 ("EO 14008"). Section 208 of the Order provides in pertinent part:

> To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore

[1] Though plaintiffs entitle the collection of the challenged actions "the Biden Ban" or "Leasing Moratoriums", we will call the action a "pause" as that is the language used by the President in the executive order at issue.

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> waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.

Exec. Ord. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021). In a purported attempt to comply with the executive order, agencies within the Department of the Interior ("DOI") rescinded or postponed all scheduled onshore and offshore lease sales. Doc. 1, pp. 26-36.

On March 24, 2021, plaintiffs[2] filed suit against the President and a number of government officials.[3] Plaintiffs allege that the defendants' actions were contrary to the Mineral Leasing Act ("MLA") and the Outer Continental Shelf Lands Act ("OCSLA"). *Id.*, p. 4. Plaintiffs bring eight claims under the Administrative Procedure Act ("APA"). *Id.*, pp. 43-48. The APA claims in Counts I and VI request that the court compel specific lease sales since the Bureau of Land Management ("BLM") and the Bureau of Ocean Energy Management ("BOEM") have "unlawfully withheld or

[2] The plaintiffs consist of the States of Louisiana, Alabama, Alaska, Arkansas, Georgia, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia. Each state has special interests in the execution of oil and gas lease sales and has sued "to vindicate its sovereign, proprietary, and *parens patriae* interests." Doc. 1, pp. 6-11, ¶¶ 8-20.

[3] The defendants consist of Joseph R. Biden, Jr. in his official capacity as President of the United States; Deb Haaland, in her official capacity as Secretary of the Interior; Michael Nedd, in his official capacity as Deputy Director of the Bureau of Land Management; Chad Padgett, in his official capacity as Director of the Bureau of Land Management Alaska Office; Raymond Suazo, in his official capacity as Director for the Bureau of Land Management Arizona Office; Karen Mouristen, in her official capacity as Director for the Bureau of Land Management California Office; Jamie Connell, in his official capacity as Director for the Bureau of Land Management Colorado Office; Mitchell Leverette, in his official capacity as Director for the Bureau of Land Management Eastern States Office; John Ruhs, in his official capacity as Director for the Bureau of Land Management Idaho Office; John Mehlhoff, in his official capacity as Director for the Bureau of Land Management Montana – Dakotas Office; Jon Raby, in his official capacity as Director for the Bureau of Land Management Nevada Office; Steve Wells, in his official capacity as Director for the Bureau of Land Management New Mexico Office; Barry Bushue, in his official capacity as Director for the Bureau of Land Management Oregon-Washington Office; Greg Sheehan, in his official capacity as Director for the Bureau of Land Management Utah Office; Kim Liebhauser, in her official capacity as Director for the Bureau of Land Management Wyoming Office; Amanda Lefton, in her official capacity as Director of the Bureau of Ocean Energy Management; Michael Celata, in his official capacity as Regional Director of the Bureau of Ocean Energy Management Gulf of Mexico Office; Lars Herbst, in his official capacity as Regional Director of Bureau of Safety and Environmental Enforcement Gulf of Mexico OCS Office; and Mark Fesmire, in his official capacity as Regional Director of the Bureau of Safety and Environmental Enforcement Alaska and Pacific Office.

AMERICAN OVERSIGHT

unreasonably delayed" executions of these lease sales. *Id*., pp. 43-44, ¶¶ 127-133; pp. 46-47, ¶¶ 156-159. Counts II-V, VII, and VIII ask the court to vacate and enjoin the action of either BOEM or BLM for three different violations of the APA: acting in an "arbitrary and capricious" manner, acting "contrary to law," or failing to employ a notice and comment period before acting. *Id*., pp. 43-48, ¶¶ 141, 146, 150, 155, 163, 167. Alternatively, plaintiffs seek relief under Count IX, which alleges a citizen suit under OCSLA. *Id*., pp. 48-40, ¶¶ 168-174. Finally, Count X alleges a claim for *ultra vires* review of the President's issuance of EO 14008. *Id*., pp. 49-50, ¶¶ 175-177.[4]

On March 31, 2021, plaintiffs filed a Motion for Preliminary Injunction requesting that the district court enjoin defendants from implementing the rescission and postponements of certain lease sales and requesting that the court order the agencies to disregard the pause on new leases. Doc. 3, pp. 1-2. Plaintiffs sought injunctive relief pursuant to the APA. Doc. 3, att. 1, pp. 16-26. After hearing oral argument on the matter, the district court granted the motion and issued the injunction. Docs. 139 and 140. That ruling ordered that the named agency officials[5] be enjoined and restrained nationwide from implementing Executive Order 14008's pause "with respect to Lease Sale 257, Lease Sale 258, and all eligible lands onshore." *Id*., p. 43.

On June 7, 2021, the defendants filed the instant motions, seeking dismissal of all claims except for Count VI,[6] and seeking dismissal of the President as a defendant. Doc. 128. Defendants

[4] As the district court pointed out, the President is not a proper defendant for the APA claims, as the law is clear that the president does not constitute an "agency" under the APA. Doc. 139, att. 1, p. 4; *see Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775-76 (1992). Even so, the President's actions may still be reviewed for constitutionality. *Id*. at 2776. Plaintiffs acknowledge that they have alleged Count X, an *ultra vires* claim challenging the legality of EO 14008, as an "alternative" cause of action to the APA claims. Doc. 3, att. 1, p. 15, n. 5; Doc. 142, p. 20.

[5] The preliminary injunction applies to "the U.S. Department of the Interior, the United States Bureau of Land Management, the United States Bureau of Ocean Energy Management, and the United States Bureau of Safety and Environmental Enforcement, along with their directors, employees and Secretary." Doc. 139, att. 1, p. 43. The President is excluded from the preliminary injunction order. *Id.*

[6] Plaintiffs' APA claim in Count VI alleges under that BLM unlawfully and unreasonably delayed its quarterly land lease sales, and the complaint seeks to compel BLM to hold the sales "according to their previous schedules with reasonable modifications." Doc. 1, pp. 46-47, ¶ ¶ 156-159 (citing 5 U.S.C. §706(1)).

AMERICAN OVERSIGHT

move to dismiss Count X, plaintiffs' *ultra vires* claim, arguing that the language of EO 14008 is "facially valid" and therefore could not have been in excess of authority. *Id.*, att. 1, pp 18-21. For 12(b)(6) dismissal of Count IX, the OCSLA citizen suit, defendants argue that plaintiffs failed to comply with OCSLA's requirement that a would-be plaintiff provide notice of intent to sue 60 days before filing a citizen suit claim. *Id.*, pp. 23-26. Defendants urge that plaintiffs have not sufficiently alleged that they would have suffered "immediate" harm to their legal interests, which constitutes a statutory exception to OCSLA's 60-day notice requirement for citizen suits. *Id.* Finally, defendants challenge the jurisdiction of the court and argue that the agency actions at issue are not reviewable under the APA. *Id.*, pp. 26-32. While the APA only allows for review of "final agency action," defendants argue and plaintiffs' challenge pertains to a wide-ranging program and not discrete agency actions. *Id.*, pp. 26-29. Even if there were proper "actions" to review, defendants contend that those actions would still not be "final" as they are only temporary pauses on leasing. *Id.*, pp. 29-32.

In their opposition, plaintiffs argue that EO 14008 is invalid on its face as its directives cannot be implemented without contravening applicable law. Doc. 142, pp. 21-23. As to their OCSLA citizen suit claim, plaintiffs contend that their complaint sets out the immediate threat of both economic harm and to harm their statutorily vested legal interest in the notice and comment period of lease sales. *Id.*, pp. 24-25. As to the leasing pause as an APA violation, plaintiffs argue that a decision need not be permanent to be considered "final" and therefore subject to judicial review under the APA. *Id.*, pp. 25-29. They urge that the overarching decision to halt all processes for oil and gas leasing was a clear and discrete agency action. *Id.*, p. 27. Further, the cancellation of specific onshore leases, the rescission of offshore Lease Sale 257, and the halt of Lease Sale

AMERICAN OVERSIGHT

258 were certainly discrete and final agency actions that are subject to judicial review under the APA. *Id.*, pp. 29-32.[7]

II.
LAW & ANALYSIS

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows for dismissal of a claim when a plaintiff "fail[s] to state a claim upon which relief can be granted." When reviewing such a motion, the court should focus exclusively on the complaint and its attachments. *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012). The court may also take judicial notice of public records. *Papasan v. Allain,* 106 S. Ct. 2932, 2935 n.1 (1986). The court reviews such motions "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 461 (5th Cir. 2010). While factual assertions are presumed to be true, "labels and conclusions" and "formulaic recitation of the elements of a cause of action" are not enough to withstand a 12(b)(6) motion. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Additionally, "the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). The court's task in evaluating a motion to dismiss under Rule 12(b)(6) is "not to evaluate the plaintiff's likelihood of success," but instead to determine whether the claim is both legally cognizable and plausible. *Billups v. Credit Bureau of Greater Shreveport*, No. 14-401, 2014 WL 4700254 at *2 (W.D. La. Sep. 22, 2014) (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)).

[7] As the defendants point out, because a preliminary injunction hearing involves a less formal procedure and Counts IX and X were not briefed before the district judge at that time, findings on the motion for a preliminary injunction are not binding at trial on the merits. Doc. 145, pp. 1-2 (citing *Jonibach Mgmt. Tr. v. Wartburg Enterprises, Inc.*, 750 F.3d 486, 491 (5th Cir. 2014)). As a result, the analysis on the merits below does not rest on the district judge's ruling, though we do reach similar conclusions.

AMERICAN OVERSIGHT

A. Statutory Scheme

OCSLA and the MLA are the two comprehensive statutory regimes that govern oil and natural gas development on the Outer Continental Shelf ("OCS") and on federal lands.

1. OCSLA

OCSLA directs the Secretary of the Interior ("the Secretary") to make the OCS "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). By statute, states benefit economically from oil and gas leasing production on the OCS. OCSLA provides certain coastal states with a percentage of bonuses, rents, royalties, and other revenues arising from oil and gas sales and development. *Id.* § 1337(g). Several plaintiffs also receive revenues arising from leases under OCSLA's coastal impact assistance program and the Gulf of Mexico Energy Security Act. *Id.* § 1331(a) note and § 1356a.

OCSLA directs the Secretary to administer a leasing program and to sell exploration interests in portions of the OCS to the highest bidder. *Id.* § 1334(a) and 1337(a)(1). BOEM, a federal agency under the DOI, oversees the process of offshore oil and gas leasing. The statute sets out a four-stage process for developing federal offshore lands: (1) development of a Five-Year Leasing Program; (2) holding lease sales; (3) exploration of the leased land by the lessees; and (4) development and production. *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 632-33 (E.D. La. 2010) (citing *Sec'y of the Interior v. California*, 104 S. Ct. 656, 669-70 (1984)).

The first stage of the leasing process promotes dialogue with and input from affected states and local governments. *See* 43 U.S.C. §§ 1344(c)-(d);1345(a); 1351(a)(3). In developing a Five-Year Program, the Secretary "must solicit comments from interested federal agencies and the governors of affected states, and must respond in writing to all comments or requests received

AMERICAN OVERSIGHT

from the state governors." *Sec'y of the Interior*, 104 S. Ct. at 669-70 (citing 43 U.S.C. § 1344). The Secretary must submit the proposed plan to the President and Congress, in addition to any comments received, at least sixty days before approval. 43 U.S.C. § 1344(d)(2). Further, such submission must indicate "why any specific recommendation of the Attorney General or a State or local government was not accepted." *Id.*

The second stage of the leasing process mandates further consultation with the states. OCSLA provides that, within sixty days of public notice of a proposed lease sale, any governor of an affected state or executive of an affected local government "may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." *Id.* § 1345(a). Then, the Secretary "shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government" if it is determined that the recommendations "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." *Id.* §1345(c). OCSLA expressly requires that any revision of the Five-Year Program "shall be in the same manner as originally developed" unless the revision is "not significant." *Id.* § 1344(e). The statute sets forth the procedures with which the Secretary must comply in making "any significant revision or reapproval of the leasing program." *Id.* § 1344(f).[8]

[8] The specific procedures required in making a significant revision to the program are:

> **(1)** receipt and consideration of nominations for any area to be offered for lease or to be excluded from leasing;
> **(2)** public notice of and participation in development of the leasing program;
> **(3)** review by State and local governments which may be impacted by the proposed leasing;
> **(4)** periodic consultation with State and local governments, oil and gas lessees and permittees, and representatives of other individuals or organizations engaged in activity in or on the outer Continental Shelf, including those involved in fish and shellfish recovery, and recreational activities; and
> **(5)** consideration of the coastal zone management program being developed or administered by an affected coastal State pursuant to section 1454 or section 1455 of Title 16.

AMERICAN OVERSIGHT

2. MLA

BLM, a federal agency under the DOI, oversees the leasing process for federal lands. The MLA grants BLM the authority to lease public lands with oil or gas deposits to private industry for development. 30 U.S.C. § 226(a). The MLA requires that the Secretary hold lease sales "for each State where eligible lands are available at least quarterly. . . ." *Id.* § 226(b)(1)(A). BLM's regulations also require quarterly lease sales. *See* 43 C.F.R. § 3120.1-2(a) ("Each proper BLM … office shall hold sales at least quarterly if lands are available for competitive leasing."). The MLA provides a certain percentage of "[a]ll money received from sales, bonuses, [and] royalties including interest charges" to the state in which a lease is located. 30 U.S.C. § 191(a).

B. Plaintiffs' Factual Allegations as to All Counts

Plaintiffs allege that the formation of the current Five-Year Program began under the administration of former President Barack Obama in 2014, and BOEM appropriately performed its OCSLA-mandated statutory duties by publishing a request for information in the Federal Register and considering the comments in forming the Draft Proposed Program. Doc. 1, p. 18, ¶ 53. In 2015, BOEM published the Draft Proposed Program and in the 60 days following, received over one million comments in response. *Id.*, ¶ 54. In 2016, BOEM then published the Proposed Program, initiating a ninety-day comment period. *Id.*, ¶ 55. In November 2016, BOEM published the Proposed Final Program and, once the program had been submitted to President Obama and Congress, the Secretary ultimately approved the Final Program on January 17, 2017. *Id.*, pp. 19-20, ¶¶ 56-59. The Final Program included eleven proposed lease sales, including Lease Sale 257 in the Gulf of Mexico and Lease Sale 258 in Cook Inlet, Alaska. *Id.*, ¶¶ 57-59. Plaintiffs allege that, after the approval of the Final Program, seven of those lease sales occurred on schedule between August 2017 and November 2020. *Id.*, p. 20, ¶ 60. Lease Sale 257's Proposed Notice of

AMERICAN OVERSIGHT

Sale was published by BOEM in November 2020 and, after a period of public comment, was approved and formally scheduled to occur March 17, 2021. *Id*., pp. 20-22, ¶¶ 61-64. Lease Sale 258 had not reached final approval yet, but as of January 2021, BOEM had published a Notice of Availability of the area proposed for sale and invited public comment. *Id*., p. 22, ¶ 65.

On January 27, 2021, President Biden issued EO 14008, which commands that the Secretary "pause new oil and natural gas leases on public lands or in offshore waters" pending a comprehensive environmental review. *Id*., p. 23, ¶ 67. This EO was issued citing "no authority" for the pause and providing no rationale for the departure from the Five-Year Program established by the Obama Administration and left in place by the administration of President Donald Trump. *Id*. Plaintiffs allege that the EO's only discernable rationale is to "follow through" on the President Biden's promises made during his campaign. *Id*. Additionally, plaintiffs claim that Secretarial Order No. 3395, issued on January 20, 2021, by the then-acting Secretary "constructively halted" development and exploration of existing oil and gas leases which suspended the previously-delegated authority of BOEM and BLM to oversee the permitting process in already-existing oil and gas leases. *Id*., pp. 23-24, ¶ 68. This Order shifted the power to oversee the drilling and exploration process from the regional offices of BOEM and BLM to "nine politically appointed officials in Washington"—the Office of the Assistant Secretary for Land and Minerals. *Id*. ¶¶ 68-69. Plaintiffs' complaint contends that the effective combined result of Secretarial Order No. 3395 and EO 14008 has been a "comprehensive ban on the leasing and development of energy resources on public lands and offshore waters," as the orders have rendered it "impossible" for the DOI to perform its statutorily mandated duties under OCSLA and the MLA. *Id*., p. 25, ¶¶ 71-72.

Discrete actions taken by regional offices of BOEM and BLM in the months following EO 14008, plaintiffs contend, further demonstrate the existence of a moratorium on oil and gas leasing.

AMERICAN OVERSIGHT

On February 18, 2021, the Regional Director of BOEM's Gulf of Mexico Office issued a Notice to Rescind the Prior Lease 257 Record of Decision. *Id*., p. 26, ¶ 73. Plaintiffs contend that the Notice involved "no analysis, no comment period, no reference to statutory factors, no reference to the Current Five-Year Program, and no consultation with the States, Tribes, or local governments." *Id*. Instead, BOEM's only stated reasoning was to comply with EO 14008. *Id*. On February 4, 2021, BOEM cancelled the public comment period and public meetings on Lease Sale 258, citing only EO 14008 for its reasoning. *Id*., pp. 31-32, ¶ 86. Plaintiffs contend that the abrupt Rescission of Lease Sale 257 improperly amends the current Five-Year Program and contravenes OCSLA's requirements that BOEM consult with the states and local governments, submit the plan to Congress and the President, hold waiting and comment periods, and prepare environmental impact statements. *Id*., p. 27, ¶ 76. Additionally, the unexplained delay of Lease Sale 258 and cancellation of its public comment period ignore the process set forth by OCSLA. *Id*., p. 32, ¶ 90.

As to the onshore oil and gas lease sales, several BLM offices[9] planned to hold quarterly sales of available lands in March and April of 2021. *Id*., pp. 33-34, ¶¶ 93-99. Plaintiffs allege that each pending quarterly sale was halted in response to EO 14008. *Id*., p. 35, ¶ 102. Indeed, in the months following EO 14008, each sale under the MLA was halted, with most offices offering no reasoning for the postponement and BLM's Wyoming Office stating that the sales were postponed to "confirm the adequacy of the underlying environmental analysis." *Id*., pp. 35-36, ¶¶ 103-110. Plaintiffs urge that BLM's delay of the land sales contravenes the MLA and abdicates BLM's mandatory statutory duty to hold lease sales "for each State where eligible lands are available at least quarterly." *Id*., p. 37, ¶ 111 (citing 30 U.S.C. § 226(b)(1)(A)).

[9] These sales were to occur through BLM offices of Nevada, Montana-Dakotas, Utah, Colorado, Oklahoma and New Mexico. Doc. 1, pp. 33-34, ¶¶ 94-99.

AMERICAN OVERSIGHT

1. Count X: *Ultra Vires* Claim

Plaintiffs allege in Count X of their complaint that "[b]ecause neither OCSLA nor MLA authorizes the President to unilaterally impose a moratorium on oil and gas lease sales by Executive Order or otherwise, Section 208 of Executive Order 14008 is ultra vires." Doc. 1, p. 50, ¶ 177. The President's power to pause oil and gas leases "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 866 (1952). Judicial review is generally available to determine whether the President has exceeded statutory authority to take a particular action. *See, e.g.*, *Rosebud Sioux Tribe v. Trump*, 428 F. Supp. 3d 282, 291 (D. Mont. 2019) ("A court's power to enjoin the President extends to enjoining portions of an executive order where the order exceeds the statutory authority delegated by Congress and constitutional boundaries." (citing *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (internal quotations omitted)); *Massachusetts Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54 (D.D.C. 2018), *aff'd*, 945 F.3d 535 (D.C. Cir. 2019) ("Because Plaintiffs' claims assert that the President exceeded his statutory authority under the Antiquities Act—*i.e.*, that the Proclamation was *ultra vires*—they are generally reviewable."); *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (recognizing a cause of action for judicial review of an executive order and noting that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.")[10]

[10] The defendants' reply argues that *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*[801 F. Supp. 2d 383, 406 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012)] and several cases that plaintiffs rely on in their opposition are inapposite because they either involve challenges to "self-executing" Presidential actions or involve *ultra vires* challenges to agency action only. Doc. 145, pp. 3-4, fn. 1. We note that an *ultra vires* claim can arise not only from the President's action, but generally from any executive officer's action that exceeds legal authority. *See California v. Trump*, 379 F. Supp. 3d 928, 942 (N.D. Cal. 2019) ("[A] court may grant injunctive relief against executive officers to enjoin both *ultra vires* acts—that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts."). Here, our inquiry on a 12(b)(6) motion is limited to whether plaintiffs' complaint establishes their entitlement to *ultra vires* review of an executive order. While plaintiffs' cited cases do not each involve the same facts as those herein—an *ultra vires* challenge to a President's executive order that directs agency action—we still find plaintiffs' cited cases instructive on the availability of *ultra vires* review.

AMERICAN OVERSIGHT

Here, defendants seek dismissal of plaintiffs' *ultra vires* claim on several grounds. First, defendants argue that, because EO 14008's language directs the Secretary to implement the pause only "to the extent consistent applicable law," the order is facially valid. Doc. 128, att. 1, p. 19. Defendants contend that this "savings clause" prevents the order from being implemented in any way that exceeds statutory authority; rather, it instructs the Secretary to follow the law. *Id.* Defendants urge that OCSLA "does not compel that lease sales occur on any particular date… nor does it require that the agencies proceed with the lease sales proposed in the Five-Year Program." *Id.*, p. 21. Defendants argue that the MLA and OCSLA give the Secretary "considerable discretion" to alter the DOI's leasing programs in a manner consistent with the law—such as reducing the size of sales or postponing sales that require additional environmental analysis. *Id.*, p. 23.

In their opposition, plaintiffs contend they have established that Section 208 of EO 14008 exceeded the President's powers, as the relevant statutes grant the President no authority to "pause" oil and gas leasing. Doc. 142, p. 21-23. Moreover, plaintiffs argue that the language "to the extent consistent with applicable law" does not render the executive order valid because the order also includes the language "shall pause"—a commandment for the Secretary to act. *Id.*, p. 22. Plaintiffs contend that EO 14008's "savings clause" must be read in context with the rest of the executive order, and here, EO 14008 unambiguously directs the Secretary to pause oil and gas leases. *Id.* Thus, plaintiffs argue the mandatory directive cannot be read out of the executive order. *Id.* As such, plaintiffs argue that EO 14008 cannot possibly be implemented in a manner that is "consistent with applicable law." *Id.*, p. 23.

Defendants reply argues that EO 14008 is akin to Executive Order No. 13202 challenged in *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, as both orders direct that an agency "shall"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003636

take action to the extent "consistent with" or "permitted by" applicable law. 295 F.3d 28, 33 (D.C. Cir. 2002). The *Allbaugh* court ruled that the mere presence of the language "[t]o the extent permitted by law" would save the executive order from being invalid even if the directive was contrary to the National Labor Relations Act. *Id.*[11] The court upheld the executive order, reasoning that its language only compelled agency action[12] when doing so would not violate the law. *Id.* Courts since *Allbaugh,* however, have interpreted the language of executive orders more broadly.

Courts should interpret an executive order beginning with its text, and the text "must be construed consistently with the Order's 'object and policy.'" *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018) (quoting *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005)). Both the Fourth and Ninth Circuit Court of Appeals have held that savings clauses as qualifiers in an executive order should not insulate an executive order from judicial review when that qualifying language would override the substance of the order itself. *Id.* at 1239 ("Savings clauses are read in their context, and they cannot be given effect when the Court, by rescuing the constitutionality of a measure, would override clear and specific language."); *Hias, Inc. v. Trump*, 985 F.3d 309, 325 (4th Cir. Jan. 8, 2021) ("[w]e reject the government's attempt to immunize the Order from review through a savings clause which, if operational, would nullify the 'clear and specific' substantive provisions of the Order."). These cases suggest that where an executive order has clear and commanding language, a court need not give effect to the savings clause. *Id.*; *but see Common Cause v. Trump*, 506 F. Supp. 3d 39, 47 (D.C. Cir. 2020) (giving effect to a savings

[11] In referring to the Supreme Court's decision in *Youngstown Sheet and Tube*, which struck down President Truman's executive order that purported to seize privately owned steel mills, the *Allbaugh* court noted that "had President Truman merely instructed the Secretary of Commerce to secure the Government's access to steel '[t]o the extent permitted by law,' *Youngstown* would have been a rather mundane dispute over whether the Secretary had statutory authority to act as he did." 295 F.3d at 33.

[12] In *Allbaugh*, the D.C. Circuit addressed an executive order issued by then-President George W. Bush that prohibited any federal agency from either requiring contractors and bidders to enter into project labor agreements ("PLA"s) or prohibiting them from doing the same. 295 F.3d 28, 29 (D.C. Cir. 2002).

AMERICAN OVERSIGHT

clause included in a Presidential memorandum and finding that "[w]e cannot ignore these repeated and unambiguous qualifiers imposing lawfulness and feasibility constraints on implementing the memorandum.").

In *City & Cnty. of S.F*, then-President Trump issued Executive Order 13768 which purported to withhold federal grants from "sanctuary" cities and counties whose policies "shield aliens from removal form the United States." 897 F.3d at 1232. The Ninth Circuit concluded that Congress, not the President, holds the spending power and therefore the President exceeded his authority by withdrawing federal grant money from certain jurisdictions. *Id*. at 1234. The court then found that Section 9(a) of the Order, which directed the Attorney General and Secretary of State to condition issuance of grants "in their discretion and to the extent consistent with law," did not immunize the Order from judicial review. *Id*. The court noted that the Order "unambiguously commands action" and therefore the so-called "savings clause" could not override rest of the Order. *Id*. at 1240.

In *Hias*, then-President Trump's Executive Order 13888 required the consent of states and local governments before the federal government could settle refugees within their borders. 985 F.3d at 317. States and localities could withhold their consent for any reason or no reason at all. *Id*. at 322. Section 2(b) of the Order allowed the Secretary of State to override a state's decision not to consent only if the Secretary determined that the failure to resettle refugees in that state would be "inconsistent with the policies and strategies established under [the Refugee Act of 1980] or other applicable law." *Id*. at 325. The Fourth Circuit held that the Order was irreconcilable with the Refugee Act, which required that the federal government "consult" with the states and localities and assess several factors in making resettlement decisions, such as the availability of employment and other resources in the destined resettlement states. *Id*. at 320, 322. The court reasoned that the

AMERICAN OVERSIGHT

text of the order essentially "supplant[ed]" the Refugee Act's requirements of consultation with the states and consideration of the statutory criteria. *Id*. at 322. Additionally, the court rejected the government's argument that Section 2(b)'s "savings clause" immunized the Order from judicial review: "[t]he intent of the Order is clear… the savings clause 'does not and cannot override [the Order's] meaning.'" *Id*. at 325 (quoting *City & Cnty. of S.F.,* 897 F.3d at 1240). Since the purported "savings clause" lacked any mechanism for agencies to implement the Order in a manner consistent with the Refugee Act, the court held that the clause could not "save" the Order from its "infirmities." *Id*.

Defendants urge that *Hias* and *City & Cnty. of S.F* are distinguishable as they both involved presidential directives that "facially contradict[ed] a federal statute." Doc. 128, att. 1, p. 20. We disagree. Rather, we find that *Hias* and *City & Cnty. of S.F.* are analogous and therefore applicable since EO 14008, as written, also contradicts two federal statutes—both the MLA and OCSLA. As we noted, the Secretary is required to consider the states' input and justify departures from their recommendations in writing. *Sec'y of the Interior*, 104 S. Ct. at 669-70 (citing 43 U.S.C. § 1344). Like the Executive Order in *Hias*, EO 14008 overwrites a statutorily mandated process of consultation with the states and localities. 985 F.3d at 317. EO 14008's across-the-board pause expressly prevents BLM from executing lease sales in accordance with this statutory duty under the MLA. 30 U.S.C. § 226(b)(1)(A). EO 14008 orders the DOI to pause all oil and gas leasing, essentially amending the current Five-Year Program without the requisite consultation with states and localities, and without the requisite review by the President and Congress before the Secretary approves the Final Plan. 43 U.S.C. § 1344(c); 1344(d)(2). Thus, on its face, EO 14008 contradicts the mandatory processes set forth by OCSLA and the MLA. As such, we follow *Hias* and *City & Cnty. of S.F.* and similarly decline to give effect to Section 208's so-called "savings clause." In

AMERICAN OVERSIGHT

doing so, we also reject the reasoning of *Allbaugh* and *Common Cause* which, as applied here, would allow the President to evade judicial review with the mere inclusion of the savings clause. *See City & Cnty. of S.F.,* 897 F.3d at 1240 ("If 'consistent with law' precludes a court from examining whether the Executive Order is consistent with law, judicial review is a meaningless exercise, precluding resolution of the critical legal issues.").

Here, EO 14008 unambiguously commands the Secretary to act with the language "*shall* pause." While it includes the boilerplate language "consistent with applicable law," this is a "purely theoretical" savings clause as it offers no mechanism for the DOI to implement the order in a manner consistent with law other than simply refusing to implement the order outright.[13] Much like the executive order in *City & Cnty. of S.F.,* the DOI simply cannot give effect to EO 14008's directive without otherwise violating OCSLA or the MLA. 897 F.3d at 1240 (citing *Allbaugh*, 295 F.3d at 33).

We find that plaintiffs have sufficiently alleged facts demonstrating that the President acted in excess of his statutory or constitutional authority in issuing EO 14008 and state a claim for *ultra vires* review. Plaintiffs have therefore demonstrated their entitlement to judicial review of the President's actions. We recommend that the court deny defendants' Motion to Dismiss as to Count X and deny defendants' Motion to Dismiss the President as a defendant.[14]

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[13] Defendants' reply argues that since the Five-Year Program only proposed that each sale occur within a certain year, the Secretary could have implemented a "pause" by delaying 2021's Lease Sales until December. Doc. 145, pp. 5-6. This, defendants argue, would allow the Secretary to comply with the Five-Year Program while still giving effect to EO 14008. That point does not sway our reasoning—in our view, a 9-month delay of already-scheduled lease sales, such as Lease Sale 257, would still constitute a significant revision to the Five-Year Program.

[14] In their motions, defendants only argued generally that the President should be dismissed as a defendant because the plaintiffs pled "no viable claim against the President for which relief can be granted." Doc. 128, att. 1, p. 8. In defendants' reply, they suggest that dismissal of the *ultra vires* claim would call for dismissal of the President as a defendant. Doc. 145, p. 3. Otherwise, defendants raise no specific arguments for the President's dismissal. As such, we find dismissal of the President would be inappropriate at this time since plaintiffs have stated an *ultra vires* claim. We make no finding as to whether the President is a proper defendant for the remaining Counts.

AMERICAN OVERSIGHT

2. Count IX: OCSLA Citizen Suit

OCSLA's citizen suit provision allows citizens, as well as and local and state governmental officials, to participate in OCSLA's enforcement. *OXY USA Inc v. Babbitt*, 122 F.3d 251, 257 (5th Cir. 1997). OCSLA provides that "any person having a valid legal interest which is or may be adversely affected" can file suit to compel compliance with OCSLA. 43 U.S.C. § 1349(a)(1). The United States and "any other government instrumentality or agency" may be a proper defendant. *Id*. Moreover, OCSLA's definition of a "person" who can properly bring suit under this provision includes not only natural persons, but also states. *Id*. § 1331(d). Typically, a would-be plaintiff for an OCSLA citizen suit must give the Secretary sixty days' notice of the intent to file suit. *Id*. § 1349(a)(2). An exception to the 60-day notice requirement lies where the alleged violation "constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff." *Id*. § 1349(a)(3). Under those circumstances, the plaintiff may file suit "immediately after notification of the alleged violation." *Id*. The Fifth Circuit has recognized that the immediacy exception does not apply where the alleged harm has occurred in the past. *Brown v. Offshore Specialty Fabricators, Inc.,* 663 F.3d 759, 768 (5th Cir. 2011).

Plaintiffs bring an OCSLA citizen suit claim in Count IX of their complaint, alleging that "Executive Order 14008 and its OCLSA Leasing Moratorium violate OCSLA by failing to adhere to its comprehensive procedures applicable to promulgating and amending Five Year Programs and holding lease sales." Doc. 1, p. 48, ¶ 170. Specifically, plaintiffs allege that the Secretary violated OCSLA in "failing to adhere to comprehensive lease sale procedures for Lease Sales 257 and 258 and by allowing an unauthorized officer to cancel Lease Sale 257." *Id*., ¶ 171. They also allege that they gave notice to the Secretary of their intent to file suit under OCSLA's citizen suit provision on March 21, 2021. *Id*., ¶ 173. Though they gave notice only two days before filing the

AMERICAN OVERSIGHT

instant action, plaintiffs allege that the immediacy exception applies because the Secretary's violations "immediately affect Plaintiff States' legal interest by denying the States revenues from March 2021 lease sales, denying conservation funds to help protect the States' coastline from further degradation, and inflicting economic harms upon the States' citizens." *Id.*, ¶ 172.

As a preliminary matter, we address defendants' jurisdictional challenge to the OCSLA citizen suit. Defendants argue that judicial review of the Secretary's approval of a leasing program can only proceed in the United States Court of Appeal for the District of Columbia. Doc. 128, att. 1, p. 24 n. 6.[15] The current 2017-2022 Five-Year Leasing Program was previously published to the states for the initial notice and comment period, properly reviewed by Congress and the President, and ultimately approved by the then-acting Secretary in January 2017. Doc. 1, pp. 19-20, ¶¶ 56-59. The plaintiffs' OCSLA citizen suit does not challenge the Secretary's preparation of the current Five-Year Program, but only the Secretary's failure to adhere to the already-promulgated Five-Year Program and OCLSA's procedures for execution of the scheduled lease sales. *Id.*, p. 49, ¶ 171. We therefore find that the violations alleged in plaintiffs' complaint do not fall within the scope of § 1349(c)(1) since the action does not challenge the Secretary's approval of a Five-Year Program but rather the Secretary's modification of that Program in contravention of the OCLSA's reapproval process.[16] We instead find that this court has jurisdiction over the

[15] "Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia." 43 U.S.C. § 1349(c)(1).

[16] We note that challenges to prior Five-Year Programs under the citizen suit provision only required the D.C. Circuit's exclusive jurisdiction when the action challenged the initially approved Final Program—not the Secretary's subsequent failures to execute the Program. *See Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 595-96 (D.C. Cir. 2015) (challenging the 2012-2017 program); *Ctr. for Biological Diversity v. United States Dep't of Interior,* 563 F.3d 466 (D.C. Cir. 2009) (challenging the 2007-2012 Program); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir.1988) (challenging the 1987-1992 Program); *California v. Watt* (*Watt II*) 712 F.2d 584 (D.C.Cir.1983) (challenging the 1982-1987 Program); *State of Cal. By and Through Brown v. Watt (Watt I),* 668 F.2d 1290 (D.C. Cir. 1981) (challenging the 1980-1985 Program). These challenges were primarily based on the Secretary's failure to balance the need for expeditious development of the OCS with environmental concerns, such as negative effects on marine life (*see e.g.*, *Ctr. for Biological Diversity,* 563 F.3d 466) or the risk of damage from oil spills (*see e.g.*, *Watt II,* 712 F.3d 584), in the initial approval of the Program.

AMERICAN OVERSIGHT

citizen suit under 43 U.S.C. § 1349(b) and would recommend the court deny defendants' Motion to Dismiss for Lack of Jurisdiction.[17]

Defendants also seek dismissal of plaintiffs' citizen suit on other grounds. First, they argue that plaintiffs "make no allegations regarding threats to public health and safety, and do not allege any 'immediate' threat to a legal interest." Doc. 128, att. 1, p. 24. Defendants argue that plaintiffs allege past injuries and potential remote future injuries but fail to allege "immediate harm" sufficient to merit the exception to the 60-day notice requirement. *Id.*, pp. 24-25. They contend that the postponement of Lease Sale 257 and cancellation of the comment period for Lease Sale 258 have already occurred and there is no continued threat of immediate harm to plaintiffs' legal interest in participating in the notice and comment process. *Id.*, p. 25. Additionally, they argue that the harms that plaintiffs characterize as "immediate" are only prospective injuries and that "many months and several intervening agency decisions" would stand between holding any lease sale and plaintiff-states' ultimate receipt of revenues from that sale. *Id.*[18]

In plaintiffs' opposition, they re-emphasize the points alleged in their complaint: that every month, the plaintiffs will lose revenue in the form of ground rents, bonuses, and royalties. Doc. 142, p. 24. Additionally, they contend that they have a "statutorily-vested right to be consulted

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[17] "[T]the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose." 43 U.S.C. § 1349(b)(1).

[18] The defendants also argue that at the preliminary injunction hearing, plaintiffs conceded that they did not immediately receive funds from new federal leases. Doc. 145, p. 9. However, considering the substance of the preliminary injunction hearing moves beyond the bounds of the 12(b)(6) analysis. We are limited to only the plaintiffs' complaint along with its attachments and may take judicial notice of public records. *Papasan v. Allain,* 106 S. Ct. 2932, 2935 n.1 (1986). Even if defendants' contentions were true, however, we note that the economic impacts claimed by plaintiffs are broader than revenue lost directly from the lease sales.

AMERICAN OVERSIGHT

about the leasing program" and that their legal interests are immediately affected by the cancellation of the lease sales' notice-and-comment process. *Id.*

We find that plaintiffs' complaint sufficiently alleges that they have previously suffered and will immediately suffer additional economic harm from the agency action at issue. The complaint sets forth that "both OCSLA and the MLA expressly entitle States to substantial portions of the proceeds from lease sales and subsequent development." Doc. 1, pp. 42-43, ¶ 126. We find that plaintiffs' alleged injuries constitute "immediate" economic harm. Plaintiffs will lose the opportunity to financially benefit from continued development under already-cancelled leases and future leases. We reject defendants' argument to the contrary: though plaintiffs' harm might have already been realized in part at the time they filed their complaint,[19] the economic vitality of the plaintiffs continues to be affected by the pause with each month that passes. According to plaintiffs, those lost economic benefits include not only the loss of direct lease sale revenue, but also lost tax revenue and employment opportunities. *Id.*, pp. 41-42, ¶ 123.

We find the anticipated economic harm as alleged in the complaint satisfies the "immediate[] … effect on legal interest" requirement of § 1349(a)(3). As such, we find that plaintiffs' complaint established their entitlement to OCSLA's exception to the 60-day notice requirement. Thus, the fact that plaintiffs only gave notice to the Secretary two days in advance does not bar this claim. We need not reach the parties' other arguments about whether plaintiffs' ongoing procedural injury is sufficient. Plaintiffs therefore state a claim for relief, and we would recommend the court deny defendants' Motion to Dismiss the OCSLA citizen suit.

[19] Though this court has found no guidance on this issue, we construe the statute as requiring the effect on legal interest to be "immediate" at the time the plaintiff filed suit. 43 U.S.C § 1349(a)(3). Otherwise, the immediacy exception would be meaningless, as the result would vary depending on the timeframe that a court makes the inquiry. Viewing the facts under either lens, however, we find that plaintiffs' monthly loss of revenue and effect on their economies constitutes an "immediate" effect on their legal interests.

AMERICAN OVERSIGHT

3. Counts I-V, VII and VIII: APA Violation Claims

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA permits judicial review of "final agency action" for which there is no other adequate remedy in court. 5 U.S.C. § 704. Notably, both the Supreme Court and Fifth Circuit have recognized a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians,* 106 S. Ct. 2133, 2135 (1986); *Deering Milliken, Inc. v. OSHA,* 630 F.2d 1094, 1099 (5th Cir. 1980).

Where an agency action is subject to judicial review, the APA also provides several specific remedies. It provides that a reviewing court "shall [] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Additionally, under 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, or short of statutory right." *Id.* § 706(2)(A) and (C). A reviewing court shall also "hold unlawful and set aside agency action … found to be… arbitrary, capricious, [or] an abuse of discretion." *Id.* § 706(2)(A). Finally, agency action must be set aside if promulgated "without observance of procedure required by law." *Id.* § 706(2)(D).

a. APA Reviewability Generally

Here, the threshold inquiry is whether plaintiffs' claims are reviewable under the APA. There are four requirements for review of an agency action: (1) the plaintiffs must demonstrate that their causes of action fall within the "zone of interests" under the relevant statutes; (2) the statutes that defendants have allegedly violated do not preclude judicial review; (3) the action at issue constitutes a "final agency action;" and (4) the action is not "committed to agency discretion

AMERICAN OVERSIGHT

by law." *See Texas v. United States*, No. 21-3, 2021 WL 2096669, at *21 (S.D. Tex. Feb. 23, 2021).

i. Zone of Interests

The first requirement for APA review is that the plaintiffs establish they are in the "zone of interests" of the statutes that were allegedly violated: here, the OCSLA and MLA. *Id*. The general "zone of interests" test requires us to "determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). Since the APA serves "a broad[] remedial purpose," [*Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 90 S. Ct. 827, 831 (1970)] the test as applied in APA cases is not "especially demanding." *Lexmark Int'l*, 134 S. Ct. at 1389. APA review will be denied only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assured Congress intended to permit the suit." *Ensco v. Offshore Co. v. Salazar*, No.10-1941, 2010 WL 4116892, at *4 (E.D. La. Oct. 19, 2010) (citing *Clarke v. Sec. Indus. Ass'n*, 107 S. Ct. 750, 757 (1987)).

Here, the plaintiffs allege that their claims are within the zone of interests of both OCSLA and the MLA since both statutes grant states a statutory right to participate in the leasing process, and both statutes entitle the states to "substantial portions of the proceeds from lease sales and subsequent development." Doc. 1, p. 42-43, ¶ 126. We agree and find that each of plaintiffs' APA claims seek protection of their interests under OCSLA and the MLA. Noting that the zone of interest test has a low threshold, we find that plaintiffs have met the first requirement for APA review.

AMERICAN OVERSIGHT

ii. Statutory Preclusion of Judicial Review

The second requirement for APA review is that the relevant statute does not preclude judicial review. 5 U.S.C. § 701(a)(1).

The general presumption favoring judicial review of administrative action controls unless congressional intent to preclude judicial review is "fairly discernable in the statutory scheme." *Block v. Cmty. Nutrition Inst*., 104 S. Ct. 2450, 2456 (1984) (quoting *Camp*, 90 S. Ct. at 831-32). The defendants have not argued that any portion of OCSLA or the MLA precludes judicial review, nor has our review of the statutes revealed Congress's intent to do so. Thus, plaintiffs meet the second requirement for APA review.

iii. Final Agency Action

The third requirement for APA review is that the challenged action is a "final agency action." The APA's requirement that only "agency action" is subject to judicial review means that courts cannot review and correct broad "programmatic challenges."[20] *Lujan v. Nat'l Wildlife Fed'n*, 110 S. Ct. 3177, 3189 (1990) (rejecting petitioners' challenge to the entirety of BLM's land withdrawal review program and holding that the broad challenge did not constitute an "agency action" under 5 U.S.C. § 702). As such, the plaintiffs must point to an "identifiable action or event" that will be subject to APA review. *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 490 (5th Cir. 2014).

Moreover, if the agency action at issue was not "final," we lack subject matter jurisdiction over review of that action. *Peoples Nat. Bank v. Off. of Comptroller of Currency of U.S.*, 362 F.3d

[20] Courts may not entertain review of efforts to alter broad federal policies and programs since the APA does not waive sovereign immunity for such challenges. *See Walmart Inc. v. U.S. Dep't of Just*., --- F. Supp. 3d ---, No. 20-817, 2021 WL 410618, at *11 (E.D. Tex. Feb. 4, 2021) (citing *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 490 (5th Cir. 2014)). As such, requests for "wholesale" improvement of an agency's programs are not subject to judicial review. *Id.*

AMERICAN OVERSIGHT

333, 336 (5th Cir. 2004). "Final" means that the action marks "the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps. of Engineers v. Hawkes Co*., 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1168 (1997)). We note that the Fifth Circuit has held that the inquiry into the finality of an agency decision is "flexible" and "pragmatic." *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011).

The defendants urge that the plaintiffs' complaint makes an "improper programmatic challenge"—that is, instead of challenging specific agency actions, plaintiffs instead challenge the OCSLA and MLA leasing moratoriums as a general program and policy of the DOI as set forth in EO 14008. Doc. 128, att. 1, p. 26. Defendants contend that plaintiffs seek review of an "amalgam of interim decisions, press releases, and other actions that Plaintiffs have self-titled 'moratoriums.'" *Id*., p. 8. Defendants contend that rather than review of individual agency decisions, that plaintiffs' claims seek "systemic changes" which only the executive or legislative branches of government may enact. *Id*., p. 28. Defendants argue that since plaintiffs cannot identify "a single discrete agency action tantamount to a program-wide moratorium" that would be properly reviewable under the APA, they have failed to state a claim for relief. *Id*., p. 27.

Defendants also argue that the purported agency action challenged by plaintiffs is not "final" within the meaning of 5 U.S.C. § 704. *Id*., p. 30. Rather, they contend the decisions are merely "interim" postponements of the lease sales, urging: "they are not decisions to forego the sales entirely, and the ultimate decision has not yet been made." *Id*. Deferrals and postponements of agency decisions, they argue, are "necessarily interlocutory in nature." *Id*. Defendants additionally urge that the challenged actions do not determine rights or obligations or trigger legal

AMERICAN OVERSIGHT

consequences. *Id.*, p. 31. The Record of Decision would "not have caused any lease sale to happen" because it only constituted notice of where the agency stood in its decision-making process and did not guarantee a lease sale would happen. *Id.* Thus, the rescission of those specific lease sales "had no real-world consequences" since they were rescinded prior to being fully executed. *Id.*

In their opposition, plaintiffs urge that they have established that a moratorium is in place, and further that BOEM and BLM's decision to implement the moratorium is a final, discrete agency action of the type that courts frequently review under the APA. Doc. 142, pp. 25-26. Plaintiffs contend that they do not ask the court to impermissibly "dictate policy" or supervise the DOI's administration of the leasing program, but only ask the court to enjoin specific agency action. *Id.*, p. 28. Plaintiffs therefore urge that their lawsuit is not an improper programmatic challenge but only an appeal for the court to enforce the agencies' duties under OCSLA and the MLA. *Id.*, p. 29.

Additionally, plaintiffs argue that the pause is still a "final" action even though the DOI never formally committed it to writing. *Id.*, p. 27. Unwritten but clear and discrete policies may constitute reviewable agency action and here the Secretary clearly implemented an unwritten policy prompting the defendant agencies to suspend lease sales pursuant to EO 14008. *Id.* They also suggest that that denying APA review here would set bad precedent in allowing the Executive Branch to "make a major national decision in the most opaque manner possible." *Id.* Thus, federal agencies should not be able to circumvent APA review merely by declining to put a final decision in writing. *Id.*, pp. 27-28.

Finally, plaintiffs argue that the decision to implement the pause was a final agency action because it "left agency officials without discretion" to conduct oil and gas lease sales, therefore marking the "consummation of a decision making process." *Id.*, p. 29. Additionally, the decision

AMERICAN OVERSIGHT

altered the obligations of federal officials to hold such lease sales, deprived the bidders of their right to acquire the lease sales and deprived the states of their right to collect revenue from those sales. *Id*. Thus, they urge, legal consequences certainly flowed from the implementation of the pause. *Id*.

As to whether the challenged agency actions at issue are "discrete," we start with *Lujan*, wherein the Supreme Court declined APA review of a plaintiff's challenge to the entirety of the Secretary's "land withdrawal review program." 110 S. Ct. at 3189. Plaintiff therein challenged the "continuing (and thus constantly changing) operations of the BLM" in withdrawal and classification of public lands. *Id*. Unlike the programmatic challenge like in *Lujan*, plaintiffs here seek relief from the cancellation and postponement of two specific Lease Sales in offshore waters—Lease Sale 257 and Lease Sale 258—in addition to the systematic cancellation of mineral leases on eligible lands. Indeed, they specifically request that the pause be vacated and enjoined[21] under the APA or that the court compel offshore Lease Sale 257 and Lease Sale 258, and BLM's previously scheduled onshore lease sales.[22] Doc. 1, pp. 43-48. Plaintiffs seek to compel the defendants to comply with their duties under OCSLA and the MLA. In our view, such relief does not seek the kind of "wholesale revision" of a federal program in which *Lujan* precludes our engagement.[23]

Moreover, the Secretary's decision to implement the pause was a discrete agency action even if not formally published like the BOEM and BLM regional offices' decisions were. Doc. 1,

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[21] Counts II-V, VII, and VIII request the court to vacate and enjoin the action of either BOEM or BLM for three violations of the APA: being arbitrary and capricious, contrary to law, or failing to employ a requisite notice and comment period. Doc. 1, pp. 43-48, ¶¶ 141, 146, 150, 155, 163, 167.

[22] Counts I and VI request the court compel specific lease sales since their executions have been "unlawfully withheld or unreasonably delayed." *Id*., ¶¶ 133, 159. Notably, the defendants are not seeking dismissal of Count VI.

[23] See *W. Energy All. v. Jewell*, No. 16-912, 2017 WL 3600740, at *13 (D.N.M. Jan. 13, 2017) ("The Court agrees with WEA that requesting BLM conduct quarterly leases of eligible and available parcels is not a programmatic challenge, but a request that this Court enforce a discrete, non-discretionary duty contained in a single statutory provision, unlike the situation in *Lujan*.")

AMERICAN OVERSIGHT

p. 26, ¶ 73; pp. 31-32, ¶ 86; pp. 35-36, ¶¶ 104-110. A "final" agency action need not be committed to writing. *See, e.g., Bhd. of Locomotive Engineers & Trainmen v. FRRA*, 972 F.3d 83, 100 (D.C. Cir. 2020). Even though plaintiffs' complaint must deduce the Secretary's decision from the collective actions of the BOEM and BLM offices after the issuance of EO 14008, they have still sufficiently alleged it is a discrete action subject to APA review.

Defendants rely on *Alabama-Coushatta*, which held that a lawsuit challenging the federal management of natural resources in purported tribal territory was an improper programmatic challenge. 757 F.3d at 490. We find those facts distinguishable as well. There, the court rejected the Tribe's lawsuit as a "blanket" challenge to "*all* of the Government's actions with respect to *all* permits and leases" on land covering several national parks in Texas. *Id*. (emphasis in original.) The court reasoned that the challenge was directed at broad policies and practices: specifically, the agencies' systematic failure to consider the Tribe's claim to aboriginal title and incidental rights relating to the land at issue. *Id*., p. 491. Here, plaintiffs are not challenging the DOI's overall management of the leasing program, nor have they lodged a "blanket" challenge as was present in *Alabama-Coushatta*. Instead, the challenge is specifically targeted towards the Secretary's unwritten decision to postpone and cancel previously scheduled lease sales under the MLA and OCLSA and the agencies' subsequent implementation of that decision.

Additionally, we find that challenged actions under the APA are "final." Neither the Secretary's implementation of the pause, nor BOEM and BLM's subsequent cancellations of lease sales, are "interlocutory in nature," as defendants urge. Rather, case law interpreting the finality requirement demonstrates that an action need not be permanent to constitute a "final" agency action. *See Texas,* 2021 WL 2096669 at *31 (S.D. Tex. Feb. 23, 2021) (the 100-day temporary pause on removal of aliens ordered by the Department of Homeland Security was a "final" agency

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003651

action subject to judicial review). The presently challenged actions are still "final" despite the possibility the DOI may decide to later make the same federal lands available for purchase. *Id.* (recognizing that the defendants' purported "'discretion' to reverse course, by itself, is insufficient to convert an action that is final to one that is nonfinal."); *See also Hawkes Co.*, 136 S. Ct. at 1814 (possibility that the U.S. Army Corps of Engineers would revise a jurisdictional determination is a "common characteristic of agency action, and does not make an otherwise definitive decision nonfinal."); *Sackett v. EPA.*, 132 S. Ct. 1367, 1372 (2012) (the mere possibility that the EPA would later reconsider a decision under the Clean Water Act was insufficient to make a final agency action nonfinal.)

While EO 14008 commands a "pause" of new oil and gas lease sales, that language is of no moment to the finality inquiry, which is flexible and pragmatic. *See Whitman v. Am. Trucking Associations*, 121 S. Ct. 903, 915 (2001) ("Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final."). Semantics aside, the essential actions at issue are the Secretary's decision to systematically cancel and postpone various onshore and offshore lease sales, and the agencies' subsequent cancellation and postponement of them. In our view, those actions are "final", as they action alter the obligations of the various federal officials charged with performing the lease sales and affect the statutory rights of plaintiffs to collect proceeds from the sales.

Accepting plaintiffs' allegations as true and noting that there is a strong presumption for reviewability of administrative action, we find that the Secretary's decision to pause oil and gas leases in compliance with EO 14008 is a discrete and final agency action. Additionally, plaintiffs have sufficiently alleged that each cancellation or postponement of specific lease sales, including

AMERICAN OVERSIGHT

BOEM's Rescission of Lease Sale 257,[24] BOEM's delay of Lease Sale 258,[25] and BLM's delay of quarterly onshore lease sales[26] is a discrete and final agency action.

iv. Committed to Agency Discretion by Law

The fourth requirement for plaintiffs to obtain APA review is that the challenged actions under the APA are not "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). This inquiry requires "careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 108 S. Ct. 2047, 2052 (1988). "Where statutes granting agency discretion are drawn in such broad terms" such that there are "no meaningful standards against which to judge the agency's exercise of discretion" then § 701(a)(2)'s exception will apply. *Perales v. Casillas*, 903 F.2d 1043, 1047 (5th Cir. 1990) (internal quotations omitted.) To honor the presumption in favor of reviewability of administrative action, courts construe the exception in § 701(a)(2) narrowly, "confining it to those rare administrative decision[s] traditionally left to agency discretion." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (internal quotations omitted).

While the OCSLA vests the Secretary with some discretion in development of the Five-Year Program,[27] we find that plaintiffs' claims arise from specific provisions of the statute that command action. "'[T]he word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, —— U.S. ——, 140 S. Ct. 1308, 1320 (2020). A sister court has noted,

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[24] Doc. 1, pp. 25-31.
[25] *Id.*, pp. 31-32.
[26] *Id.*, pp. 32-38.
[27] Specifically, the statute requires the Secretary to "prepare and periodically revise, and maintain an oil and gas leasing program" which "shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval." 43 U.S.C. § 1344(a). Moreover, the statute sets forth several considerations for the Secretary to make, including economic, social, and environmental factors. *Id.* § 1344(a)(1). Additionally, the Secretary considers specific factors in determining the timing and location of the leasing, ultimately striking a "proper balance between the potential for environmental damage, the potential for discovery of oil and gas, and the potential for adverse impact on the coastal zone." *Id.* § 1344(a)(2)-(3).

AMERICAN OVERSIGHT

however, that the use of "shall" alone cannot compel government action unless coupled with "'some stronger indication' from the legislature that the call to action was mandatory." *Texas,* 2021 WL 2096669, at *34 (S.D. Tex. Feb. 23, 2021) (citing *Cairo & F.R. Co. v. Hecht*, 95 U.S. 168, 170 (1877) and *Town of Castle Rock, Colo. v. Gonzales*, 125 S. Ct. 2796, 2806 (2005)).

OCSLA states that the Secretary "shall prepare and periodically revise" a Five-Year Leasing Program. 43 U.S.C. § 1344(a). In preparing a Five-Year Program, the statute further states that the Secretary "shall invite and consider suggestions" from any State potentially affected by the leasing program, and "shall submit a copy of such proposed program to the Governor of each affected States for review and comment." *Id.* § 1344(c)(1)-(2). In executing the lease sales, the Secretary "shall" again solicit recommendations from state governors and "shall" accept such recommendations if the recommendations strike a "reasonable balance" between national and state interests. *Id.* § 1345(c). In contrast, the statute uses the language "may" in referring to the Secretary's duty to solicit and accept recommendations from affected local governments. *See id.* §§ 1344(c)(1)-(2), 1345(c). From the statutory construction, it is clear Congress intended the language "shall" to impose a mandatory duty upon the Secretary, while the reciprocal use of "may" is permissive and allows the Secretary to use her discretion. *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1033 (1994) ("The word 'may' [] clearly connotes discretion.").

Moreover, the policy of the United States, as declared through OCSLA, is that the OCS is a "vital national resource reserve" that the federal government holds "for the public." 43 U.S.C. § 1332(3). Additionally, it recognizes that certain states and local governments will be affected by exploration, development, and production on the OCS and are therefore "entitled to an opportunity to participate" in the development of oil and gas exploration and production. *Id.* § 1332(4) & (4)(C). *See Texas*, 2021 WL 2096669, at *34. Thus, while the Secretary may hold a residuum of

AMERICAN OVERSIGHT

discretion over oil and gas leasing operations on the OCS, we find that the specific OCSLA provisions forming the basis of plaintiffs' complaint supersede that discretion. *See Webster,* 108 S. Ct. at 2052 (in determining whether certain decisions were committed to the discretion of the Director of the CIA, the Supreme Court examined not only to the general purpose of the National Security Act, but also the specific provisions under which plaintiffs sued). OCLSA sets forth the machinery by which oil and gas leasing must take place while the Secretary maintains some discretion in how to operate that machinery. However, the presently challenged actions stem from non-discretionary duties that OCSLA imposes upon the Secretary and BOEM and are therefore not "committed to agency discretion by law."

Like OCSLA, the MLA similarly juxtaposes the words "may" and "shall," [28] committing some decisions to the discretion of the Secretary but also imposing non-discretionary duties. The MLA explicitly provides that the Secretary "shall" hold lease sales "for each State where eligible lands are available at least quarterly…" 30 U.S.C. § 226(b)(1)(A). Thus, when eligible lands are available, BLM must hold quarterly lease sales. *Id.*; *See also W. Energy All. v. Jewell*, 16-0912, 2017 WL 3600740, at *7 (D.N.M. Jan. 13, 2017). Notably, plaintiffs allege that there were eligible lands available. Doc. 1, p. 37, ¶ 111. Accepting plaintiffs' allegation as true, we can only conclude that the Secretary's decision to cancel the onshore leases when eligible lands were available was not one "committed to agency discretion by law."

Based on the allegations of plaintiffs' complaint, we have determined that the challenged actions herein, including the Secretary's decision to implement the pause, the Rescission of Lease Sale 257, the delay of Lease Sale 258, and the cancellation of onshore leases meet all four

[28] *See, e.g.*, 30 U.S.C. § 226(b)(1)(B): "The national minimum acceptable bid *shall* be $2 per acre for a period of 2 years from December 22, 1987. Thereafter, the Secretary, subject to paragraph (2)(B), *may* establish by regulation a higher national minimum acceptable bid for all leases based upon [certain findings]." (emphasis added)

AMERICAN OVERSIGHT

requirements for APA review. Since judicial review is proper, we now look to the sufficiency of plaintiffs' claims brought under specific provisions of the APA.

b. Unreasonable Delay: Count I

The APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A claim under this provision may only proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Louisiana v. United States*, 948 F.3d 317, 323 (5th Cir. 2020) (quoting *Norton v. S. Utah Wilderness All.*, 124 S. Ct. 2373, 2380 (2004) (emphasis in original)). This limitation means that if a discrete agency action "is not demanded by law," a court may not compel the action under § 706(1). *Id.*

Plaintiffs allege in Count I that acting in reliance on EO 14008, BOEM unlawfully and unreasonably rescinded Lease Sale 257 and delayed Lease Sale 258, and additionally unreasonably and unlawfully withheld and delayed the remaining lease sales in the Five-Year Program. Doc. 1, p. 43, ¶¶ 129-132. We have already determined that the delays and cancellations of specific sales were final and discrete agency actions. *See supra* Part II(B)(3)(a)(iii). The question remains as to whether the Secretary was required to hold Lease Sales 257 and 258 and the remainder of the lease sales under the current Five-Year Program.

As plaintiffs allege, the current Program set forth the schedule of offshore lease sales to occur throughout the five-year period. Doc. 1, pp. 19-20, ¶¶ 56-60. While the Secretary may "revise and reapprove" the Program at any time, any significant revisions must be "in the same manner as originally developed." 43 U.S.C. § 1344(e). The Secretary and BOEM complied with none of the required procedures for revision of the program set forth in § 1344(f).[29] As such, we

[29] *See* supra fn. 8.

AMERICAN OVERSIGHT

find that BOEM was required to hold the scheduled lease sales. Per plaintiffs' allegations, BOEM's delays contravened OCSLA's requirements without providing any rationale for its decisions and were therefore "unlawful" or "unreasonable" by definition. Doc. 1, p. 30, ¶ 83 and p. 32, ¶ 88. Plaintiffs have sufficiently plead that BOEM unlawfully or unreasonably delayed and withheld the Five-Year Program's scheduled lease sales. Thus, they state an APA claim under § 706(1).

c. Failure to Employ Notice and Comment: Counts II and VIII.

The APA provides that a reviewing court shall "hold unlawful and set aside agency action … found to be … without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The APA requires rules to undergo notice and comment unless they are exempt. *Texas*, 2021 WL 2096669 at *42 (S.D. Tex. Feb. 23, 2021).

An exemption to APA's notice and comment requirement applies under 5 U.S.C. § 553(b)(A) when a rule is interpretive, a general statement of policy, or a rule of agency organization, procedure, or practice. "In contrast, if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The APA's notice and comment exemptions must be narrowly construed." *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (internal citations omitted). To determine whether the rule is substantive or interpretive, the inquiry is twofold: "whether the rule (1) 'impose[s] any rights and obligations' and (2) 'genuinely leaves the agency and its decision-makers free to exercise discretion.'" *Id.* (citing *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). "If a statement denies the decisionmaker discretion in the area of its coverage ... then the statement is binding, and creates rights or obligations." *Id.* "While mindful but suspicious of the agency's own characterization, we ... focus[ ] primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Id.*

AMERICAN OVERSIGHT

(internal quotations omitted). Additionally, "[a]n agency pronouncement will be considered binding as a practical matter 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.* (quoting *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002)).

Plaintiffs allege in Count II that the Rescission of Lease Sale 257 and delay of Lease Sale 258 was each a "substantive rule that was required to undergo notice-and-comment rulemaking," and BOEM's decision to forgo notice and opportunity for public comment violated the APA. Doc. 1, p. 27, ¶ 77, pp. 31-32, ¶ 86, p. 44, ¶¶ 134-141. Plaintiffs also contend that the "OCSLA Leasing Moratorium" was also a substantive rule requiring notice and comment procedures before its issuance. *Id.*, p. 44, ¶ 136. Additionally, Count VIII alleges that the BLM's cancellation of the onshore leases failed to employ the notice and comment period required under § 553. *Id.*, pp. 47-48, ¶¶ 164-167. Plaintiffs urge that because the OCSLA and MLA leasing "moratoriums" do not fit the exemption under § 553, the court should vacate and enjoin the decisions of BLM and BOEM to cancel and delay the sales. *Id.*, p. 44, ¶ 141 and p. 48, ¶ 167.

We find here that Rescission of Lease Sale 257 and delay of Lease Sale 258 were substantive rules since they determined legal rights and obligations. As discussed in our analysis at Part II(B)(3)(a)(iii), those actions affect the statutory rights of plaintiffs to collect proceeds from the sales. While courts do consider the agency's own characterization of the action, this consideration is not dispositive. *Gen. Elec.*, 290 F.3d at 382. Thus, government's ex post facto labelling of the rescission and delay as "interim" does not render those decisions interpretive rules. The original Notice to Rescind Lease Sale 257's only stated rationale was to comply with EO 14008, and provided "no analysis, no comment period, no reference to statutory factors, no reference to the Current Five-Year Program, and no consultation with States, Tribes, or local

AMERICAN OVERSIGHT

governments." Doc. 1, p. 26, ¶ 73. Similarly, the cancellation of the public comment period and subsequent delay of Lease Sale 258 relies solely on EO 14008. *Id.*, pp. 31-32, ¶ 86. The abrupt cancellations offer no suggestion that BOEM may later reassess its decision. The mere reliance on EO 14008 and lack of independent rationale suggests that BOEM has no discretion in the decisions on Lease Sales 257 and 258.

Additionally, the imposition of the OCSLA and MLA "moratoriums" constitutes a substantive rule requiring the notice and comment procedures of § 553. Our inquiry here is more difficult because, to the plaintiffs' knowledge, the Secretary's reasoning and ultimate decision to implement EO 14008's pause was not committed to writing. The decision to implement EO 14008, however, is evident from the systematic cancellation and delay of lease sales in the months immediately following EO 14008. Despite the government's arguments that the Secretary has vast discretion in this area and its labelling of the pause as "interim," we must look to the government's actual treatment of the rule. *Gen. Elec.,* 290 F.3d at 383. As to the OCSLA "moratorium," BOEM's notice of the cancelled and delayed leases refers solely to EO 14008 for its rationale. Doc. 1, p. 27, ¶ 73 and pp. 31-32, ¶ 86. As to the MLA "moratorium," various regional offices of BLM either provided no reasoning at all for the cancellations or, in only one case, stated that the cancellation was to "confirm the adequacy of underlying environmental analysis." *Id.*, pp. 34-36, ¶¶ 100-110. The public record of the Secretary's implementation of the moratoriums offered no mechanism for the agency to exercise its discretion moving forward, only deferring to an executive order. Thus, the decisions appear to be binding on the agencies. Moreover, the "moratoriums" altered the existing obligations of federal officers to make the OCS and onshore federal lands available for lease. As such, we find the pause as applied to OCLSA and MLA leases was a substantive rule subject to the APA notice and comment requirements. We find that plaintiffs have stated a claim

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003659

for relief under Counts II and VIII for the agencies' failures to employ requisite notice and comment periods.

d. Contrary to Law or in Excess of Authority: Counts III and V

The APA provides that a reviewing court shall "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). This sort of claim "necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." *W. Union Tel. Co. v. F.C.C.*, 541 F.2d 346, 354 (3d Cir. 1976) (citing *FPC v. Moss*, 96 S. Ct. 1003 (1976)).

In Count III, plaintiffs contend that the Rescission of Lease Sale 257 and cancellation of Lease Sale 258's notice and comment procedures must be vacated and enjoined as "not being in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitations" since the decision circumvented statutorily mandated procedures. Doc. 1, pp. 26-27, ¶ 76 and p. 45, ¶¶ 142-146. Plaintiffs also allege in Count V that the MLA leasing moratorium is contrary to law or "in excess of statutory jurisdiction, authority, or limitations" since the MLA commands the Secretary to hold lease sales "for each State where eligible lands are available at least quarterly." *Id.*, p. 46, ¶¶ 151-155.

We have already discussed at length the duties imposed upon federal officials to conduct oil and gas lease sales. OCSLA requires the leasing of the OCS in accordance with a Five-Year Program developed with input from the states and submitted to the President and Congress before final approval. Moreover, OCSLA does not permit "significant" revisions of the plan without going through the same procedures. As such, we find that plaintiffs have sufficiently alleged that DOI's cancellations and delays of the Five-Year Program's sales without adhering to the statutorily mandated process was contrary to law.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003660

The MLA also imposes a nondiscretionary duty for BLM to hold quarterly lease sales when eligible lands are available. Since the plaintiffs allege that eligible lands were available, BLM would have cancelled the onshore leases in derogation of that statutory duty and in excess of its authority. We therefore find that plaintiffs have stated a claim under 5 U.S.C. § 706(2)(C).

e. Arbitrary and Capricious: Counts IV and VII

The APA provides that a reviewing court shall "hold unlawful and set aside agency action found to be … arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The law requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Texas*, 2021 WL 2096669 at *38 (S.D. Tex. Feb. 23, 2021) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 103 S. Ct. 2856, 2866 (1983)). An agency action is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Texas v. EPA, 829 F.3d 405, 425 (5th Cir. 2016) (quoting *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998)). Moreover, a court must look to the agency's "stated rationale at the time of its decision" and must disregard any "*post hoc* rationalizations" of the agency action. *Id.* (quoting *Luminant Generation Co. v. EPA.*, 675 F.3d 917, 925 (5th Cir. 2012)).

Count IV of the plaintiffs' complaint urges that the Rescission of Lease Sale 257 and cancellation of Lease Sale 258's comment period were "issued without any reasoning whatsoever and rely only upon Executive Order 14008, which itself provides no reasons. Both decisions also ignore the statutory factors, prior inconsistent agency positions, and reliance instances." Doc. 1,

AMERICAN OVERSIGHT

pp. 45-46, ¶ 149. In Count VII, the plaintiffs make the same allegations relative to the MLA leasing "moratorium." *Id*., p. 45, ¶¶ 142-146. They urge that the foregoing agency actions were arbitrary and capricious and must be vacated and enjoined under § 706(2)(A).

Here, the only rationales of BOEM and BLM at the time they issued their decisions to postpone and cancel the lease sales were either (1) none given; (2) reliance on EO 14008; or (3) in the case one of specific onshore lease sale,[30] environmental concerns. As discussed above in Part II(B)(3)(b)-(c), these agency decisions provided very limited rationale. The formal Notice to Rescind Lease Sale 257's only stated rationale was to comply with EO 14008, and provided "no analysis, no comment period, no reference to statutory factors, no reference to the Current Five-Year Program, and no consultation with States, Tribes, or local governments." *Id*., p. 26, ¶ 73. Similarly, the cancellation of the public comment period and subsequent delay of Lease Sale 258 relies solely on EO 14008. *Id*., pp. 31-32, ¶ 86. Plaintiffs contend, however, that mere reference to the executive order is insufficient rationale since the executive order itself "contains no analysis of the statute or previous rulemaking proceedings." *Id*., p. 28, ¶ 79. Section 208 of EO 14008 only states that pause is for "completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices." Exec. Ord. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7624-25 (Jan. 27, 2021). As to BLM's postponements of the onshore leases, besides the BLM Wyoming Office, no BLM Office provided any reasoning for its decision. Doc. 1, pp. 35-36.

As plaintiffs allege, neither the agencies' public notices of the pause nor EO 14008 "examine relevant data" or "articulate a satisfactory explanation for its action." *Texas*, 2021 WL 2096669 at *38. We need not consider the government's "post hoc rationalizations" of its decision.

[30] Plaintiffs allege that BLM's Wyoming Office updated the posting for its March 2021 sale to note that lease sales "are postponed to confirm the adequacy of underlying environmental analysis." Doc. 1, p. 35, ¶ 105.

AMERICAN OVERSIGHT

As such, we find that plaintiffs have sufficiently alleged that the challenged actions are arbitrary and capricious and that they state claims under § 706(2)(A).

f. Summation of the APA Claims

Having determined that the plaintiffs' APA claims are subject to judicial review and that they have stated a claim as to all alleged APA violations, we recommend the court deny the defendants' Motion to Dismiss those claims.

III.
CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED** that the court **DENY** defendants' Motions to Dismiss.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file written objections with the Clerk of Court. Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days of receipt shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1428–20 (5th Cir. 1996), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1)), *as recognized in Cruz v. Rodriguez*, 828 F. App'x 224, 2020 WL 6478502 (5th Cir. 2020) (unpubl.).

THUS DONE AND SIGNED in Chambers this 23rd day of August, 2021.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

AMERICAN OVERSIGHT

Message

From: Meyer, Danielle [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C1D16D2A17884ED3A187D6CA1B61DA86-MEYER, DANIELLE]
Sent: 8/23/2021 7:43:42 PM
To: Weaks, Timothy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9796f42ac2b149a99dc0b8f288adf9f3-Weaks, Timothy]; SL-Staff [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a37cdd3e5b6d4c6798cbc5a5d58de75e-SL-Staff]
CC: Krug, Christine [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5e3a3c4bff4741a48c20c65befcba2eb-Krug, Christine]; Nuelle, Chris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5f087eebfbb34d7e8854e258b6fd403b-Nuelle, Chris]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Ebert, Mik [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c6a7780a915d4a408cd80d524fc28d4a-Ebert, Mik]; Deal, Marianna [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=968ddb64a1194ac4af691d6e90762ec4-Deal, Marianna]; Estep, Robert [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e44f6ef0bb24ecd81753eb8613699d8-Estep, Robert]; Houser, Rachael [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=houser]; Morgan, Jeremiah [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=morgaj]; Lewis, Jason [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b5c0354b7d8f4ae4b03d7dd0d4144031-Lewis, Jason]; Haywood, Amy [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=haywoa]; Foster, Josh [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30031dddc5fd40b0bc03e3a33d8d46b7-Foster, Josh]; Goodwin, Gregory [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=goodwg]; Atkins, Jay [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1502e6e18e4545a38d80cc0069f63728-Atkins, James]; Stevens, Cris [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=521151f1306d4ea2ae0c6fa08b7a6293-Stevens, Cris]
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

Great Job you guys !!!! sorry I missed it this year maybe next year ☺

From: Weaks, Timothy
Sent: Monday, August 23, 2021 11:09 AM
To: SL-Staff
Cc: Krug, Christine ; Nuelle, Chris ; Atkins, Jay ; Ebert, Mik ; Deal, Marianna ; Estep, Robert ; Houser, Rachael ; Morgan, Jeremiah ; Lewis, Jason ; Haywood, Amy ; Foster, Josh ; Goodwin, Gregory ; Atkins, Jay ; Stevens, Cris
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

Good morning everyone,
I just wanted to share that our AGO Softball Team competed hard Friday afternoon and defeated the St. Louis County Prosecutor's Office in our first game. Unfortunately, we fell just short in the championship game to the Eastern District of MO US Attorney's Office. I was real proud of the squad that we were able to put together at the last minute on Friday and how hard everyone played in the blinding sun and dead heat.
A special shout-out goes out to those who participated alongside me - Jason Lewis, Verdina Pilipovic, Megen Campbell, Michael Schwalbert and his wife Jessica, former intern Jeff Suddy, Mik Ebert, and Cris Stevens. Thanks again to Rachael Houser for ordering new shirts. I hope that next year we can come out in greater numbers and take back the title!

Until next year, thanks.
Tim Weaks

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From: Stevens, Cris <Cris.Stevens@ago.mo.gov>
Sent: Friday, August 20, 2021 9:50 AM
To: Weaks, Timothy <Timothy.Weaks@ago.mo.gov>; SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <Mik.Ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>; Goodwin, Gregory <Gregory.Goodwin@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Smith, Justin <Justin.Smith@ago.mo.gov>
Subject: We Need Players! 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

All,
The softball tournament is tonight. We are the defending champs. **We are critically short on players.** Let's show up and defend our title!
Regardless of ability, please make plans to join the team if at all possible. **Contact Tim Weaks and me by return email by noon today** and we will gladly put you on the team-and you will have my undying admiration for making the defense of our title possible!
Best,
Cris

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Cristian M. Stevens | First Assistant Attorney General
Missouri Attorney General's Office
207 West High St
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(573) 690-0223
Cris.Stevens@ago.mo.gov

From: Weaks, Timothy <Timothy.Weaks@ago.mo.gov>
Sent: Thursday, August 19, 2021 2:39 PM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <Mik.Ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>; Goodwin, Gregory <Gregory.Goodwin@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 20, 2021

All,
Tomorrow evening, the Missouri Attorney General's Office will play in a round-robin softball tournament against the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office.

Unfortunately, I have received a large amount of cancellations this afternoon. So, in order to avoid having to forfeit, I am once again putting out a call for people to play.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing* and have not already responded to me today, please let me know. Please email me separately without replying all, as this is being sent to the entire St. Louis. If not, no need to send regrets. If any Section Chiefs are able to help recruit, I would greatly appreciate it.

If you have any questions, there are more details below, or feel free to contact me directly. Thank you!

Tim

Timothy Weaks | Assistant Attorney General
Missouri Attorney General's Office
815 Olive St, Suite 200
St. Louis, MO 63101
(314) 340-4748
Timothy.Weaks@ago.mo.gov

AMERICAN OVERSIGHT

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:35 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Softball tournament tonight is postponed due to rain.

We will play next Friday, August 20th at 4:00pm at Wilmore Park

If you are now able or unable to play, please let me know as soon as possible so we can determine if we will have enough to play. Remember, we want to win, but all skill levels are welcome and we would love to have you come out.

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Friday, August 13, 2021 10:05 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

Happy Friday, everyone. A few updates. Apologies for all of the emails.

1. Softball Tournament is tentative at this point due to all of the rain and more expected this evening. The organizer is waiting to hear from the Parks Department as to whether we can play. I will send a follow-up email either way to let you all know. If we do play, please try to arrive by 4:00pm. We will have a first-round bye so I don't expect to play until 4:30pm, but there is a chance that some offices, perhaps those with a history of not showing up to court, may not show up to play, so we could play sooner.
2. If you ordered merchandise, it is available for pickup from Rachael Houser's office. Please go get it this morning or this afternoon.

Thanks!
Tim Weaks

From: Weaks, Timothy
Sent: Thursday, August 12, 2021 11:38 AM
To: SL-Staff <SL-Staff@ago.mo.gov>
Cc: Krug, Christine <Christine.Krug@ago.mo.gov>; Stevens, Cris <Cris.Stevens@ago.mo.gov>; Nuelle, Chris <Chris.Nuelle@ago.mo.gov>; Atkins, Jay <Jay.Atkins@ago.mo.gov>; Ebert, Mik <mik.ebert@ago.mo.gov>; Deal, Marianna <Marianna.Deal@ago.mo.gov>; Estep, Robert <Robert.Estep@ago.mo.gov>; Houser, Rachael <Rachael.Houser@ago.mo.gov>; Morgan, Jeremiah <jeremiah.morgan@ago.mo.gov>; Lewis, Jason

AMERICAN OVERSIGHT

<Jason.Lewis@ago.mo.gov>; Haywood, Amy <Amy.Haywood@ago.mo.gov>; Foster, Josh <Josh.Foster@ago.mo.gov>
Subject: RE: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021

All,
Tomorrow is the day! This casual event is open to both attorneys and support staff (so long as your schedule accommodates), and we would love to see as many people as possible come out. As of now, we have 11 people committed to playing, but we could definitely use more. So if you are on the fence, I urge you to come by even if you are in as bad of shape as I am currently. Especially if you identify as female, your presence would be greatly appreciated, as 4 females are required in the field at all times and the batting order must alternate men and women. If you have not already, please let me know if you are able to play!

If you have a ball glove or bat, please bring it with you. Parking is available in the park and also directly across Hampton on the side of Schnucks. I would encourage you to patronize the store if possible and put the receipt on your dashboard. Please do not park in the Walgreens lot.

If you ordered a t-shirt through the AGO Pop-Up Shop that Rachael Houser so graciously organized, those will arrive in the St. Louis office tomorrow morning after Rachael picks them up. If you did not order one, I would suggest wearing the blue AGO t-shirts we wore last time (pictured below) or any other shirt with a similar color.

There is a good possibility that it rains and storms tomorrow, unfortunately, so if the tournament is canceled, I will inform everyone as soon as I know, but I would still plan on playing at this point.

Any questions, please feel free to reach out!

Thanks,
Tim Weaks

From: Weaks, Timothy
Sent: Thursday, July 22, 2021 4:09 PM
To: SL-Staff <SL-Staff@ago.mo.gov>
Subject: 2021 Prosecutors' Softball Challenge - Friday, August 13, 2021



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Friday, August 13, 2021 at 4:00pm, Wilmore Park (Hampton & Gravois, STL City) - Following last year's cancellation due to COVID, the Missouri Attorney General's Office will fight to defend its title against the likes of the Federal Public Defender's Office, St. Louis County Prosecutor's Office, U.S. Attorneys' Offices in the Eastern District of Missouri and Southern District of Illinois, and the St. Louis Circuit Attorney's Office in a round-robin softball tournament.

If you have not attended in the past, it is a great time in a relaxed atmosphere and a good opportunity to support the office and get to know your coworkers. We had a great turnout two years ago with players of all skill levels and spectators.

All are welcome to attend and cheer us on, but if you are interested in *playing*, please let me know so that we can get a preliminary head count. Please email me separately without replying all, as this is being sent to the entire St. Louis Office. If not, no need to send regrets.

We will likely order new shirts this year featuring the logo above. More details to come about those from either myself or Rachael Houser, but please let either of us know if you are interested in one.

My apologies if you have already received an email about the tournament from either me or your section chief.

Thanks!

Tim Weaks

Timothy Weaks | Assistant Attorney General
Missouri Attorney General's Office
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AMERICAN OVERSIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, STATE OF MONTANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF KANSAS; COMMONWEATH OF KENTUCKY; STATE OF INDIANA; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; and STATE OF WYOMING, *Plaintiffs*, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., *Defendants.*	Civ. Action No. 3:21-cv-00065

PLAINTIFFS' RESPONSE IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 2

STANDARDS OF REVIEW 2

I. THIS COURT HAS JURISDICTION 3

A. This Case Is Not Moot 3

1. This Court Can Still Grant Effective Relief. 4

2. In Any Event, this Case Meets a Traditional Mootness Exception. 7

3. The Court Can Grant Declaratory Relief. 11

B. Neither the President Nor the Agency Defendants Are Above the Law. . 13

1. Judicial Review is Available under the APA. 13

2. The President is Not Immune from Constitutional Challenges. ... 19

C. The Court Has Jurisdiction to Enter Relief Against Agency Defendants 22

D. Plaintiffs Have Standing 27

1. Plaintiffs Have Alleged Concrete and Particularized Injuries. 27

a. The Executive Order Robs Plaintiffs of Specific Tax Revenues. 28

b. Plaintiffs Have Special Solicitude Standing. 30

c. Plaintiffs Have Parens Patriae Standing. 31

i. Economic and Physical Well-Being 33

ii. Rightful status within the federal system 35

AMERICAN OVERSIGHT

2. Plaintiffs' Injuries are Redressable. 36

II. VENUE IS PROPER 37

III. EXECUTIVE ORDER 13990 VIOLATES THE SEPARATION OF POWERS 40

A. Congress Has Primacy Over Matters of Foreign Commerce 41

B. Congress Expressly Authorized the Keystone XL Pipeline in 2011 43

C. Even Absent Pub. L. 112-78, the President Lacks the Power to Unilaterally Revoke this Oil Pipeline Cross-Border Permit 46

1. History of the Foreign Commerce Power 48

a. The Constitutional Convention 48

b. The Early Republic 49

c. Cross-Border Instrumentalities 50

2. Congress Has Not Acquiesced to Presidential Power over the Keystone XL 55

3. Revocation of a Duly Granted Permit Triggers Additional Constitutional Scrutiny 57

CONCLUSION 60

CERTIFICATE OF SERVICE 69

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

6th St. Bus. Partners LLC v. Abbott,
No. 1:20-CV-706-RP, 2020 U.S. Dist. LEXIS 130814 (W.D. Tex. July 24, 2020) .. 26

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 15

Abrams v. Heckler,
582 F. Supp. 1155 (S.D.N.Y. 1984)..... 31–32

Adarand Constructors v. Slater,
528 U.S. 216 (2000) 3

Air One Helicopters, Inc. *v. Fed. Aviation Admin.*,
86 F.3d 880 (9th Cir. 1996) 14–15

Alfred L. Snapp & Son, Inc. *v. Puerto Rico ex rel. Barez*,
458 U.S. 592 (1982) 31, 32, 35

American School of Magnetic Healing v. McAnnulty,
187 U.S. 94 (1902) 24

Armstrong v. Exceptional Child Center, Inc.,
575 U.S. 320 (2015) 24

Atlee v. Nixon,
336 F. Supp. 790 (E.D. Pa. 1972) 21

Baker v. Carr,
369 U.S. 186 (1962) 54, 58

Bas v. Tingy,
4 U.S. (4 Dall.) 37 (1800) 50

Bayou Liberty Ass'n v. United States Army Corps of Eng'rs,
217 F.3d 393 (5th Cir. 2000) 7, 8, 9, 10

Biden v. Knight First Amendment Inst. at Columbia Univ.,
141 S. Ct. 1220 (2021) 20

Bd. of Trustees v. United States,
289 U.S. 48 (1933) 41

Borders v. Reagan,
518 F. Supp. 250 (D.D.C. 1981) 21

AMERICAN OVERSIGHT

Brown v. United States,
12 U.S. (8 Cranch) 110 (1814) 50

Cable News Network v. American Broadcasting Companies,
518 F. Supp. 1238 (N.D. Ga. 1981) 21

California Bankers Ass'n v. Shultz,
416 U.S. 21 (1974) 47

Cargo of the Brig Aurora v. United States,
11 U.S. (7 Cranch) 382 (1813) 50

Catholic Leadership Coalition of Texas v. Reisman,
764 F.3d 409 (5th Cir. 2014) 9, 10

Chafin v. Chafin,
568 U.S. 165 (2013) 3, 7

Chamber of Commerce of the U.S. v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 13, 24

Chas. T. Main Int'l v. United States,
509 F. Supp. 1162 (D. Mass. 1981) 21

Chicago & Southern Air Lines. v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 53, 54, 59

Church of Scientology of Cal. v. United States,
506 U.S. 9 (1992) 4

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739 F. Supp. 761 (E.D.N.Y. 1990) 21

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 4

Clinton v. Jones,
520 U.S. 681 (1997) 19

Connell v. Shoemaker,
555 F.2d 483 (5th Cir. 1977) 12

Czyzewski v. Jevic Holding Corp.,
137 S. Ct. 973 (2017) 28

Dalton v. Specter,
511 U.S. 462 (1994) 21–22

AMERICAN OVERSIGHT

Dames & Moore v. Regan,
453 U.S. 654 (1981) ..... *passim*

Darr v. Carter,
640 F.2d 163 (8th Cir. 1981) 21

Dart v. United States,
848 F.2d 217 (D.C. Cir. 1988) 24

Davis v. FEC,
554 U.S. 724 (2008) 28

Dellums v. Bush,
752 F. Supp. 1141 (D.D.C. 1990) 21

District of Columbia v. Trump,
291 F. Supp. 3d 725 (D. Md. 2018) 20

Doe # 1 v. Trump,
423 F. Supp. 3d 1040 (D. Ore. 2019) 18

Doe v. Nielsen,
No. 18-cv-02349-BLF (VKD), 2018 U.S. Dist. LEXIS 153199 (N.D. Cal. Sept. 7, 2018) 17

Doe v. Trump,
No. 3:19-cv-1743-SI, 2020 U.S. Dist. LEXIS 65441 (D. Or. Apr. 13, 2020) 14

Doe v. United States,
853 F.3d 792 (5th Cir. 2017) 13

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932 F.3d 742 (9th Cir. 2018) 14

El Paso Cty. v. Trump,
982 F.3d 332 (5th Cir. 2020) 28, 30

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 3

Ex parte Young,
209 U.S. 123 (1908) 23

Familias Unidas v. Briscoe,
544 F.2d 182 (5th Cir. 1976) 11

Franklin v. Massachusetts,
505 U.S. 788 (1992) 21, 22, 25

AMERICAN OVERSIGHT

Friedman v. Fed. Aviation Admin.,
841 F.3d 537 (D.C. Cir. 2016) 15, 16

Friends of the River v. U.S. Army Corps of Eng'rs,
870 F. Supp. 2d 966 (E.D. Cal. 2012) 18

Georgia v. Stanton,
73 U.S. (6 Wall.) 50 (1868) 21

Gibbons v. Ogden,
22 U.S. 1 (1824) 41, 45, 51, 52

Glenwood Springs Citizens' All. v. United States DOI,
Civil Action No. 20-cv-00658-CMA, 2021 U.S. Dist. LEXIS 44690, at *2–4 (D. Colo. Mar. 10, 2021) 14, 17

Grand Canyon Tr. v. Williams,
No. CV13-8045, 2013 WL 12176992 (D. Ariz. Sept. 9, 2013) 17

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969 F.3d 460 (5th Cir. 2020) 24

Halperin v. Kissinger,
606 F.2d 1192 (D.C. Cir. 1979) 21

Hanson v. Veterans Administration,
800 F.2d 1381 (5th Cir. 1986) 37

Hawaii v. Trump,
878 F.3d 662 (9th Cir. 2017) 13

Henderson v. Mayor of New York,
92 U.S. 259 (1875) 41

Holmes v. Energy Catering Servs., L.L.C.,
270 F. Supp. 2d 882 (S.D. Tex. 2003) 38

Home Building & Loan Assn. v. Blaisdell,
290 U.S. 398 (1934) 42

Hood ex rel. Miss. *v. Microsoft Corp.*,
428 F. Supp. 2d 537 (S.D. Miss. 2006) 32

In re Trump,
928 F.3d 360, 364 (4th Cir. 2019) 20

Indigenous Environmental Network v. Biden,
4:19-cv-00028, at 11 (D. Mont. May 28, 2021) 6

AMERICAN OVERSIGHT

Inst. of Certified Prac., Inc. v. Bentsen,
874 F. Supp. 1370 (N.D. Ga. 1994) 38, 39

Japan Line, Ltd. v. Cty. of L.A.,
441 U.S. 434 (1979) 32–33, 41, 47

John Doe, Inc. v. Gonzalez,
Civil Action No. 06-966 (CKK), 2006 U.S. Dist. LEXIS 44402 (D.D.C. June 29, 2006) 16

Kansas ex rel. Hayden v. United States,
748 F. Supp. 797 (D. Kan. 1990) 31

Kent v. Dulles,
357 U.S. 116 (1958) 48

Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016) 9

Knight First Amendment Inst. at Columbia Univ. v. Trump,
928 F.3d 226 (2d Cir. 2019) 20

Knox v. SEIU, Local 1000,
567 U.S. 298 (2012) 3

Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.,
505 U.S. 71 (1992) 47

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 7

License Tax Cases,
72 U.S. (5 Wall.) 462 (1867) 47

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804) 50

Lopez v. City of Hous.,
617 F.3d 336 (5th Cir. 2010) 10

Mach Mining, LLC v. E.E.O.C.,
135 S. Ct. 1645 (2015) 15

Make the Rd. New York v. Pompeo,
475 F. Supp. 3d 232 (S.D.N.Y. 2020) 25

Maryland v. Louisiana,
451 U.S. 725 (1981) 36

AMERICAN OVERSIGHT

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... *passim*

Medellin v. Texas,
552 U.S. 491 (2008) 42, 46, 55

Meltzer v. Bd. of Pub. Instruction,
548 F.2d 559 (5th Cir. 1977) 11

Michelin Tire Corp. v. Wages,
423 U.S. 276 (1976) 49

Miller v. Albright,
523 U.S. 420 (1998) 38

Miller v. Christopher,
870 F. Supp. 1 (D.D.C. 1994) 39

Minnesota Chippewa Townsend v. Carter,
476 F. Supp. 1070 (N.D. Tex. 1979) 21

Mississippi v. Johnson,
71 U.S. (4 Wall.) 475 (1867) 20

Murphy v. Ford,
390 F. Supp. 1372 (W.D. Mich. 1975) 21

N.L.R.B. v. Noel Canning,
573 U.S. 513 (2014) 23

Nash v. Texas,
632 F. Supp. 951 (E.D. Tex. 1986) 11

Nat'l Treasury Emps. Union v. Nixon,
492 F.2d 587 (D.C. Cir. 1974) 20, 21, 22

Nat'l Urban League v. Ross,
No. 20-CV-05799-LHK, 2020 U.S. Dist. LEXIS 165989 (N.D. Cal. Sept. 10, 2020) 18–19

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 15

Nat'l Distillers and Chemical Corp. v. Dep't. of Energy,
487 F. Supp. 34 (D. Del. 1980) 39

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019) 5, 28, 36

AMERICAN OVERSIGHT

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 20–21, 21

Nixon v. Sirica,
487 F.2d 700 (D.C. Cir. 1973) 21

Okpalobi v. Foster,
244 F.3d 405 (5th Cir. 2001) 26

Panama Ref. Co. v. Ryan,
293 U.S. 388 (1935) 22, 42

Qureshi v. Holder,
663 F.3d 778 (5th Cir. 2011) 15, 16

Ramming v. United States,
281 F.3d 158 (5th Cir. 2001) 2–3

Roe v. Wade,
410 U.S. 113 (1973) 9

Romero v. City of Grapevine,
888 F.3d 170 (5th Cir. 2018) 3

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006) 39

S. Recycling, L.L.C. v. Aguilar,
982 F.3d 374 (5th Cir. 2020) 2

Sackett v. E.P.A.,
566 U.S. 120 (2012) 17

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 18

Simmat v. U.S. Bureau of Prisons,
413 F.3d 1225 (10th Cir. 2005) 25

Smilde v. Snow,
73 F. App'x 24 (5th Cir. 2003) 38

Southern Pac. Terminal Co. v. ICC,
219 U.S. 498 (1911) 10

Spencer v. Kemna,
523 U.S. 1 (1998) 3, 9

AMERICAN OVERSIGHT

Stark v. Wickard,
321 U.S. 288 (1944) 24

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 36

Steffel v. Thompson,
415 U.S. 452 (1974) 23

Storer v. Brown,
415 U.S. 724 (1974) 9

Super Tire Eng'g Co. v. McCorkle,
416 U.S. 115 (1974) ..... *passim*

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 28

Texas v. United States,
86 F. Supp. 3d 591 (S.D. Tex. 2015) 31, 36, 39

Texas v. United States,
328 F. Supp. 3d 662 (S.D. Tex. 2018) ..... *passim*

Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 30, 31, 36, 37

Texas v. United States,
No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133114 (S.D. Tex. July 16, 2021) 40

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137 S. Ct. 1645 (2017) 40

Tribe v. Carlucci,
358 F. Supp. 973 (D.D.C. 1973) 21

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 13

Trump v. Vance,
140 S. Ct. 2412 (2020) 1

U.S. Army Corps of Eng'rs v. Hawkes Co.,
136 S. Ct. 1807 (2016) 15, 16

United States ex. rel. Turner v. Williams,
194 U.S. 279 (1904) 41, 47

AMERICAN OVERSIGHT

United States v. Curtiss-Wright Exp. Corp.,
299 U.S. 304 (1936) 41, 46

United States v. Guy W. Capps, Inc.,
204 F.2d 655 (4th Cir. 1953) 45

United States v. Holliday,
70 U.S. 407 (1865) 41

United States v. Lee,
106 U.S. 196 (1882) 19

United States v. Nixon,
418 U.S. 683 (1974) 19, 21

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272 F. 311 (S.D.N.Y. 1921) 52, 53, 60

Vieux Carre Prop. Owners v. Brown,
948 F.2d 1436 (5th Cir. 1991) 7, 8, 9

Wash. Utilities and Transp. Comm'n v. F.C.C.,
513 F.2d 1142 (9th Cir. 1975) 31

Welton v. Missouri,
91 U.S. 275 (1875) 32, 47–48

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 13

Winsness v. Yocom,
433 F.3d 727 (10th Cir. 2006) 23

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 28

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) ..... *passim*

Zivotofsky v. Clinton,
566 U.S. 189 (2012) 42

Zivotofsky v. Kerry,
576 U.S. 1 (2015) 41, 42, 45, 47

Zweibon v. Mitchell,
516 F.2d 594 (D.C. Cir. 1975) 54, 55

AMERICAN OVERSIGHT

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United States Code
5 U.S.C. § 501(a) 44
5 U.S.C. § 501(b)(1) 44
5 U.S.C. § 501(b)(2) 44
5 U.S.C. § 501(b)(3) 44
5 U.S.C. § 551(6) 13
5 U.S.C. § 551(13) 13
5 U.S.C. § 704 15
5 U.S.C. § 706 ..... 13, 44, 45
15 U.S.C. § 717b(a), (c) 53
16 U.S.C. § 824(e) 53
28 U.S.C. § 1391(e)(1) 37
33 U.S.C. § 535 53
47 U.S.C. §§ 34–39 53

United States Constitution
Art. I, § 8 ..... 1, 41, 43, 46

Federal Register
86 Fed. Reg. 7037 ..... 58, 60

La. Rev. Stat. Ann.
§ 47:32 30
§ 47:601 30

14D Charles Alan Wright, *et al., Federal Practice and Procedure* § 3815 (4th ed.) 39

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AMERICAN OVERSIGHT

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North American Energy Access Act, H.R. 4348, 112th Cong., 2d Sess. (2012) 56

S. 1, 114th Cong., 1st Sess. (2015) 56

Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, 125 Stat. (Dec. 23, 2011) ..... *passim*

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Foreign Cables, 22 Op. Att'y Gen. 13 (1898) 50, 51

AMERICAN OVERSIGHT

INTRODUCTION

Who may regulate foreign and interstate commerce? The Constitution says Congress. U.S. CONST. ART. I, § 8. Defendants argue otherwise—at least when it comes to revoking a transnational pipeline's permit to cross the peaceful Canadian border. That power to destroy a massive commercial project with millions of reliant stakeholders resides in the President, they argue. The principal dispute here, then, involves fundamental questions about the Constitution's separation of powers—the sinews of our republican freedoms.[1] Defendants also argue the Court has no place in this dispute—that the President's action is unreviewable. But that is wrong as a matter of precedent and principle. The President is not above the law. *See Trump v. Vance*, 140 S. Ct. 2412 (2020).

These weighty constitutional questions are not theoretical. The Keystone XL Pipeline ("KXLP") is a lifeline for communities and industries across the Plaintiff States. Undisputed analyses *from Defendants* confirm that the States and their communities would glean millions of dollars in direct, indirect, and induced revenue from the KXLP's construction and operation.[2] The KXLP would steward the environment, boost our energy security, and strengthen poor and rural communities.

Hours into his tenure, President Biden revoked the KXLP cross-border permit,

---

[1] *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008) ("Structure is everything.").

[2] *See* U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Jan. 2014) [hereinafter "2014 FSEIS"], https://2012-keystone-pipeline-xl.state.gov/finalseis/index.htm; U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Dec. 2019) [hereinafter "2019 FSEIS"], https://www.state.gov/wp-content/uploads/2019/12/Vol-I-Keystone-Final-SEIS-Cover-through-Chapter-11_508-December-2019.pdf.

AMERICAN OVERSIGHT

thereby eliminating the abundant benefits Plaintiffs and their citizens justifiably pinned on the project. If Defendants prevail, those losses may become permanent.

But this Court can and should stop this presidential power grab. If it grants Plaintiffs' relief, the KXLP project will revive. Removing the specter of capricious presidential power will incentivize TC Energy or another entity to complete and operate the pipeline. Yet without the regulatory certainty only this Court can provide, Executive Order 13990 will remain a "continuing and brooding presence" that will bar all attempts to resurrect the KXLP. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). The unconstitutional Order has harmed and continues to harm Plaintiffs, and this Court can stop it.

Congress expressly approved the KXLP in 2011—removing the matter from presidential discretion. But even if Congress had remained silent (it hasn't), the President lacks the independent power to cancel a cross-border pipeline project that raises no legitimate national security concerns. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The President's Order is unconstitutional, and the motion to dismiss must fail.

ARGUMENT

STANDARDS OF REVIEW

To survive Defendants' 12(b)(1) motion, Plaintiffs need only demonstrate they have standing by preponderance of the evidence. *S. Recycling, L.L.C. v. Aguilar*, 982 F.3d 374, 379 (5th Cir. 2020). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United*

AMERICAN OVERSIGHT

States, 281 F.3d 158, 161 (5th Cir. 2001). Plaintiffs similarly survive Defendants' 12(b)(6) motion. *See Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) ("a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face") (cleaned up). And Plaintiffs agree, this Court must consider certain documents outside the complaint. ECF 98 at 14. The Complaint's factual allegations and Defendants' uncontested economic analyses are more than sufficient to avoid dismissal.

I. THIS COURT HAS JURISDICTION

A. This Case Is Not Moot.

This case is very much alive. The party seeking to moot a controversy faces a "heavy burden." *Adarand Constructors v. Slater*, 528 U.S. 216, 222 (2000) (per curiam). "[A] case 'becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012)); *see also Knox*, 567 U.S. at 307–08 ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). Defendants cannot meet that burden.

A favorable judgment will redress Plaintiffs' injuries. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998). It will certainly lead to the resurrection of the KXLP by TC Energy or another entity.[3] Until then, the Executive Order's looming presence will prevent the

[3] *See* Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets, White House Briefing Room, Aug. 11, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/11/statement-by-national-security-advisor-jake-sullivan-on-the-need-for-reliable-and-stable-global-energy-markets/ ("Higher gasoline costs, if left unchecked, risk harming the

AMERICAN OVERSIGHT

completion and operation of the Keystone XL. *See Super Tire*, 416 U.S. at 122. For reasons the federal government has long acknowledged, this imposes costly, ongoing injuries on the States. But this Court can end those injuries; in fact, the only way to end those injuries—to ensure that the KXLP disburses its massive economic, employment, and environmental benefits to the States—is to issue a judicial declaration dispelling the fiction that the President can unilaterally regulate foreign and domestic commerce contrary to the will of Congress.

1. This Court Can Still Grant Effective Relief.

The Court can grant effective relief in this case by declaring the President's Order unlawful and enjoining Defendants from enforcing it. It's not a question of whether the "threatened injury [is] certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), but whether any "possible remedy" is available. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). That remedy exists here.

Plaintiffs seek, inter alia, declaratory judgment that the unilateral cancellation of the KXLP cross-border permit was unlawful. But for Defendants' actions, that largely underground and completed segment traversing the U.S.-Canada border would enable

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ongoing global recovery. The price of crude oil has been higher than it was at the end of 2019, before the onset of the pandemic."); Houston Keene, *Biden's energy sec says 'pipe is best way' to transport fuel, sparks backlash regarding Keystone XL pipeline*, FOX NEWS (May 12, 2012), https://www.foxnews.com/politics/jennifer-granholm-pipeline-comment-backlash ("But it's – the pipe is the best way to go.'"); 2019 FSEIS at S-4 (primary purpose of KXLP is to transport up to 830,000 bpd); *See* Ylan Mui & Pippa Stevens, *White House calls on OPEC to boost oil production as gasoline prices rise*, CNBC (Aug. 11, 2021), https://www.cnbc.com/2021/08/11/as-gas-prices-rise-white-house-says-opec-action-is-simply-not-enough-calls-for-ftc-scrutiny.html ("[OPEC's] July agreement to boost production by 400,000 barrels per day … is 'simply not enough….'").

AMERICAN OVERSIGHT

the KXLP to transport crude oil to vital U.S. refining centers. *See* ECF 71 at ¶ ¶ 61–77. Much of the KXLP is fully constructed and could again be operated by TC Energy or its competitors to transport hundreds of thousands of barrels of Canadian and American oil to the Gulf Coast. ECF 71 at ¶ ¶ 51, 59–60; *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (finding Article III satisfied where Plaintiffs' "theory of standing … relies … on the predictable effect of Government action on the decisions of third parties.").

In *Dep't of Commerce*, plaintiffs challenged the inclusion of a citizenship question on the decennial census questionnaire. *Id.* at 2563. They alleged that many noncitizens would refuse to complete the questionnaire due to fears about how the government would use the answers to the citizenship question. *Id.* at 2565–66. All the prospective injuries hinged on how the government's action (inserting the question) would predictably drive third party decisions (whether to complete the form). *Id.* at 2565–66. If those plaintiffs could obtain meaningful relief on that basis, the States can obtain relief here.

A project like the KXLP will unquestionably deliver significant financial returns for any company with the requisite capital resources. *See* ECF 71 at ¶ ¶ 40, 42, 66–77, 83–84. President Biden's requests to OPEC for increased production clearly show increased oil demand.[4] Once operational, the KXLP will not only supply that demand, it will stimulate the States' economies, augment tax revenues, promote energy security, and curb dependence on geopolitical competitors. *See* ECF 71 at ¶ ¶ 39–42, 56–84.

Recently, in an ongoing case related to President Trump's 2019 approval of the

[4] Mui & Stevens, *supra*.

AMERICAN OVERSIGHT

KXLP's cross-border permit, a Montana federal district court remarked that, "[t]his case … involves a physical pipeline that today sits under the ground at the U.S.-Canada border." Order on Mootness, *Indigenous Environmental Network v. Biden*, 4:19-cv-00028, at 11 (D. Mont. May 28, 2021). Despite the facts that the permitted segment is completely constructed, President Biden's order succeeded President Trump's, and that TC Energy has terminated its plans to complete and operate the KXLP, the district court refused to dismiss the challenge as moot. Instead, the court found there was still a "live controversy," *id.* at 10, because it could "order[] TC Energy to remove that pipeline from the ground." *Id.* at 11. Even though the pipeline isn't currently transporting oil, the court could still grant some relief to the plaintiffs. Similarly, here the live controversy surrounds whether the order prohibiting the existing pipeline from operating is lawful.

The executive order significantly claims *sole* constitutional authority for granting and *revoking* all cross-border pipeline permits. ECF 71 at ¶ 52. If the Court doesn't correct that constitutional error, it's unlikely the KXLP or any other transnational pipeline will ever transport heavy crude to refining centers in Texas and Louisiana. At the mercy of such unchecked and fickle Presidential power, no entity is likely to again invest the considerable resources necessary to build and operate this type of project. And even if a subsequent Administration re-issued the permit, the President's day-one revocation proves there is no certainty against arbitrary revocations in the future. Knowing the President could pull the plug at any time and that judicial recourse would be foreclosed is more than enough to deter reasonable investors from undertaking the project.

TC Energy has terminated its plans to complete and operate the project for

AMERICAN OVERSIGHT

precisely these reasons. The KXLP, however, is not dead. If the Court corrects the legal errors under which the Executive currently operates, some entity—perhaps even TC Energy—will resume the project, and its manifold benefits will flow to the States.

This case is not moot. If the Court grants Plaintiffs' requested relief, the KXLP will transport oil. And that's not wishful thinking—it's business reality. *See Chafin*, 568 U.S. at 172. In fact, this case becomes non-redressable only if the Court dismisses it.

2. In Any Event, this Case Meets a Traditional Mootness Exception.

Even if the Court concludes that TC Energy's recent termination announcement moots this controversy, this case presents "issues capable of repetition, yet evading review." *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991) (citation omitted). The exception applies when: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Bayou Liberty Ass'n v. United States Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000).

The durational requirement is met because the unique and high-stakes circumstances surrounding the President's Order has not allowed the "challenged action … to be fully litigated prior to its cessation or expiration." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990). TC Energy endured over a decade of permitting, environmental review, and litigation before it began construction of the KXLP. ECF 71 at ¶¶ 30–50. The company invested an estimated $9 billion in the pipeline.[5] But less than two years after

[5] Kenneth Garger, *Company Behind Keystone XL pipeline seeks $15 billion damages from US*,

AMERICAN OVERSIGHT

it obtained the permit, President Biden abruptly revoked it, leaving TC Energy with a $1.81 billion first-quarter loss.[6] Its mounting losses were so severe that this case could not be litigated before the company was forced to discontinue the project.

But the costly regulatory crucible TC Energy endured, basic rudiments of the oil industry, and common sense all lead to an obvious conclusion: no company with shareholders could long withstand the flippant revocation of a previously granted (and hard-fought) permit upon which the entire transnational project relies. When the government believes the President may monocratically dispatch multi-year, international, and inter-state commercial projects set to provide numerous benefits to the States based on two paragraphs of platitudinous rationale—or no rationale at all—then no such project is safe. Affected industries will eschew or abandon development projects. And the States will be left to suffer the results. Plaintiffs maintain strong, live interests in this litigation, and judicial review should not be withheld *because* Defendants' unlawful actions were brutally effective. *See Bayou Liberty,* 217 F.3d at 398 (expectation of future development made alleged harm capable of repetition); *Vieux Carre*, 948 F.2d at 1447–48 (same).

The KXLP bears similarity to other cases of short duration that evade review—labor strikes, pregnancy, and elections—where the circumstances "should not preclude

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N.Y. POST. (July 4, 2021), https://nypost.com/2021/07/04/company-behind-keystone-xl-pipeline-seeks-15b-in-damages/. The province of Alberta invested significantly as well. *See Keystone XL is dead, and Albertans are on the hook for $1.3B*, CBC NEWS (Jun. 9, 2021), https://www.cbc.ca/news/canada/calgary/keystone-xl-termination-1.6059683.

[6] Nia Williams & Shariq Khan, *TC Energy posts C$1 bln quarterly loss on Keystone XL suspension*, REUTERS (May 7, 2021), https://www.reuters.com/world/americas/tc-energy-posts-c1-billion-quarterly-loss-keystone-xl-suspension-2021-05-07/.

AMERICAN OVERSIGHT

challenge to state policies that have had their impact and that continue in force, unabated and unreviewed." *Super Tire*, 416 U.S. at 126–27 (labor strike); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973) (pregnancy); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (election law). Suppose a company in 2025 obtained a new cross-border permit to operate the KXLP from a new administration, and that permit was revoked by a subsequent administration. That company—like TC Energy here—would face the task of honoring its fiduciary duties while sustaining a massive investment in a dormant project pending costly litigation. Business realities make the President's order one that evades review. *See Bayou Liberty,* 217 F.3d at 398; *Vieux Carre*, 948 F.2d at 1447–48.

There is also a reasonable expectation the States will be subjected to the same unlawful action again. *See Spencer*, 523 U.S. at 17. Plaintiffs need only show "a reasonable expectation that the challenged illegality will reoccur." *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014) (quotations omitted).

The challenged illegality reoccurs every day as the Executive Order keeps the KXLP on ice. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (Article III is satisfied when "it is reasonable to expect that the [defendant] will refuse to apply" the Plaintiff's interpretation of the law, and the Court's adoption of this interpretation will guide future transactions between the parties). At issue here is the fate of a physical pipeline, not an abstract concept. It is in the ground, near complete, poised to transport oil, and sure to generate revenue. ECF 71 at ¶ 51. If Plaintiffs' arguments prevail here, it is reasonable, likely, and logical that TC Energy or another entity will restart the KXLP. It's also worth noting that, unless the Court grants Plaintiffs' relief,

AMERICAN OVERSIGHT

the President could capriciously interfere with similar projects.

In *Bayou Liberty*, homeowners sued the Army Corps of Engineers for issuing a building permit to nearby retail stores. 217 F.3d at 395. Though the stores were completely constructed during the litigation, the Fifth Circuit concluded the case was not moot because there was an "expectation of future development in the … area that may create the types of problems with flooding and destruction … [plaintiffs] complained about." *Id.* at 398; *see also Lopez v. City of Hous.*, 617 F.3d 336, 340 (5th Cir. 2010) (pertinent inquiry was whether city had formed a policy that it would follow in future similar circumstances that are likely to repeat). Should the Plaintiffs prevail, the government's ability to arbitrarily shutter the KXLP \ will be checked. But if not, both the KXLP and other similar projects will be surrendered to the tender mercies of regulatory whim.

Finally, the "capable of repetition yet evading review" exception was made for cases like this. *See Super Tire*, 416 U.S. at 122 (when case challenges governmental action, courts must broaden their considerations to determine whether "petitioners are adversely affected by government 'without a chance of redress'") (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); *see, e.g., Reisman*, 764 F.3d at 423 (focusing in election law cases on whether the issue will recur between the defendant and the other members of the public). The KXLP's many benefits cannot be realized unless a court declares it unlawful for the President to do as he did here. The States cannot be denied a forum simply because the unlawful government actions so severely damaged the initial project operator that it felt compelled to abandon *its* plans. In sum, this case should not be cut short because the challenged government action succeeded in driving one affected party

AMERICAN OVERSIGHT

from the regulated activity—at least temporarily.

3. The Court Can Grant Declaratory Relief.

Even if the case is mooted for purposes of injunctive relief, the Court may still grant *declaratory* relief. *See Meltzer v. Bd. of Pub. Instruction*, 548 F.2d 559, 571–72 (5th Cir. 1977). As the Fifth Circuit explained in *Meltzer*, requests for declaratory relief are evaluated under a lesser mootness standard than injunctive relief. 548 F.2d at 571; *see also Familias Unidas v. Briscoe*, 544 F.2d 182, 189 (5th Cir. 1976); *Nash v. Texas*, 632 F. Supp. 951, 964 (E.D. Tex. 1986) ("The Supreme Court has explicitly recognized that when declaratory relief is sought, mootness should not preclude review of a statute that will be enforced in the future against the complainants."). The States have shared KXLP's long, sordid regulatory journey—from endless administrative review to approval, to Presidential approval and now revocation. That treatment will continue absent judicial relief.

In *Super Tire*, employers challenged New Jersey's policy of awarding public assistance to their striking employees through a state welfare program. 416 U.S. at 116–17. When the strike ended with a new collective bargaining agreement, the Court ruled that the case was not moot for purposes of declaratory relief because "the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 122.

Super Tire's rationale applies here. Plaintiffs challenge government decisions that affect the behavior of third parties. Like New Jersey's welfare policy after the labor strike, the Executive Order "has not evaporated or disappeared." *Id.* No entity may bring KXLP

AMERICAN OVERSIGHT

online without the declaratory relief Plaintiffs have requested. And that means the Executive Order continues to impose "substantial[ly] adverse effect[s] on the interests of the petitioning parties." *Id.* The States continue to lose out on the economic, employment, environmental, and energy benefits they were expecting from the Keystone XL. But unlike *Super Tire*—where the *plaintiffs* took the action that potentially mooted the case (by negotiating a new agreement with the third party)—Defendants' conduct here caused TC Energy to stop constructing and operating the KXLP. That distinction make's *Super Tire*'s rationale even more applicable here.

The major constitutional questions in dispute and the Executive Order's ongoing consequences weigh heavily in plaintiffs' favor. In *Connell v. Shoemaker*, 555 F.2d 483 (5th Cir. 1977), rental property owners challenged an order prohibiting soldiers from leasing units owned or managed by the plaintiffs due to racism allegations. When the order lifted, the Fifth Circuit allowed the plaintiffs to continue seeking declaratory judgment because of the "continuing practical consequences" of the Army's policy. *Id.* at 486–87 (noting that plaintiffs had "interests in various businesses engaged in retail sales of goods and services directly to the public in the area adjacent to Fort Hood"). Also significant to the Court was that the case involved a constitutional question. *Id.* at 487. The Executive Order's practical consequences for the States are tangible and ongoing. Millions in revenue and economic benefits have disappeared and millions of barrels of oil per week are not flowing through the pipeline. ECF 71 at ¶¶ 3, 56–60. This case also raises the significant constitutional question of whether the President's Article II powers allow him to trump Congress's Article I foreign commerce powers and revoke the KXLP permit.

AMERICAN OVERSIGHT

For these reasons, this case still presents a live case and controversy.

B. Neither the President Nor the Agency Defendants Are Above the Law.

1. Judicial Review is Available under the APA.

Agency actions that implement an executive order are also reviewable under the APA. *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996) ("[T]hat the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question."); *Hawaii v. Trump*, 878 F.3d 662, 680–81 (9th Cir. 2017) (finding final agency action reviewable under the APA, despite the fact that it was implementing an executive proclamation), *rev'd on other grounds, Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

"[A]gency action" under 5 U.S.C. § 706 "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act … thereof." 5 U.S.C. § 551(13). This list is expansive. It is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). "[T]he Supreme Court has explained that "'failure to act,' is … properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)."' *Doe v. United States*, 853 F.3d 792, 799–800 (5th Cir. 2017) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004)).

The term "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other

AMERICAN OVERSIGHT

than rule making but including licensing." 5 U.S.C. § 551(6). And "'license' includes the whole or a part of an agency permit," § 551(8), while "'licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." § 551(9).

The Army Corps of Engineers' withdrawal of TC Energy's application for a permit is a failure to act on its application for a permit, and is therefore agency action reviewable by the Court. The withdrawal explicitly incorporated the Executive Order. *See* ECF 98-8. This Court may review the substantive validity of the withdrawal as it bases its decision on the Executive Order. *See Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 U.S. Dist. LEXIS 65441, at *1-4 (D. Or. Apr. 13, 2020) (reviewing validity of presidential proclamation by way of APA review of agency rule incorporating the proclamation); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018) ("It is the substantive rule of decision, not the Rule itself, that the Organizations have challenged under the APA, and insofar as DOJ and DHS have incorporated the [presidential] Proclamation by reference into the Rule, we may consider the validity of the agency's proposed action, including its 'rule … or the equivalent.'") (quoting 5 U.S.C. § 551(13)).

That TC Energy "requested" "suspension" of consideration of its application—in response to the Army Corps pointing to the Executive Order, ECF 98-9—does not take the agency's termination of that process from the realm of final agency action. *See, e.g., Air One Helicopters, Inc. v. Fed. Aviation Admin.*, 86 F.3d 880, 882 (9th Cir. 1996) (stating that "it is a common rule of judicial economy that we will not require a party to exhaust administrative procedures when exhaustion would be futile … Accordingly, we will treat

AMERICAN OVERSIGHT

[the agency's letters denying action on application for registration of aircraft until applicant undertook some other action] as final agency action."); *Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 542 (D.C. Cir. 2016) ("Where an agency has clearly communicated it will not reach a determination on a petitioner's submission due to petitioner's recalcitrance but simultaneously refuses to deny the petitioner's submission on those grounds, it has engaged in final agency action subject to this Court's review.").

Not only is the Army Corp's withdrawal an "agency action," it is "final." "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 Def.*, 138 S. Ct. 617, 626 (2018) (citing 5 U.S.C. § 704). "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) (quotations omitted). "For that reason, [the Supreme] Court applies a 'strong presumption' favoring judicial review of administrative action." *Id.* In APA cases, this presumption is "guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 149–50 (1967)).

Agency action is considered "final" under the APA where the action first, "mark[s] the consummation of the agency's decisionmaking process," and second, is "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.*, 136 S. Ct. 1807, 1813 (2016) (quotations omitted)

Defendants argue that the Army Corps' withdrawal of TC Energy's application is

AMERICAN OVERSIGHT

not final agency action because "the withdrawal does not mark the completion of the agency's decision-making process on the application, but is interlocutory in nature." ECF 98 at 24. While an intermediate step in an administrative process "cannot be viewed as a 'consummation' of agency decision making," *Qureshi,* 663 F.3d at 781, that is not the situation here. The Army Corps has not merely paused consideration of TC Energy's permit; it has "withdraw[n]" its application and required TC Energy to begin the process anew by "submit[ting] an updated application for this project in the future." ECF 98-8. "[A]dministrative inaction [that] has precisely the same impact on the rights of the parties as denial of relief" is final agency action despite the ability of TC Energy to submit a new application because "its actions suggest the [Army Corps] has made up its mind, yet it seeks to avoid judicial review by holding out a vague prospect of reconsideration." *Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 543 (D.C. Cir. 2016); *John Doe, Inc. v. Gonzalez*, Civil Action No. 06-966 (CKK), 2006 U.S. Dist. LEXIS 44402, at *43 (D.D.C. June 29, 2006), *aff'd sub nom. John Doe, Inc. v. Drug Enf't Admin.*, 484 F.3d 561 (D.C. Cir. 2007) ("DEA's denial of Plaintiff's import permit application is not tentative; rather, the DEA has explicitly stated that the import permit request 'was being cancelled,'" and was therefore final agency action). This application process has been consummated, and legal consequences—the inability to perform the actions sought by the permit—flow from it.

Regardless, "discretion" to reverse course, by itself, is insufficient to convert an action that is final to one that is nonfinal. *See Hawkes Co.*, 136 S. Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency

AMERICAN OVERSIGHT

action, and does not make an otherwise definitive decision nonfinal.") (citation omitted); *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

Defendants have resisted discovery to uncover any other final agency actions implementing the Executive Order, arguing that the Court should rule on their motion to dismiss on lack of subject matter jurisdiction due to there being no final agency action. The Magistrate Judge has ordered a stay on discovery pending resolution of the motion to dismiss. ECF 99.

However, even in pure APA cases where discovery is not the norm, courts permit discovery to support a claim of subject matter jurisdiction. *Glenwood Springs Citizens' All. v. United States DOI*, Civil Action No. 20-cv-00658-CMA, 2021 U.S. Dist. LEXIS 44690, at *2–4 (D. Colo. Mar. 10, 2021) (ordering limited discovery in an APA case regarding the "factual question as to whether Defendants engaged in any action that would be subject to review under the APA"); *Doe v. Nielsen*, No. 18-cv-02349-BLF (VKD), 2018 U.S. Dist. LEXIS 153199, at *7 (N.D. Cal. Sept. 7, 2018) (permitting limited jurisdictional discovery in an APA case where "discovery of the nature of the agency action issue is necessary in order for the parties and the Court to determine the scope of the administrative record to be produced"); *Grand Canyon Tr. v. Williams*, No. CV13-8045, 2013 WL 12176992, at *1 (D. Ariz. Sept. 9, 2013) (permitting written discovery for plaintiffs to develop facts to demonstrate final agency action).

It would be improper for the Court to dismiss Plaintiffs' APA claims on the ground

AMERICAN OVERSIGHT

that there is no final agency action, when Defendants have yet to produce an administrative record or respond to any discovery. Courts have demanded the production of the administrative record before deciding reviewability. *Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 974–77 (E.D. Cal. 2012) (denying motion to dismiss APA claims before submission of administrative record because "[d]etermining whether the [challenged actions] are final agency actions in the instant case requires a review of the full administrative record because … 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of [the] action.") (quoting *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004)); *Ctr. for Popular Democracy Action v. Bureau of the Census*, No. 1:19-cv-10917 (S.D.N.Y. Jan. 9, 2020) (granting motion to expedite production of administrative record before deciding reviewability); *Doe # 1 v. Trump*, 423 F. Supp. 3d 1040, 1046 (D. Ore. 2019) (holding that production of administrative record was appropriate because the court required the administrative record to determine whether the agency action is final).

Instead of producing the administrative record of, for example, the Army Corps' decision to withdraw TC Energy's application, Defendants have submitted as exhibits a facially incomplete set of correspondence between the agency and TC Energy that fails to include the precipitating communication from the agency. ECF 98-8, 98-9 (referring to a "letter dated March 2, 2021" from the Army Corps that is not in the record here). Agencies are not permitted to defend their actions under the APA by way of post-hoc rationalizations outside the contemporaneous administrative record. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); s*ee also Nat'l Urban League v. Ross, No. 20-CV-05799-*

AMERICAN OVERSIGHT

LHK, 2020 U.S. Dist. LEXIS 165989, at *43 (N.D. Cal. Sept. 10, 2020) ("this Court cannot engage in APA review based on a new record made initially in the reviewing court, especially a declaration drafted for litigation, because the declaration would be an impermissible post hoc rationalization that does not reveal the agency's reasons for acting at the time of the action.") (cleaned up).

The Army Corps' withdrawal of TC Energy's application for a permit—based on the Executive Order making any subsidiary permits for the KXLP project futile—is a final agency action which the Court can review under the APA. Regardless, the Court should refuse to dismiss Plaintiffs' APA claims until examining the administrative record and any discovery on this issue.

2. The President is Not Immune from Constitutional Challenges.

Despite the Defendants' contrary claims, this Court may exercise jurisdiction over the President—he is not above the law. *See United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."). The Supreme Court has "long held" that federal courts "ha[ve] the authority to determine whether [the President] has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). This authority includes the power to restrain unconstitutional presidential action through injunctive and declaratory relief. *See id.*

Defendants claim that no court has issued a permanent injunction against the President in his official capacity in the absence of agency co-defendants. *See* ECF 98 at 17–18. But just two years ago the Second Circuit affirmed a permanent injunction against

AMERICAN OVERSIGHT

President Trump for blocking Twitter followers.[7] *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1220 (2021); *see also District of Columbia v. Trump*, 291 F. Supp. 3d 725, 752 (D. Md. 2018) ("[I]t would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the President and one or more of them can be named as a defendant.'") (quoting *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974), *rev'd on other grounds*, *In re Trump*, 928 F.3d 360, 364 (4th Cir. 2019)). Indeed, lower courts have "permitted plaintiffs to proceed against the President by nonstatutory review" and "even issued injunctions to the President in such suits."[8] As a practical matter, the President is most often named along with agency defendants—as he is here—because subordinate officers enforce his directives. So while it might be somewhat rare for courts to review purely presidential acts, it is not unprecedented. Such review is entirely appropriate here.

And the Defendants' 155-year-old chestnut doesn't convince otherwise. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867). Courts may—indeed should—proceed with prudence and circumspection when exercising jurisdiction over the President, but that doesn't give Presidents a judicial hall pass. *See Nixon v. Fitzgerald*, 457 U.S.

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[7] No agency co-defendants were named in *Knight*.

[8] Jonathan Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1678–79 (1997) (citing, e.g., Mackie v. Bush, 809 F. Supp. 144, 148 (D.D.C.), vacated as moot, 10 F.3d 13 (D.C. Cir. 1993); Nat'l Treasury Emps., 492 F.2d 587; Berry v. Reagan, No. CIV.A. 83-3182, 1983 WL 538 (D.D.C. Nov. 14, 1983) vacated as moot, 732 F.2d 949, 949 (D.C. Cir. 1983)).

AMERICAN OVERSIGHT

731, 753–54 (1982). First, *Johnson* has been sharply narrowed, if not completely overruled.[9]

Second, the legitimate separation of powers concerns expressed in *Johnson*[10] have been diverted into different doctrinal terrain—namely absolute immunity, standing, and the political question doctrine. *See, e.g., Fitzgerald*, 457 U.S. at 756 (recognizing presidential immunity from damages liability); Ray, *Prerogative to Accountability*, *supra*, at 810.

Finally, Defendants lean on dicta from a plurality opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Although the Court has failed to define the entire constitutional landscape, it is evident from later cases that *Johnson* and *Franklin* do not insulate Presidents from review. *See Dalton v. Specter*, 511 U.S. 462, 469 (1994) ("In reaching our conclusion [in *Franklin*] , we noted that the 'President's actions may still be reviewed for

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[9] *See* Laura Krugman Ray, *Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739, 809 (1992) ("In the years following [Johnson] , the law has shifted from the idea that the President of the United States could not be sued to the idea that the President is accountable in the courts for his official conduct."). *See generally* Ray, *Prerogative to Accountability*, *supra*, at 759-810 (discussing progression of *Youngstown*, 343 U.S. 579; *Nixon*, 418 U.S. 683; *Fitzgerald*, 457 U.S. 731; *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Nat'l Treasury Emps.*, 492 F.2d 587; *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972); *Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973); *Murphy v. Ford*, 390 F. Supp. 1372 (W.D. Mich. 1975); *Minnesota Chippewa Townsend v. Carter*, 476 F. Supp. 1070 (N.D. Tex. 1979); *Darr v. Carter*, 640 F.2d 163 (8th Cir. 1981); *Chas. T. Main Int'l v. United States*, 509 F. Supp. 1162 (D. Mass. 1981); *Borders v. Reagan*, 518 F. Supp. 250 (D.D.C. 1981); *Cable News Network v. American Broadcasting Companies*, 518 F. Supp. 1238 (N.D. Ga. 1981); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990); *City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761, 764–68 (E.D.N.Y. 1990)).

[10] *Johnson* must also be placed in its unique historical context. Southern states sued to enjoin President Johnson from enforcing the Reconstruction Act. *See Suing the President*, *supra*, at 1693. In a follow-up case challenging the *same* law—this time against the President's subordinates—the Court *still* refused to reach the merits, concluding they raised nonjusticiable "political questions." *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1868).

AMERICAN OVERSIGHT

constitutionality.'") (quoting *Franklin*, 505 U.S. at 801); *id.* at 474 ("[A] ssum[ing] … that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA.") (citing *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981)). To be sure, injunctive relief against the President is an "extraordinary" measure, but not novel. There is almost always a subordinate cabinet official that the court may enjoin. *See, e.g.*, *Youngstown*, 343 U.S. at 583 (majority opinion);[11] But there are times—like this—where the President may be appropriately enjoined to stop a constitutional violation. *See, e.g.*, *Nat'l Treasury Emps.*, 492 F.2d at 615–16 (granting declaratory relief against the President for violating the Federal Pay Comparability Act). In such a case, this Court necessarily has authority to grant injunctive relief against the Chief Executive.

C. The Court Has Jurisdiction to Enter Relief Against Agency Defendants.

While presidential actions are not subject to review under the APA, *Franklin*, 505 U.S. at 801, they "may still be reviewed for constitutionality" by evaluating subordinate executive agency actions implementing them. *Id.* (citing *Youngstown*, 343 U.S. 579; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 405 (1935)).

Although Defendants argue that "Executive Order No. 13990 does not call for or contemplate any role for the Agency Defendants in the revocation" and that "the Executive Order is self-executing," ECF 98 at 19, this is contrary to how the Executive Branch functions and to the agency actions evident here. "Because the President almost never

[11] *See also* Ray, *Prerogative to Accountability*, *supra*, at 763 (the *Youngstown* Court enjoined Commerce Secretary Sawyer "as a convenient way to reach the merits of the steel companies' challenge to President Truman's executive order without addressing the scope of *Mississippi v. Johnson*.").

AMERICAN OVERSIGHT

personally executes his orders, injunctive relief against his subordinates" is the method to obtain review of the constitutionality of presidential actions.[12] President Biden will not be personally policing the border in Northern Montana for violations of the Executive Order. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 523 (2014) (noting "the President's continuous need for the assistance of subordinates") (quotations omitted).

President Biden surely was able to *promulgate* the Executive Order without subordinate agency action—that is, he was able to issue the Executive Order himself (the issuance was "self-executing" in this sense). But any injunctive relief would be forward-looking against any future enforcement actions for violations of its commands, not against the promulgation of the Executive Order itself. Plaintiffs do not (and could not) seek relief against the Executive Order's issuance because courts do not wield a "writ of erasure" against adopted textual provisions, whether statutes or executive enactments.[13]

As with statutes, so it is with executive actions that have the force of law: this Court has no power to reverse the President's *issuance* of the Executive Order. The relevant "events" for purposes of injunctive relief are the current and future actions to enforce

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[12] William Powell, *Policing Executive Teamwork: Rescuing the APA from* Presidential Administration, 85 Mo. L. Rev. 71, 103 (2020)

[13] *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936, 938 (2018) ("[t]he federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute … All [an] injunction does is prevent the named defendants from *enforcing* that law while the court's injunction remains in place.") (citing *Ex parte Young*, 209 U.S. 123 (1908)) (emphasis in original;); *cf. Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment … cannot make even an unconstitutional statute disappear.") (citation omitted); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts … to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.") (McConnell, J.).

AMERICAN OVERSIGHT

the Executive Order, whether through denials of permits or to penalize violations of the Order's prohibitions of the maintenance and operation of the Keystone XL Pipeline across the border. The Executive Order's issuance, solely by the President, is not the relevant target of judicial relief.

Federal courts have long exercised the power to enjoin federal officers from violating the Constitution or statutes. *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).

As a result, even if the Court were to disagree with Plaintiffs' arguments relating to their APA claims, that would not affect their right to relief on their constitutional claim (Count I) or their claim that the Executive Order conflicts with a statute enacted by Congress (Count II). There is a long history of federal courts granting relief on such claims. *See, e.g.*, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *Stark v. Wickard*, 321 U.S. 288, 310 (1944). "Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). "When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id.* Thus, Plaintiffs can bring a "non-statutory review action," 33 Charles Alan Wright, *et al., Federal Practice and Procedure* § 8304 (2d ed.), and courts have authority to review federal executive action that violates constitutional or statutory commands. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327–32 (D.C. Cir. 1996).

AMERICAN OVERSIGHT

As any injunctive relief looks forward to future agency action, these "non-statutory review" claims against the Cabinet Defendants here are not in any way dependent on the requirements of the APA, including that there be final agency action. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 n.9 (10th Cir. 2005) (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'").

Defendants argue that Plaintiffs' injuries are not redressable because the Cabinet Defendants have no enforcement role regarding the Executive Order. ECF 98 at 19. But Plaintiffs have alleged that the Cabinet Defendants have regulatory responsibilities regarding the KXLP project that will necessarily require them to apply the Executive Order. *See* ECF 71 at ¶¶ 9–20. These allegations are sufficient to withstand a motion to dismiss. *See Make the Rd. New York v. Pompeo*, 475 F. Supp. 3d 232, 252–53 (S.D.N.Y. 2020) (rejecting motion to dismiss for lack of standing on ground that agency defendants did not have responsibility for challenged actions because "Plaintiffs allege in their complaint, however, that HHS is responsible for implementing the [presidential] Proclamation … and that the Proclamation assigns to HHS a variety of responsibilities regarding its implementation and enforcement[.]" (citing *Franklin*, 505 U.S. at 828).

On this point, Defendants also cite inapposite cases involving State governments facing diffused law-enforcing power. ECF 98 at 21–22. President Biden is head of the Executive Branch, and the Cabinet Defendants are all subject to his direction, *see* U.S. Const. art. II, § 1, cl. 1; this is very different from cases where State executive officials were facing suits for injunctive relief where they had literally no control over those tasked

AMERICAN OVERSIGHT

with enforcing the challenged provision. *See Okpalobi v. Foster*, 244 F.3d 405, 422–26 (5th Cir. 2001) (en banc) (civil enforcement scheme enforced by private plaintiffs); *6th St. Bus. Partners LLC v. Abbott*, No. 1:20-CV-706-RP, 2020 U.S. Dist. LEXIS 130814, at *7 (W.D. Tex. July 24, 2020) (while Texas governor is "empower[ed] to promulgate executive orders, [he is not empowered] to enforce them.").

Furthermore, the Cabinet Defendants here have already taken action to implement the Executive Order. As part of the overall KXLP project, TC Energy had submitted an application for an Individual Permit under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. *See* ECF 71 at ¶ 54. After President Biden's revocation of the cross-border permit in the Executive Order, the Army Corps of Engineers initiated communication with TC Energy on March 2, 2021, which TC Energy described as a "letter … request[ing] that TC Energy provide the Corps with clarification regarding the Project's current purpose and need in light of Executive Order 13990, which revoked the previously issued Presidential Permit that is required to construct and operate the project at the international border." ECF 98-9.

Taking the hint, TC Energy asked that the Corps to "suspen[d] . . . review of its application" while it evaluated the continued viability of the Keystone XL Pipeline project in light of the Executive Order. ECF 98-9. The Corps then informed TC Energy that it would not merely "suspend" its consideration of the permit application, but "decided to administratively withdraw [its] application for a Department of the Army permit while [TC Energy] continue[d] to consider [its] path forward," terminating the process and requiring it to start over with a new application, if desired. ECF 98-8.

AMERICAN OVERSIGHT

Defendants dismiss this agency action as a mere "collateral consequence" of the Executive Order, rather than an example of its implementation. ECF 98 at 20. They reason that "[t]he Army Corps' suspension of its own administrative process was not a necessary step in the revocation of the permit for the border crossing [in the Executive Order]." ECF 98 at 21. But this reverses the causation here: Plaintiffs' claim is not that the Army Corps' withdrawal of the application somehow caused the temporally earlier Executive Order, or was a necessary subsequent action to make the Executive Order effective; rather, the claim is that the Army Corps implemented the Executive Order by acting based on it, with the clear implication that TC Energy seeking further permits for the KXLP project would be futile. This supports the common-sense intuition that the Executive Order will be implemented by the same agencies that have been involved in regulatory approvals for the KXLP project for over a decade. Defendants' apparent contention that subordinate executive officials will ignore the Executive Order when making subsidiary determinations for the KXLP project is not viable either in theory or in fact. Injunctive and declaratory relief against the Army Corps and the other Cabinet Defendants would prevent implementation of an unlawful Executive Order without raising the separation-of-powers concerns of direct relief against the President.

D. Plaintiffs Have Standing.

1. Plaintiffs Have Alleged Concrete and Particularized Injuries.

With the stroke of a pen, the President robbed Plaintiffs and their citizens of millions of dollars in tax revenue and income. Defendants' own analyses confirm that Plaintiffs have cognizable injuries because they will suffer numerous direct and indirect

AMERICAN OVERSIGHT

economic injuries as a result of Defendants' revocation of the permit for the KXLP. *See Dep't of Commerce*, 139 S. Ct. at 2565–66 (finding states' alleged injuries sufficiently concrete and particularized when they predicted a census undercount based on illegal third-party acts motivated by fears that were legally impossible to realize); *El Paso Cty. v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020) ("Economic injury is a quintessential injury upon which to base standing.") (quotations omitted). Plaintiffs' standing theories are amply supported by *Defendants'* thorough economic analyses in the State Department's 2014 and 2019 FSEISs—which Defendants understandably make no attempt to refute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); ECF 71 at ¶¶ 39–42, 56–60. In sum, Plaintiffs' injuries are "concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. FEC*, 554 U.S. 724, 733 (2008). The President's unlawful actions that have withheld the KXLP's economic and environmental benefits also give rise to standing under the special solicitude and *parens patriae* doctrines. *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

a. The Executive Order Robs Plaintiffs of Specific Tax Revenues.

Defendants' actions are causing Plaintiffs to lose millions in direct tax revenue from the KXLP's construction and operation. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). As in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), Defendants' revocation "directly affects" Plaintiffs' "ability to collect" specific taxes, including franchise taxes, property taxes, and income taxes. *Id.* at 451; ECF 71 at ¶ 40–42, 56–58. Defendants misapply the Fifth Circuit's decision in *El Paso*. Unable to assert *parens patriae* standing

AMERICAN OVERSIGHT

as a local government, El Paso County merely asserted that "the economy of the county at large will be harmed, resulting in a reduction in general tax revenues for the county." *Id.* at 340. Here, however, Plaintiffs have alleged a "direct link between the state's status as a collector and recipient of revenues and the … action being challenged, such as the loss of a specific tax revenue to have standing." *Id.* at. 341 (quotations omitted).

Plaintiffs Texas and Louisiana will suffer a significant loss in direct revenue. ECF 71 at ¶ 61, 78. The Gulf Coast region is one of the world's largest refining hubs and the most important buyer-processor of heavy crude produced globally. ECF 71 at ¶ 65; 2019 FSEIS at S-4–5. Heavy crude—delivered from Western Canada via the KXLP—offers the Gulf Coast's refineries optimal profit margins. *See* ECF 71 at ¶¶ 61–77. Without the KXLP's provision of this heavy crude, refineries must process other grades of oil, which increases costs, diminishes profit margins, and yields lower franchise taxes that will lower Texas state revenues. *See* ECF 71 at ¶¶ 79–83.

Construction of the KXLP would directly support 42,100 jobs and create approximately $2 billion in earnings across multiple plaintiff states. *See* ECF 71 at ¶ 41; 2014 FSEIS at ES-19. Residents of Kansas, Nebraska, South Dakota, and Montana would get about 12,000 of those jobs. 2014 FSEIS at 4.10-17. The halt in KXLP construction and operation directly reduces tax revenues in Kansas, Nebraska, and Montana, which assess state income taxes. *See, e.g.,* ECF 71 at ¶ 58. According to Defendants, the loss of taxes from construction materials and construction worker spending for basic living expenses such as food, housing, gasoline, and entertainment would cost South Dakota $46.5 million, Nebraska $16.5 million, and Kansas $2.7 million. 2014 FSEIS at 4.10-29–30.

AMERICAN OVERSIGHT

Louisiana will also suffer significant revenue losses. ECF 71 at ¶ 78. The KXLP is the state's key to heavy crude and optimal refinery profits. *See* ECF 71 at ¶¶ 61–77; 2019 FSEIS at 1-20. Three of the six contractors building the KXLP were from the Gulf Coast Plaintiff states. ECF 71 at ¶ 77. Louisiana will now lose state corporation tax revenue based on the disappearance of this work. *See*, La. Rev. Stat. Ann. § 47:32, 47:601.

Once operational, the KXLP would generate tens of millions in direct tax revenue for several Plaintiffs. ECF 71 at ¶ 42. The 2014 FSEIS estimated that the KXLP would generate $55.6 million in annual property taxes across South Dakota, Nebraska, and Montana. ECF 71 at ¶ 56; 2014 FSEIS at ES-20. The Montana Department of Revenue now estimates "[i]n its first year of operation, the KXLP would generate an estimated $95,033,723 in property tax revenue across all jurisdictions in Montana." Ex. 1, Decl. of Doug Roehm at ¶ 11.[14] This includes "$15,343,164 in property tax revenue for the State of Montana in the first year of operation." *Id.* ¶ 11(a). Workers hired to permanently maintain the pipeline in certain states would also pay state income taxes. ECF 71 at ¶ 59; 2014 FSEIS at 4.10-31. These are the exact tax revenue damages required by *El Paso* to establish standing. *See El Paso*, 982 F.3d at 341.

b. Plaintiffs Have Special Solicitude Standing.

Plaintiffs are entitled to special solicitude to preserve their quasi-sovereign interests. *See Texas v. United States*, 809 F.3d 134, 159 (5th Cir. 2015) (*Texas I*); *Texas v. United States*, 328 F. Supp. 3d 662, 691 (S.D. Tex. 2018) (*Texas III*). Defendants' revocation

[14] The Court may allow plaintiffs to submit affidavits furthering particularized allegations of fact in support of standing. *See Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983).

AMERICAN OVERSIGHT

harmed Plaintiffs' quasi-sovereign interests because it affected their rights of foreign and interstate commerce. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Plaintiffs, therefore, have an Article III interest in maintaining the constitutional separation of powers as it relates cross-border pipeline permitting. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607–08 (1982).

When they entered the Union, the States surrendered certain sovereign prerogatives, such as the right to regulate commercial relations with foreign powers and their sister States. *See Massachusetts,* 549 U.S. at 519–20. The Fifth Circuit held that Texas and other states could challenge federal immigration policy because they "cannot establish their own classifications of aliens, just as Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] cannot negotiate an emissions treaty with China or India." *Texas I*, 809 F.3d at 153 (citation omitted); *see also id. at* 152–53 (noting DAPA would cause Texas to lose millions of dollars). Plaintiffs, similarly, cannot negotiate a treaty with Canada or regulate the free flow of foreign commerce, including cross-border oil pipelines.

c. Plaintiffs Have Parens Patriae Standing.

"Parens patriae standing allows a state to sue a defendant to protect the interests of its citizens at large." *Texas III*, 328 F. Supp. 3d at 694 (citing *Alfred L. Snapp*, 458 U.S. at 600–02). "[A]n established line of cases … have held that states may rely on the doctrine of parens patriae to maintain suits against the federal government." *Texas v. United States*, 86 F. Supp. 3d at 626 (*Texas II*) (citing *Wash. Utilities and Transp. Comm'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975); *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797

AMERICAN OVERSIGHT

(D. Kan. 1990); *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984)), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

"[T]he State … must have a 'quasi-sovereign interest' in the litigation to sue in its parens patriae capacity." *Hood ex rel. Miss. v. Microsoft Corp.*, 428 F. Supp. 2d 537, 542 (S.D. Miss. 2006) (citing *Alfred L. Snapp*, 458 U.S. at 607). Quasi-sovereign interests fall into two categories: (1) "the health and well-being—both physical and economic—of its residents in general"; and (2) "not being discriminatorily denied its rightful status within the federal system." *Id.* at 542–43 (quoting *Alfred L. Snapp*, 458 U.S. at 609).

Alfred L. Snapp does not, as Defendants claim, preclude *parens patriae* suits against the federal government. ECF 98 at 32. Like another court in this district noted, the language cited by Defendants in *Alfred L. Snapp* was dictum and the federal government was not a defendant in that case. *See Texas III*, 328 F. Supp. 3d at 696. And "[i]n *Massachusetts v. EPA*, the Court specifically rejected the argument that state *parens patriae* standing is categorically barred in suits against the federal government." *Id.* at 697 (citing *Massachusetts*, 549 U.S. at 520 n.17). *Massachusetts* clarified that *parens patriae* standing is prohibited where a state seeks to "protect her citizens from the operation of federal statutes," but not where it wishes "to assert its rights under federal law." 549 U.S. at 520 n.17.

First, Plaintiffs satisfy the *Massachusetts* standard because they challenge the President's revocation decision as a violation of the Constitution's systems of enumerated and separated powers. The States, moreover, seek to vindicate on behalf of their citizens the presumption, absent a contrary Congressional regulation, in favor of the free flow of commerce with foreign nations and among the states. *See* ECF 71 at ¶¶ 89–90; *Welton v.*

AMERICAN OVERSIGHT

Missouri, 91 U.S. 275, 282 (1875) ("The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce … is equivalent to a declaration that inter-State commerce shall be free and untrammelled."); *see also Japan Line, Ltd. v. Cty. of L.A.*, 441 U.S. 434, 448 (1979) (federal uniformity is essential for foreign commerce).

Second, Plaintiffs satisfy the *Massachusetts* standard because they seek to vindicate the States' and their citizens' rights under a federal statute. "The [*Massachusetts*] Court suggested that this type of litigation, which 'turn[ed] on the proper construction of a congressional statute,' presented 'a question eminently suitable to resolution in federal court.'" *Texas III*, 328 F. Supp. 3d at 691 (quoting *Massachusetts*, 549 U.S. at 516). Plaintiffs also rights under the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, 125 Stat. 1289–1290 (Dec. 23, 2011). The proper construction of Pub. L. 112-78 directly affects Plaintiffs and their citizens. *Massachusetts*, 549 U.S. at 516.

Plaintiffs are entitled to special solicitude and *parens patriae* standing.

i. Economic and Physical Well-Being

Defendants' revocation will devastate the well-being of Plaintiffs' communities and economies. KXLP's construction and operation would create and sustain thousands of jobs, bolster energy independence, and infuse high-poverty areas with much needed local tax revenue. *See* ECF 71 at ¶ ¶ 31, 38–42, 56–60, 84.

Defendants' own analyses—which they don't contest—demonstrate that direct economic activity is dwarfed by the substantial indirect and induced economic activity associated with the KXLP. ECF 71 at ¶ ¶ 39–42; 2014 FSEIS at ES-19-20. This indirect activity includes all goods and services that would be purchased by contractors such as

AMERICAN OVERSIGHT

concrete, fuel, surveying, welding materials, and earth-moving equipment. 2014 FSEIS 4.10-14. Induced activity includes the spending of earnings that would be received by employees working for either contractors or for any supplier of goods and services, such as access road construction crews, welders, employees of pipe manufacturers, and food suppliers. ECF 71 at 39 (citing 2014 FSEIS at 4.10-14). Indirect and induced spending would total approximately $1.3 billion. 2014 FSEIS at 4.10-2.

These benefits would not end with construction. Once operational, the KXLP would generate tax revenue, jobs, and other economic benefits. ECF 71 at ¶¶ 39–42, 59–60. For example, for its first year of operation in Montana, the KXLP would generate: $30,202,721 in revenue paid directly to county governments; $5,070,018 in revenue for county schools; $27,784,235 in revenue for local schools; $2,234,333 in revenue for miscellaneous entities and fire districts; $5,499,483 for cities; and $8,899,769 in additional taxes and fees. Roehm Decl. at ¶ 11(b)-(g). These revenues would provide sorely needed resources to low income and rural areas. ECF 71 at ¶ 57. Several poor Montana counties would see their property tax revenues increase anywhere from 27% to 117%. ECF 71 at ¶ 57. South Dakota, Nebraska, and Kansas would see similar benefits. *See* 2014 FSEIS at 4.10-33–34. The Gulf States' general public revenues would grow over the short and long terms as well. *See* ECF 71 at ¶ 78. Plaintiffs and their communities would also gain tens of millions in annual tax revenue from the regulators, residents, and businesses that refine, transport, and export KXLP's crude oil. ECF 71 at ¶ 60.

Three smaller projects connected to the KXLP would affect numerous local economies. First, the Bakken Marketlink Project ("BMP") would transport North Dakota and

AMERICAN OVERSIGHT

Montana oil from the Bakken formation to the KXLP. Construction of the BMP would create an estimated 1,000 jobs and $59.4 million in earnings. 2014 FSEIS at 4.10-10. The BMP would deliver up to 100,000 bpd of oil to Oklahoma and the Gulf Coast. 2014 FSEIS at ES-9. Second, the Big Bend to Witten Transmission Line Project would provide reliable electricity for KXLP's continuing operation by constructing a new transmission line originating in South Dakota. 2014 ES at ES-9. This would create 1,100 jobs and $47.6 million in earnings. 2014 FSEIS at 4.10-10. Finally, electrical power for the KXLP would be obtained from local power providers. Electrical distribution lines and substations would create approximately 3,100 jobs and $137 million in earnings. 2014 FSEIS at 4.10-10. In Montana, the KXLP would have been the largest customer for several electrical co-ops, which would reduce rural consumers' energy bills. *See* Ex. 2, Decl. of Tary Hanson at ¶ 6; Ex. 3, Decl. of Michael Hoy at ¶ 7.

The KXLP would generate enormous benefits for Plaintiffs. But those benefits will never materialize if President Biden's Executive Order stands.

ii. Rightful status within the federal system

Each State "also has an interest in securing observance of the terms under which it participates in the federal system." *Alfred L. Snapp*, 458 U.S. at 607–08. "In the context of *parens patriae* actions," the Court has explained, "this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Id.* at 608. Under the Court's caselaw, states may vindicate Commerce Clause interests as *parens patriae*. For example, the Court said a state "need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the

AMERICAN OVERSIGHT

participation by its residents in the free flow of interstate commerce." *Id.* at 608.

As discussed above, under *Massachusetts v. EPA*, the President's decision to revoke the KXLP affected Plaintiffs' quasi-sovereign interests by halting a major foreign and interstate commercial project. *See Texas II*, 86 F. Supp. 3d at 625 (noting that *parens patriae* standing and special solicitude standing theories are "at least indirectly related"). And States have *parens patriae* standing to challenge violations of the Interstate Commerce Clause because they lack the power to control or interfere with interstate commerce. *See, e.g.,* M*aryland v. Louisiana,* 451 U.S. 725, 739 (1981) (direct injury to plaintiff states from discriminatory tax was supported by the states' interest in protecting citizens from substantial economic injury). States, likewise, have the same interest in enforcing the Foreign Commerce Clause. By ratifying the Constitution, states ceded their authority to regulate foreign and interstate commerce to Congress, so they must have some orderly mechanism to challenge harmful commercial regulations propounded by the wrong constitutional actor. *See Texas I*, 809 F.3d at 153–54 (citing *Massachusetts*, 549 U.S. at 519). Defendants' have violated the Commerce Clause and have resultantly inflicted substantial economic injuries on the plaintiffs, their communities, and their citizens.

2. Plaintiffs' Injuries are Redressable.

Finally, as discussed above, if this Court grants Plaintiffs' requested relief, it will redress Plaintiffs' injuries. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The KXLP—much of which is already constructed—would deliver strong returns for any company that chose to resume the project. But as a matter of business sense, no company with the requisite investment capital would ever revive the KXLP project—not as long

AMERICAN OVERSIGHT

as the President wields the unliteral authority to revoke permission for such projects without notice, process, or legitimate justification. *See Dep't of Commerce*, 139 S. Ct. at 2566. Doing so would likely violate the company's fiduciary responsibilities. That company would know that it could reasonably face the same fate as TC Energy.

The Fifth Circuit has found redressability under less-certain facts than this case. In *Hanson v. Veterans Administration*, 800 F.2d 1381 (5th Cir. 1986), a plaintiff claimed discriminatory appraisals undervalued his property, located in a racially mixed neighborhood. *Id.* at 1384. The $7,000 delta between the appraised value and contract price prevented plaintiff from securing necessary financing. *Id.* at 1385. Although it was uncertain whether a discrimination-free appraisal would result in a higher valuation, the Court found redressability because it "*might* permit [plaintiff] to purchase" the house. *Id.* at 1386 (emphasis added). Under that standard, and due to the clear economic benefits that would follow a favorable judgement, Plaintiffs' injuries are clearly redressable.[15]

Plaintiffs satisfy multiple theories of standing and this Court has jurisdiction to adjudicate these claims.

II. VENUE IS PROPER

Where, as here, "a defendant is an officer or employee of the United States," venue is proper "in any judicial district in which … the plaintiff resides [or where] a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of

[15] Plaintiffs note that special solitude standing lessens their redressability burden. *See Texas III*, 328 F. Supp. 3d. at 691 (citing *Texas I*, 809 F.3d at 159); *see also id.* ("at the very least, it appears to shore up weaknesses presented by attenuated causation and redressability arguments") (citing *Massachusetts*, 549 U.S. at 523).

AMERICAN OVERSIGHT

property that is the subject of the action is situated." 28 U.S.C. § 1391(e)(1). In their First Amended Complaint, Plaintiffs alleged that "[v]enue lies [in the Southern District of Texas] because Plaintiff the State of Texas is a resident of this judicial district, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District." ECF 71 at ¶ 23.

Defendants attempt to bootstrap an argument against the standing of the State of Texas into the analysis of whether venue is proper in this District. ECF 98 at 37–38. This is erroneous for two reasons.

First, the conflation of standing with venue conflicts with the well-established rule that "venue [is] determined at the outset of litigation and [is] not affected by subsequent events." *Smilde v. Snow*, 73 F. App'x 24, 26 (5th Cir. 2003); *see also Holmes v. Energy Catering Servs., L.L.C.*, 270 F. Supp. 2d 882, 885 n.1 (S.D. Tex. 2003) (concluding that "[u]nder section 1391, venue is determined when the suit is filed and is not affected by subsequent events such as the dismissal of a defendant, as occurred here"). Even if the Court found that Texas lacked standing, this would not affect the propriety of venue.

The cases cited by Defendants are inapposite. Defendants first cite *Miller v. Albright*, 523 U.S. 420 (1998). ECF 98 at 37. There, the district court found that venue was improper after the Texas-based plaintiff had already been dismissed for lack of standing. *Miller*, 523 U.S. at 426–27. Defendants state that of the nine justices, "none disputed the straightforward conclusion that venue was improper if the Texas plaintiff in fact lacked standing." ECF No. 98 at 37 n.15. But the propriety of the venue transfer was not before the Court, and the Texas-based plaintiff "never indicated any intent to challenge his

AMERICAN OVERSIGHT

dismissal from the suit." *Miller*, 523 U.S. at 448 (O'Connor, J., concurring).

Defendants also rely on *Inst. of Certified Prac., Inc. v. Bentsen*, 874 F. Supp. 1370 (N.D. Ga. 1994), for the proposition that venue is improper where the only plaintiff that resided in the district lacks standing. ECF 98 at 37. In that case, there were two plaintiffs, who the court labeled as "Institute" and "Shinn." *Bentsen*, 874 F. Supp. at 1371. Having found that Institute lacked standing, the court held that venue was improper with respect to Shinn because the "plaintiff cannot manufacture venue by *adding the Institute as a party*." *Id.* at 1372 (emphasis added). *Bentsen* cited *Nat'l Distillers and Chemical Corp. v. Dep't. of Energy*, 487 F. Supp. 34 (D. Del. 1980) in support; that case involved "a number of facts which strongly suggest that the transfer [of property] was made for the sole purpose of obtaining venue in this district," *id.* at 37, indicating the concerns of the *Bentsen* court. The district court in *Miller* also apparently faced collusive behavior. *See Miller v. Christopher*, 870 F. Supp. 1, 2 (D.D.C. 1994) (explaining that after the defendant moved to dismiss or transfer venue, the non-U.S. citizen plaintiff added her father, a Texas resident, as a co-plaintiff). There is no allegation of improper collusion here.[16]

Second, the Court need not even reach the question of whether Texas has standing because "[i]t is not necessary … for all Plaintiffs to demonstrate standing; rather, 'one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'"

[16] Consultation with a leading treatise confirms this reading of these two cases. In Wright and Miller's *Federal Practice and Procedure*, the only two instances listed for venue being improper under § 1391(e) in cases involving multiple plaintiffs is where (1) venue is based on the joinder of a plaintiff with a frivolous claim, or (2) a plaintiff has been improperly and collusively joined for the purpose of creating venue in the district. 14D Charles Alan Wright, *et al., Federal Practice and Procedure* § 3815 (4th ed.).

AMERICAN OVERSIGHT

Texas II, 86 F. Supp. 3d at 616, *aff'd*, 809 F.3d 134 (5th Cir. 2015) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

If "one of the Plaintiff States has standing, this Court need not analyze the standing of any other plaintiff." *Texas v. United States,* No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133114, at *57 (S.D. Tex. July 16, 2021) (citing *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017). As Defendants assert that "Texas *in particular* fails to establish its standing to sue," ECF 98 at 37 (emphasis added), presumably they believe the claims of other Plaintiffs are stronger. As explained earlier, Texas has adequately alleged its standing under Article III. But if Montana's standing is the clearest to evaluate, there is no need to analyze the standing of other Plaintiffs, including Texas. Defendants' attempt to conflate the standing analysis with that for venue should not be entertained.

III. EXECUTIVE ORDER 13990 Violates the Separation of Powers

President Biden's revocation of the KXLP permit in Executive Order 13990 improperly encroaches on Congress's Article I powers to regulate foreign and interstate commerce. Congress regulates cross-border commercial instrumentalities like transnational oil pipelines. Congress expressly authorized the KXLP in 2011. Congress has repeatedly signaled its approval of the project. Congress has never acquiesced to the President's contrary policy preferences regarding the KXLP. And even if Congress had remained silent on the issue, the President lacks the constitutional power to unilaterally revoke a duly authorized cross-border permit absent some legitimate national security justification. No such justifications exist. So the President's residual foreign affairs powers are neither implicated nor strong enough to justify the President's action here. And

AMERICAN OVERSIGHT

when the Executive Branch invades Congress's constitutional domain, the Court can and should restore proper constitutional balance.[17]

A. Congress Has Primacy Over Matters of Foreign Commerce

The Constitution vests the power to regulate foreign and interstate commerce in Congress—not the President. U.S. CONST. art I, § 8, cl. 3. Congress's foreign commerce power is "exclusive and plenary." *Bd. of Trustees v. United States*, 289 U.S. 48, 56 (1933); *see also Japan Line*, 441 U.S. at 448 (suggesting that Congress's power over foreign commerce is greater than its domestic counterpart). The Foreign Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." *Gibbons v. Ogden*, 22 U.S. 1, 193–94 (1824); *accord United States ex. rel. Turner v. Williams*, 194 U.S. 279, 290 (1904); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875); *United States v. Holliday*, 70 U.S. 407, 417 (1865). As a constitutional matter, therefore, Congress possesses the authority to authorize, prohibit, and regulate a transnational oil pipeline cross-border permit.

The President is Commander-in-Chief and accordingly possesses certain implied Article II powers over foreign affairs. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). He has the sole power to negotiate treaties, nominate the Nation's ambassadors, engage in direct diplomacy, and recognize

[17] Plaintiffs drop their nondelegation claim. *See* ECF 98 at 58.

AMERICAN OVERSIGHT

foreign governments. *See Zivotofsky v. Kerry*, 576 U.S. 1, 13–14 (2015). The President also has broad authority to protect national security. *See Youngstown*, at 343 U.S. at 645 (Jackson, J., concurring). Defendants rely on the President's implied foreign affairs powers to justify his action here.

But this foreign affairs power does not swallow Congress's foreign commerce power. *See Zivotofsky*, 576 U.S. at 16 ("[M]any decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may 'regulate Commerce with foreign Nations ….'"; *Medellin v. Texas,* 552 U.S. 491, 524 (2008) ("The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'") (quoting *Youngstown*, 343 U.S. at 585) (majority opinion); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations safeguarding essential liberties"). The President's authority over foreign affairs is far from absolute and does not displace that of Congress—specifically when it relates to questions of foreign commerce.

But Defendants advance a near-absolute theory of Executive Power that would upend our constitutional order. And the President's unilateral revocation of the KXLP—which coopts commercial regulatory powers belonging to Congress—manifests that dangerous theory. In such instances, courts must enforce the separation of powers. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 201(2012); *Medellin*, 552 U.S. at 523; *Youngstown*, 343 U. S. at 587; *Panama Ref. Co.*, 293 U. S. at 433.

Courts generally use Justice Jackson's *Youngstown* framework when evaluating

AMERICAN OVERSIGHT

separation-of-powers challenges to Presidential action. *See Medellin*, 552 U.S. at 524 (discussing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). This framework recognizes that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635. Here, Congress has spoken clearly, and that should resolve the question. But even if it failed to speak to the KXLP matter, the President may not annex Congress's Article I, § 8 powers and regulate foreign commerce as he, alone, sees fit.

B. Congress Expressly Authorized the Keystone XL Pipeline in 2011

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and courts can sustain his actions "only by disabling the Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637–38. Congress has expressly and impliedly approved the KXLP permit—an implement of foreign and interstate commerce—so the President's foreign affairs powers must yield.

After years of administrative delay, the State Department in November 2011 announced it could not complete the necessary review to make a decision on the KXLP permit until at least the first quarter of 2013.[18] One month later in response, Congress enacted Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112–78, 125 Stat. 1289–90 (Dec. 23, 2011), *which President Obama signed*. Section 501 mandated that "not later than 60 days after the date of enactment of this Act, the

[18] President Obama touted Keystone's importance during a 2012 campaign event and suggested the delay in KXLP's approval was due to reviews of health and safety protocols. *See* Joe Wertz, *What Obama's Cushing Visit Means for Oklahoma and the Keystone Pipeline*, NPR (Mar. 23, 2012), https://stateimpact.npr.org/oklahoma/2012/03/23/what-obamas-cushing-visit-means-for-oklahoma-and-the-keystone-pipline/.

AMERICAN OVERSIGHT

President, acting through the Secretary of State, shall grant a permit under Executive Order No. 13337 ... for the Keystone XL pipeline project." *Id.* § 501(a). The only exception to this mandate was "if the President determines that the Keystone XL pipeline would not serve the national interest." *Id.* § 501(b)(1).

If he reached a negative national interest determination, Section 501 required the President to submit a report to Congress that "provides a justification for [the] determination including consideration of economic, employment, energy security, foreign policy, trade, and environmental factors" "not later than 15 days after the date of the determination." *Id.* § 501(b)(2). The statute then expressly dictated the "[e]ffect of no finding or action." *Id.* § 501(b)(3). If "a determination is not made … and no action is taken by the President … not later than 60 days after the date of enactment of this Act, the permit for the Keystone XL pipeline … shall be in effect by operation of law." *Id.*

Neither the President nor the State Department made the requisite determination that the KXLP disserved the national interest, and neither submitted the required report to Congress within the prescribed timeframe. The State Department recommended that the President deny the application due to "the fact that the Department does not have sufficient time to obtain the information necessary to assess whether the project … is in the national interest."[19] On the other hand, the announcement admitted the State Department was unable to "determine that the Keystone XL would not serve the national interest." *Id.* Either way, the Department failed to produce a negative national interest

[19] Press Release, Denial of the Keystone XL Pipeline Application, U.S. Dep't of State, (Jan. 18, 2012), https://2009-2017.state.gov/r/pa/prs/ps/2012/01/181473.htm.

AMERICAN OVERSIGHT

determination and therefore didn't avail the administration of the exception Congress provided in § 501. *Id.* (emphasizing that the "denial" wasn't a national interest determination by "not preclude[ing] any subsequent permit application").

When President Obama accepted the State Department's recommendation, he painstakingly explained that his denial wasn't a negative national interest determination: "[t]his announcement is *not a judgment on the merits of the pipeline*, but the arbitrary nature of a deadline that prevented the State Department from gathering the information necessary to approve the project and protect the American people."[20] And as noted above, the President never submitted the negative national interest report to Congress. "We need more time" wasn't a statutory option.

The President failed to satisfy the terms of § 501(b). As a result, the KXLP permit was granted by operation of law. The Executive Order violates federal law because § 501 did not give the President power to revoke the KXLP. His only discretionary authority was set forth in § 501(b)(1). And the only conditions put on the permit were that the project comply with applicable federal laws and regulations. *See* § 501(c). Congress has constitutional authority over foreign commerce. *Zivotofsky*, 576 U.S. at 16; *Gibbons*, 22 U.S. at 193–94. The President's power over the KXLP consisted of Congress's delegation in § 501(b)(1). *Youngstown*, 343 U.S. at 637–38; *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (invalidating executive agreement regulating Canadian seed potato imports that conflicted with statute).

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[20] Press Release, President Barack Obama, Statement by the President on the Keystone XL Pipeline (Jan. 18, 2012) (emphasis added), https://obamawhitehouse.archives.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline.

AMERICAN OVERSIGHT

Executive Order 13990 is therefore contrary to law and unconstitutional.

C. Even Absent Pub. L. 112-78, The President Lacks the Power to Unilaterally Revoke this Oil Pipeline Cross-Border Permit.

"When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his independent powers …." *Youngstown*, 343 U.S. at 637. There, "the validity of the President's action … hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch." *Dames & Moore*, 453 U.S. at 668. Courts consider whether Congress has "enacted legislation, or even passed a resolution, indicating its displeasure with the" action. *Id.* at 687.

They also consider whether Congress has acquiesced in a "particular exercise of Presidential authority." *Medellin*, 552 U.S. at 528; *see also id.* at 531 (confining acquiescence inquiry to the "narrow set of circumstances" directly supported by past practice). But "past practice does not, by itself, create power." *Medellin*, 552 U.S. at 532. Past practice—when systematic, unbroken, and unquestioned—"can raise a presumption that the action ha[s] been taken in pursuance of [Congressional] consent." *Id.* 531 (cleaned up). Defendants here cannot establish this presumption, nor can they overcome Congress's express opposition to this specific exercise of power.

The Supreme Court has observed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss-Wright*, 299 U.S. at 319. But in the same breath the Court reaffirmed that the President's foreign affairs powers, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. And the Constitution empowers Congress to both regulate foreign commerce and declare war.

AMERICAN OVERSIGHT

U.S. CONST. art. II, § 8. So while the President may be the Nation's sole representative with foreign nations, he doesn't dictate foreign policy alone. Indeed, the President must even exercise his enumerated foreign affairs powers in concert with Congress. *See id.* § 2 (requiring Senate consent to make treaties and commission Ambassadors).

Reaffirming these structural limitations on executive power, the Court has repeatedly explained that "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky*, 576 U.S. at 21. The *Zivotofsky* Court moreover noted "[i]t is essential that the congressional role in foreign affairs be understood and respected." *Id.*; *id.* at 16; *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over both interstate and foreign commerce is not open to dispute …."; *Turner v. Williams*, 194 U.S. at 290 ("[T]he power to regulate commerce with foreign nations … includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States …."; *License Tax Cases*, 72 U.S. (5 Wall.) 462, 470 (1866) (Congress may grant licenses to engage in interstate and international commerce).

The Foreign Commerce Clause is designed, in part, to prevent discriminatory actions that prevent the free flow of commerce. *See, e.g., Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81 (1992) (states may not discriminate against foreign commerce with compelling justification); *Japan Line*, 441 U.S. at 434. So Congress's inaction on foreign commercial regulation is not tantamount to acquiescence, but rather a conscious decision to promote the free flow of commerce. The same is true for interstate commerce. *See Welton v. Missouri*, 91 U.S. 275, 282 (1875) ("The fact that Congress has

AMERICAN OVERSIGHT

not seen fit to prescribe any specific rules to govern inter-State commerce … is equivalent to a declaration that inter-State commerce shall be free and untrammelled.").

But no such "dormant" authority allows Presidents to unilaterally revoke a cross-border oil pipeline in a time of peace. The KXLP is clearly a species of economic intercourse between nations. Both the history of the Foreign Commerce Clause and the relationship between Congress and the Executive Branch in this arena demonstrate that the President lacked the independent authority to revoke the KXLP permit.

Defendants argue that the President may act as he did because Congress has acquiesced to the Executive Branch's supervision of this subject matter—whether to permit or reject cross-border projects. ECF 98 at 44–48. Yet where a claim of executive power is "expressed in broad terms," but that same power has in practice been "exercised quite narrowly," courts will find Congressional acquiescence only where the claimed power has been both exercised by the executive and implicitly approved by the Congress. *See Kent v. Dulles*, 357 U.S. 116, 127–28 (1958). Defendants have not, and cannot identify "a systematic, unbroken, executive practice [of axing major international energy projects], long pursued to the knowledge of the Congress and never before questioned" "which may be treated as a gloss on 'Executive Power' vested in the President …." *Dames & Moore*, 453 U.S. at 686 (quotations omitted). Far from it.

1. History of the Foreign Commerce Power

a. The Constitutional Convention

The Framers entrusted Congress with the power to regulate foreign commerce, even when that regulation implicated other foreign affairs issues. Due to defects in the

AMERICAN OVERSIGHT

Articles of Confederation, the Philadelphia delegates in 1787 were particularly concerned with *who* would determine foreign policy and regulate foreign commerce. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976) ("[A] compelling reason for the calling of the Constitutional Convention of 1787 … was the fact that the Articles [of Confederation] essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased."). By design, the Foreign Commerce Clause empowered Congress to establish national uniformity over commerce with foreign nations so that the country could act as a single economic unit. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 114 (Jonathan Elliot ed., 2d ed. 1836) (draft resolution of James Madison). When a Convention proposal would have required a supermajority vote by Congress to regulate foreign commerce, James Madison fought it *because* it would have undermined Congress's ability to retaliate against discriminatory tariffs imposed by a foreign country. *See* JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 629 (E.H. Scott ed., The Lawbook Exchange 2003). So even in areas where foreign commercial regulation and broader foreign policy issues overlapped, the Framers intended Congress—through the Foreign Commerce Clause—to hold the prevailing authority.

b. The Early Republic

Congress controlled foreign commercial affairs in the early Republic even as presidential power expanded. Almost from its inception the U.S. implemented trade law that

AMERICAN OVERSIGHT

guarded its economic security by restricting imports or exports with rival powers.[21] Yet President Washington "respected Congress's significant foreign affairs prerogatives" and "never … regulated foreign commerce."[22] Congress delegated broader powers to Presidents Adams, Jefferson, and Madison to wage economic warfare.[23]

Acting as an umpire, the Court in a series of cases upheld these congressional delegations, while checking executive impulses to expand their scope. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding U.S. commander liable who seized a neutral ship in violation of a statute even though he had acted pursuant to a presidential order); *accord Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–41 (1800). Courts in the early republic protected Congress's primacy over foreign commerce.

c. Cross-Border Instrumentalities

Defendants claim that—if history is guide—Presidents have mostly acted alone in approving or rejecting cross-border commercial instrumentalities. But their history is incomplete, at best.

Look no further than their portrayal of President Grant after Congress authorized the first international cable connecting Cuba and Florida in 1867. *See* ECF 98 at 4–5; 22 Op. Att'y Gen. 13, 15 (1898). A French company proposed laying a cable from France to

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[21] Harold Koh & John Yoo, *Dollar Diplomacy/ Dollar Defense: The Fabric of Economics and National Security Law* 26 INT'L L. 715, 720 (1992).

[22] Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 296 (2001).

[23] *See* Koh & Yoo, *supra*, 718–22.

AMERICAN OVERSIGHT

the United States in 1869. *Id.* President Grant initially had reservations about the cable because the French government had given the company a monopoly on communications. *See id.* at 15–16. Inconvenient to Defendants' argument is that President Grant's own words confirm he recognized congressional primacy in the area of cross-border cables: "[I]n the absence of legislation by Congress I was unwilling, on the one hand, to yield to a foreign state the right to say that its grantees might land on our shores while it denied a similar right to our people to land on its shores; and, on the other hand, I was reluctant to deny to the great interests of the world and of civilization the facilities of such communication as were proposed." *Id.* at 16. Grant's predicament acknowledged that *both action and inaction on the cable implicated Congress's foreign commerce power.*

The company ultimately dropped the monopoly rights, but President Grant recognized that "[t]he right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose." *Id.* at 16. Grant's words and deeds respected Congress's command of foreign (and interstate) commerce.

The Executive Branch subsequently did not object to the landing of foreign cables in 1877, 1879, and 1884, observing in 1877 that the power to impose the limited conditions asserted by President Grant had "met the approval of Congress … indicated by the tacit acquiescence of the Congress, and by the expressed approval of individual members of that body …." 22 Op. Att'y Gen. at 19. In 1892 a French company again wanted to land a cable, this time in Virginia. Secretary of State Gresham agreed that because

AMERICAN OVERSIGHT

"[t]here is no Federal legislation conferring authority upon the President to grant such permission, and in the absence of such legislation, Executive action … would have no binding force." *Id.* at 23; *see also id.* at 24 (Secretary of State Olney in 1895 confirming that "in the absence of Federal legislation conferring authority upon the Executive to grant permission, this Department has no power to act in the matter.").

It was not until the late nineteenth/early twentieth century that the Executive began asserting broader authority. *See id.* at 27; *see also Granting of License for the Constr. of a Gas Pipe Line*, 38 Op. Att'y Gen. 163 (1935). But all three branches of government still recognized Congress's authority in this area.

When President Woodrow Wilson permitted a pipeline running between the U.S. and Canada in 1919, he made clear that the permit was subject to any action "by the Congress … confirming, revoking, or modifying in whole or in part the conditions and terms upon which this consent is granted." HEARING REPORT, CABLE LANDING LICENSES, UNITED STATES SENATE, SUBCOMMITTEE ON INTERSTATE COMMERCE 27 (1921).

Western Union in 1920 wished to extend a cable from Florida to a British affiliate offshore. The Executive Branch thought this violated the standard set by President Grant because the British affiliate was a monopoly owned by a foreign power and tried to block the company's action. Judge Augustus Hand noted that it was "most questionable whether the power of the President to regulate cable connection is expressed or implied in the Constitution." *United States v. W. Union Tel. Co.*, 272 F. 311, 318 (S.D.N.Y. 1921), *aff'd*, 272 F. 893, 893 (2d Cir. 1921). Judge Hand pointed out that the President's broad assertion of power over foreign commerce would permit him to block imports such as

AMERICAN OVERSIGHT

opium, silk, steel, or even immigrants. *Id.* at 315; *see also id.* at 313 (rejecting "a failure by Congress to exercise its undoubted powers as proof that some other branch of the government has the right to do what Congress might readily have authorized").

Congress then passed the Kellogg Act, which delegated to the President power to make cable landing determinations subject to a statutory framework. *See* Act of May 27, 1921, ch. 12, 42 Stat. 8 (codified at 47 U.S.C. §§ 34–39); *see id.* §§ 34, 35. Congress likewise enacted regulatory schemes for miscellaneous transmission facilities via the Federal Water Power Act, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. § 824(e); natural gas pipelines via the Natural Gas Act, 52 Stat 822 (1938) (codified as amended at 15 U.S.C. § 717b(a), (c)); and international bridges via the International Bridge Act of 1972, 86 Stat. 731 (1972) (codified at 33 U.S.C. § 535).

In all these examples, Congress instructed the President to regulate cross-border commercial instrumentalities pursuant to *statutory authority*. Yet Defendants portray these explicit and limited delegations as evidence that Congress has now acquiesced to the President's unilateral regulation of all cross-border concerns. *See* ECF 98 at 45–48. But that would have stark implications for the separation of powers—if Congress's specific delegations over certain cross-border facilities and commodities meant that it had abdicated its constitutional authority over all cross-border facilities and commodities. Congress has not, as a matter fact, instructed the President to regulate all cross-border commercial instrumentalities as he sees fit; it defies logic to interpret Congress's retention of authority as an abandonment of it. *See W. Union Tel. Co.*, 272 F. at 313. Even if Congress had failed to regulate cross-border crude oil pipelines, the President would lack the

AMERICAN OVERSIGHT

power to unilaterally revoke the KXLP cross-border permit.

Defendants rely heavily on dicta from *Chicago & Southern Air Lines. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), but for several reasons that case doesn't legitimize the President's unilateral revocation of the KXLP permit. First, *Waterman*'s statements about the President's Commander-in-Chief powers were addressing national security concerns uniquely related to the rapid growth of commercial air travel after World War II. *See id.* at 108 (noting that "aerial navigation routes and bases should be prudently correlated with facilities *and plans for our own national defenses*") (emphasis added). It reasoned that air transportation "carr[ied] new threats" that made it fundamentally different from foreign commerce by rail, water, and vehicles, or communications by wire or radio. *See id.* at 106–08; *see id.* at 111 (noting that the President "has available intelligence services whose reports are not and ought not to be published to the world").[24]

But neither President Biden nor Congress has identified any national security concerns related to the KXLP or Canada, one of our closest allies and trading partners. The KXLP, moreover, enhances U.S. national security by securing energy from a reliable and stable ally. *See* 2019 FSEIS at S-5 (shortfalls in crude oil from Venezuela, Mexico and

[24] *Waterman* also concluded that that the dispute's "national security" and "foreign relations" dimensions rendered it nonjusticiable as a political question. *Id.* at 111. But simply slapping those labels on a dispute doesn't make it unreviewable. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Zweibon v. Mitchell*, 516 F.2d 594, 623 (D.C. Cir. 1975) ("[W]e see no reason to take the Waterman dicta as a Supreme Court statement that any issue that touches foreign affairs is to be immunized from judicial review, particularly when there are strong countervailing constitutional interests.").

AMERICAN OVERSIGHT

other traditional suppliers increase U.S. energy security concerns).[25] *Waterman*, therefore, supports the Plaintiffs' position—the President may have a bigger role to play in controlling cross-border commercial instrumentalities when *specific projects raise legitimate national security concerns.* But that is not this case.

Finally, *Waterman* was decided primarily on statutory grounds. *See Zweibon*, 516 F.2d at 623. In his *Youngstown* concurrence, Justice Jackson—who authored *Waterman*—"[d]ismiss[ed] *Waterman* as an example of the 'wide definition of presidential powers under statutory authorization.'" *Id.* (quoting *Youngstown*, 343 U.S. at 636 n. 2).

To the extent *Waterman* speaks to this dispute, it favors Plaintiffs' position.

2. Congress Has Not Acquiesced to Presidential Power over the Keystone XL

Defendants' arguments depend largely on the theory of congressional acquiescence. As discussed above, there has been no historical acquiescence. But even zeroing in on the KXLP permit, specifically, it's impossible to conclude that Congress acquiesced to the President's revocation order. *See Medellin*, 552 U.S. at 528 (President must demonstrate "acquiescence in this particular exercise of Presidential authority").

Section 501 of the Payroll Protection Act conclusively proves Congress was not acquiescing to presidential power over the KXLP. *See* Part I(B), *infra.* But Congress

[25] Having spurned our friendly neighbor's oil, President Biden now seeks it elsewhere. See Ken Thomas, *White House Urges OPEC to Boost Oil Output Amid Covid-19 Economic Recovery*, WALL ST. J. (Aug 11, 2011), https://www.wsj.com/articles/white-house-urges-opec-to-boost-oil-production-amid-covid-19-recovery-11628688236; David Blackmon, *OPEC+ Predictably Rejects Biden Plea For More Oil Production*, FORBES (Aug. 17, 2021), https://www.forbes.com/sites/davidblackmon/2021/08/17/opec-predictably-rejects-biden-plea-for-more-oil-production/?sh=58b6e52c2acd.

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subsequently continued to voice its support for the KXLP project. *Dames & Moore*, 453 U.S. at 687. Most forcefully—after President Obama's denied TC Energy's later application in 2015—Congress passed the Keystone Pipeline Approval Act (KPPA), which mandated that "[TC Energy] may construct, connect, operate, and maintain the pipeline and cross-border facilities described in the application filed on May 4, 2012." S. 1, 114th Cong., 1st Sess. §§ 1, 2(a) (2015). Several similar examples abound.[26]

Defendants illogically claim that these post-2011 examples provide no insight into Congressional intent because President Obama refused to sign them. ECF 98 at 54. But that theory merely reaffirms Defendants' monolithic view of presidential power. Of course, congressional actions short of enacted laws shed light on Congress's views when undertaking an acquiescence analysis. That's clear in the caselaw. Defendants cite *Dames & Moore*, but neglect to note that the Court in that case said that resolutions (which Presidents don't sign) were salient evidence of congressional intentions. *See* 453 U.S. at 687.

Dames & Moore also doesn't support Defendants' view that the President's independent constitutional powers give him plenary control over foreign affairs. At issue were executive orders authorized by the Trade With the Enemy Act following the 1979 seizure of the U.S. Embassy in Tehran. 453 U.S. at 659; *see id. at* 688 (finding significant that this involved a "major foreign policy dispute"). The limited holding concerned a

[26] *See also* H.R. 5682, 113th Cong., 2d Sess. § 1 (2014); American Energy Solutions for Lower Costs and More American Jobs Act, H.R. 2, 113th Cong., 2d Sess. § 103 (2014); Northern Route Approval Act, H.R. 3, 113th Cong., 1st Sess. (2013); North American Energy Access Act, H.R. 4348, 112th Cong., 2d Sess. § 201-204 (2012).

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narrow question of settlement of mutual claims by executive agreement between a hostile foreign government and the United States. *See id.* at 688 ("Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities."). The Court even warned against the constitutional danger of plenary power. *See id.* at 688 ("[the] sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary.") (quotations omitted). The Court found significant that Congress was enacting legislation to implement the agreements at issue, *id.* at 680–81, and had done nothing to disapprove to the agreements. *Id.* at 687. This is not at all analogous to the KXLP. Congress has never given the President power to regulate cross-border pipelines. And even if it did, the President would still be subject to the statutory limitations.

There can be no serious argument that Congress has acquiesced to the President's revocation of the KXLP permit.

3. Revocation of a Duly Granted Permit Triggers Additional Constitutional Scrutiny

Defendants claim the President's discretion in revoking the permit is "unreviewable." ECF 98 at 55. But for the matter to fall within his unreviewable discretion, it must actually be a matter committed to him by the Constitution or Congress. When the President "'acts in absence of either a congressional grant or denial of authority' it enters what Justice Jackson called the "zone of twilight." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Even there, cross-border oil pipelines fall at an intersection between the Foreign Commerce Power in Article I and (potentially) the President's Commander-in-

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Chief Power in Article II. *Cf. Dames & Moore*, 453 U.S. at 688. Due to this intersection, the courts necessarily cannot cede absolute discretion to the President.

Defendants claim that an international pipeline "implicates national security and foreign relations considerations" and that the President "has the authority to protect the Nation's territorial integrity and prevent intrusions at the border." ECF 98 at 38. If the KXLP implicates national security concerns, the Executive Order failed to mention them. The Executive Order merely asserts that "approval of the pipeline would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take climate action." Exec. Order 13990, 86 Fed. Reg. 7037. It even concedes the KXLP itself is a purely *domestic* consideration when it states, "Our domestic efforts must go hand in hand with U.S. diplomatic engagement." *Id.*

It certainly implicates foreign relations in some respect—TC Energy, a Canadian corporation, is seeking $15 billion from the U.S. because of the President's decision.[27] But again, to the extent the KXLP implicates some foreign relations considerations, those undefined, implied powers cannot supersede the enumerated Foreign Commerce power vested in Congress. *See Zivotofsky*, 576 U.S. at 16; *Youngstown*, 343 U.S. at 637–38. And Plaintiffs agree the President has authority to prevent border intrusions. But again, that authority stems from his Commander-in-Chief power, and the KXLP raises no legitimate national security concerns. If the President can invoke his "territorial integrity" power in a situation like this—without a bona fide national security rationale—then he can wrest the power to regulate foreign commerce at any time. *Dames & Moore*, 453 U.S. at 688. In

[27] Garger, *supra*.

AMERICAN OVERSIGHT

that scenario—the one Defendants champion here—Congress's Foreign Commerce power is reduced to a paper tiger. *See Baker*, 369 U.S. at 211.

The President could only lawfully revoke the KXLP permit by identifying some problem within his Article II capacities to solve. Simply asserting that the KXLP does not "comport[ ] with the national interest" does not suffice. ECF 98 at 39; Pub. L. 112-78 § 501(b)(2) (justification for national interest determination includes "consideration of economic, employment, energy security, foreign policy, trade, and environmental factors"). Perhaps it would if Canada was a hostile power, or the pipeline connected Alaska and Russia. *Cf. Dames & Moore*, 453 U.S. at 688 (finding significant that the issue involved "a major foreign policy dispute" with Iran); W*aterman*, 333 U.S. at 106–108, 111. Indeed, Article II may empower the President to temporarily halt landings of cross-border commercial instrumentalities to protect the national security and ensure compliance with applicable law. But after more than a decade of intensive government scrutiny and one White House approval, it's safe to say these are not good-faith bases for nixing the KXLP—which is why the President didn't bother mentioning them in the Order. There's no legitimate Article II basis for the President's revocation decision.

President Biden's sole rationale is that allowing KXLP to be completed would undermine U.S. leadership on climate change, but that is not a national security interest.[28] And given that President Biden recently (a) approved the Nord Stream 2 pipeline enabling Russia to transport natural gas directly to western Europe;[29] (b) requested in July

[28] President Biden's decision ultimately weakens U.S. national security. *See, e.g.*, Ariel Cohen, *U.S. Loses, Russia and China Win With Keystone XL Closure*, FORBES (June 10, 2021).

[29] *Nord Stream 2 sanctions would be 'counter-productive' for European ties – Biden*, REUTERS

AMERICAN OVERSIGHT

2021 that OPEC increase its oil production by 400,000 barrels per day;[30] and (c) made another request to OPEC for increased production on August 11,[31] it's unlikely any post hoc "national security" justification can survive even the lowest level of judicial scrutiny.

Practically, Defendants' argument that the global politics of climate change give the President carte blanche to commandeer Congress's foreign commerce powers lacks any intelligible limiting principle. If there are foreign affairs and national security concerns associated with climate change that trump Congress's power in this area, then what is to stop the President from invoking those same considerations to shut down *interstate* oil pipelines? *See W. Union Tel. Co.*, 272 F. at 315. Defendants cannot be right, for that would signal a perilous concentration of power the Framers earnestly sought to prevent by giving Congress the power to regulate foreign and interstate commerce.

But in the end, Executive Order 13990 didn't address national security or foreign affairs problems. The Order tellingly admits the revocation is an attempt to realigning *domestic* policy. 86 Fed. Reg. at 7037. Whatever the motives, it trammeled foreign and interstate commerce. And only Congress may do that. The President's revocation order is therefore unlawful and unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

(May 25, 2021), https://www.reuters.com/business/energy/nord-stream-2-sanctions-would-be-counter-productive-european-ties-biden-2021-05-26/.

[30] Mui & Stevens, *supra*.

[31] Statement by National Security Advisor Jake Sullivan, *supra*.

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CERTIFICATE OF SERVICE

I certify that on August 23, 2021, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ David M.S. Dewhirst
David M.S. Dewhirst

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Human Trafficking

What You Can Do at a Municipal Level

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Missouri Attorney General's Office
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Key Intersections with Human Trafficking

- Transportation
- Pornography
- Health Care
- Schools
- At – risk youth
- Hotels, casinos, strip clubs
- Illicit massage businesses
- And more…

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Schools

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Why Schools?

- Children are the target
- Intervention opportunities – esp. for high risk youth
- Mandated reporters

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What does an engaged school look like?

- **Students** are educated and empowered to stay safe and look out for their friends
- **Teachers, parents, counselors** are on the "same page" with the students
- **School resource officers** receive training on human trafficking

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Resources for Schools in Missouri

The Stop Trafficking Project

Age appropriate educational presentations and resources for youth and the caring adults in their lives across the state of Missouri

For more information or to schedule a presentation: russ@stoptraffickingproject.com

Interdiction for the Protection of Children (IPC)

Free training for School Resource Officers offered by the Missouri State Highway Patrol

To Attend a Training: Contact your local Missouri State Highway Patrol Troop Headquarters, or the Missouri State Highway Patrol IPC/Human Trafficking Unit.

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Illicit Massage Businesses

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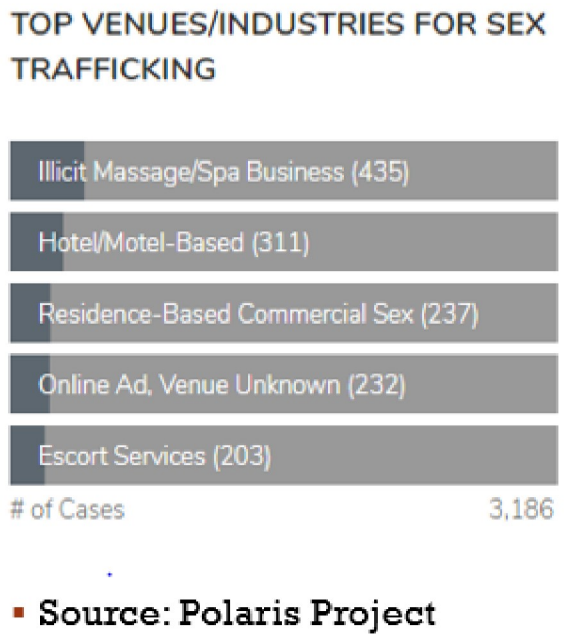
Prevalence

- Polaris estimates that there are over 9,000 illicit massage business in the U.S.
  - Approximately 90 of those are in Missouri



- **Source: Polaris Project**

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Recruitment Tactics

- Usually in Japan, Thailand, China, or South Korea
- Poverty or abuse
- Offered legitimate, well-paying job or educational opportunity in the U.S by a recruiter
- Recruiter offers to cover expenses (travel, housing, etc.) to be paid back later
- After arrival in U.S., the script flips.

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Methods of Control

- Debt is higher than anticipated.
- Threatened, forced, coerced, or tricked into prostitution to pay off this debt.
- Use shame and stigma to control victim.
- Isolation
- Feelings of hopelessness

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Victim Control



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Business Model

- Renting
- Ads
- Money Laundering
- Use of Networks

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Indicators

- Prices much lower than market
- Male-only clientele
- Customers using rear or side entrances
- Open late
- Windows obstructed so you can't see inside
- Locked doors, customers must be "buzzed in"
- Website contains innuendos or comments about masseuse's appearance
- Online reviews describing sex acts
- Masseuse(s) appear to live at business

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What you can do

- Do not intervene yourself or attempt to take vigilante action
- If you see indicators that a business is illicit, you can report that information to your local non-emergency police department phone number and the National Human Trafficking Hotline at 1-888-373-7888
- Share your concerns with your city and state leaders
- Speak up. Help spread awareness and combat apathy. Next time someone shares a "happy ending" joke in your presence, you can explain that there is no happy ending for the people who work in these places.

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Thank You!

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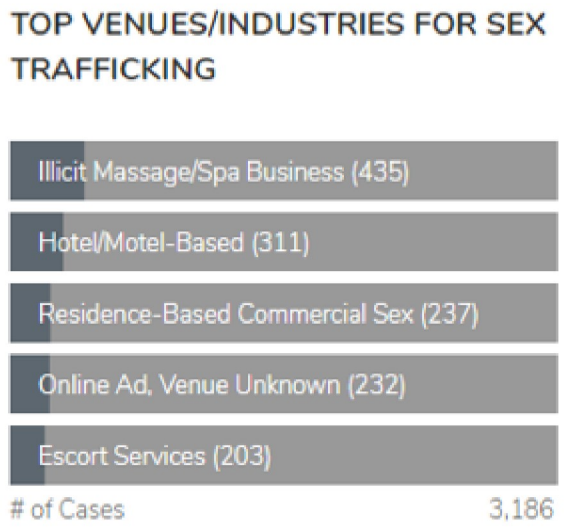

- **Source: Polaris Project**

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AMERICAN OVERSIGHT

Re: Case No. 20-2256, *Resurrection School, et al v. Elizabeth Hertel, et al*
Originating Case No. : 1:20-cv-01016

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Thomas Dorwin

Enclosures

Mandate to issue.

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0191p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; STEPHANIE SMITH, individually and as next friend on behalf of her minor child F.S.,

Plaintiffs-Appellants,

v.

ELIZABETH HERTEL, in her official capacity as the Director of the Michigan Department of Health and Human Services; DANA NESSEL, in her official capacity as Attorney General of the State of Michigan; LINDA VAIL, in her official capacity as the Health Officer of Ingham County; CAROL A. SIEMON, in her official capacity as the Ingham County Prosecuting Attorney,

Defendants-Appellees.

No. 20-2256

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:20-cv-01016—Paul Lewis Maloney, District Judge.

Argued: July 21, 2021

Decided and Filed: August 23, 2021

Before: SILER, MOORE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, for Appellants. Daniel J. Ping, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Elizabeth Hertel. Ann M. Sherman, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Dana Nessel.

AMERICAN OVERSIGHT

ON BRIEF: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Daniel J. Ping, Joseph T. Froehlich, Ann M. Sherman, Rebecca A. Berels, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for State of Michigan Appellees. Bonnie G. Toskey, Sarah K. Osburn, COHL, STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellees Linda Vail and Carol Siemon. Alex J. Luchenitser, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amici Curiae.

MOORE, J., delivered the opinion of the court in which DONALD, J., joined, and SILER, J., joined in part. SILER, J. (pg. 31), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. To control the spread of COVID-19, the Michigan Department of Health and Human Services ("MDHHS") required that all persons five years of age and older wear a mask in indoor public settings, including while attending public and private K–12 schools. Plaintiffs Resurrection School, a Catholic elementary school in Lansing, Michigan, and two parents with children enrolled at the school, on behalf of themselves and their minor children, challenge the mask requirement as a violation of their free exercise of religion, equal protection, and substantive due process rights. Since Plaintiffs filed suit, MDHHS has rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement. We hold that Plaintiffs' challenge to the mask requirement is not moot, and we **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction on the merits.

I. BACKGROUND

A. COVID-19 in Michigan

COVID-19 is a novel respiratory infection first discovered in December 2019. Since then, 925,377 Michigan residents have been diagnosed with COVID-19 and 20,076 Michigan residents have died from the disease. Mich. COVID-19 Dashboard, Cumulative Confirmed Cases and Deaths Among Confirmed Cases, https://www.michigan.gov/coronavirus/0,9753,7-

AMERICAN OVERSIGHT

406-98163_98173---,00.html (accessed Aug. 19, 2021). Although young children have been largely spared the worst of the disease's impact, six children ages 5–14 have died of COVID-19 in Michigan, *Number of COVID-19, Pneumonia and Influenza Deaths by Age of Death, Michigan Occur[r]ences*, MDHHS, https://www.mdch.state.mi.us/osr/Provisional/CvdTable2.asp (accessed Aug. 19, 2021), and 1,280 children ages 0-17 have been hospitalized with COVID-19, COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (accessed Aug. 19, 2021). One-hundred-and-sixty-one children in Michigan who recovered from COVID-19 went on to develop Multisystem Inflammatory Syndrome in Children ("MIS-C"), a condition causing inflammation and damage to organs. MIS-C Data and Reporting, MDHHS, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_104661---,00.html (accessed Aug. 19, 2021); *see also* R. 16-2 (Vail Aff. ¶ 7) (Page ID #538) (describing MIS-C and other long-term complications of COVID-19 infection). Children infected with COVID-19 can spread the disease to their parents and grandparents, teachers and school staff, and other medically vulnerable Michiganders.

COVID-19 primarily spreads through airborne particles that accumulate in enclosed spaces with inadequate ventilation, respiratory droplets produced when a person coughs, sneezes, or talks, and occasionally through contact with objects contaminated with the virus. *How COVID-19 Spreads*, CDC (July 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. Individuals infected with COVID-19 can spread the disease while asymptomatic and pre-symptomatic, and many individuals infected with COVID-19 experience mild symptoms. *See* R. 14-6 Ex. 5 (Nathan Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 Emerg. Infect. Dis. (July 2020)) (Page ID #297–303). These features make COVID-19 difficult to control. As a result, universal community use of masks is a widely accepted method to prevent the spread of COVID-19, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html, despite Plaintiffs' contentions to the contrary, R. 21 (First Amended Compl. ¶¶ 75–77) (Page ID #648–49).

AMERICAN OVERSIGHT

Since Plaintiffs filed their lawsuit in October 2020, the Food and Drug Administration ("FDA") has authorized three COVID-19 vaccines for emergency use, including one for use in persons twelve years of age and older. *Different COVID-19 Vaccines*, CDC (May 27, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html. Two of the vaccine manufacturers, Pfizer-BioNTech and Moderna, are testing their vaccines in children ages six months to eleven years old. Apoorva Mandavilli, *In the U.S., Vaccines for the Youngest Are Expected This Fall*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/health/us-vaccines-children-fall.html. Although initially Pfizer-BioNTech hoped to apply for emergency authorization of the vaccine for children ages five to eleven years old in September, and Moderna sometime in the fall, *id.*, the FDA has requested that the two vaccine manufacturers increase the size of their studies, which may delay the FDA's authorization of the vaccine for children younger than twelve, *see* Sheryl Gay Stolberg et al., *At the F.D.A.'s Urging, Pfizer-BioNTech and Moderna Are Expanding Their Trials for Children 5 to 11*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/us/politics/fda-covid-vaccine-trials-children.html.

B. Michigan's Mask Requirement

Masks have been a significant part of Michigan's COVID-19 response, especially prior to the widespread availability of safe and effective vaccines. Beginning on April 27, 2020, Michigan required all persons "able to medically tolerate a face covering" to wear a face covering "when in any enclosed public space." E.O. 2020-59 § 15(a) (Apr. 24, 2020); *see also* E.O. 2020-147 § 1 (July 10, 2020) (reiterating that all persons ages five and older must wear a face covering in public except in limited circumstances or if medically unable to wear a face covering).

In preparation for the 2020–2021 school year, Governor Gretchen Whitmer issued the MI Safe Schools Roadmap ("Roadmap"), which outlined safety recommendations and requirements for K–12 schools. *MI Safe Schools: Michigan's 2020-21 Return to School Roadmap* (June 30, 2020), https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf. The Roadmap varied its prescriptions based on the prevalence of COVID-19 in the

AMERICAN OVERSIGHT

community and the grade of the students. *Id.* at 9.[1] The Roadmap strongly recommended, but did not require, students in grades K–5 to wear a face covering in the classroom so long as they did not come into contact with students in another class. *MI Safe Schools*, at 22; *see also* E.O. 2020-142 § (2)(b)(1)(E) (June 30, 2020) (incorporating requirement into an executive order).

On September 25, 2020, citing "the higher incidence of [COVID-19] cases among children in recent months," "the clear effectiveness of masking as mitigation strategy," and the "absence of a widespread vaccine," Whitmer issued an executive order mandating that children in grades K-5 also wear a face covering in classrooms. E.O. 2020-185 § 1 (Sept. 25, 2020). A few days later, the Michigan Supreme Court concluded that the 1945 law under which Whitmer had been issuing executive orders regarding the COVID-19 pandemic was an improper delegation of legislative power in violation of the Michigan Constitution. *See In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1 (Mich. 2020). MDHHS then issued an order reinstating the requirement that children in grades K–5 wear a face covering in the classroom. 10/05/20 MDHHS Order §§ 2–3. MDHHS issued another near-identical order on October 9, 2020. 10/09/20 MDHHS Order. The Ingham County Health Department, which includes Lansing, also issued its own emergency order requiring all persons who leave their home or place of residence to wear a face covering, including children in grades K-5. Ingham Cnty. E.O. 2020-21 (Oct. 4, 2020); *see also* R. 16-2 Ex B. (Vail Aff. ¶¶ 13–22) (Page ID #539–41) (describing the Ingham County order). On October 23, 2020, the Ingham County Health Department rescinded its order after it confirmed that the MDHHS Orders included all requirements of the county order. *Id.* ¶ 23 (Page ID #541).

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[1]The Roadmap corresponds to the MI Safe Start Plan, which adopted a six-phase approach to reopening the state based on the prevalence of disease. In Phase 1, a region is experiencing "[i]ncreasing number of new cases every day, likely to overwhelm the health system" and only critical infrastructure is permitted to remain open, whereas in Phase 6, the region has community immunity sufficient to minimize community spread and restrictions are lifted. *MI Safe Start: A Plan to Re-engage Michigan's Economy*, at 2 (May 7, 2020), https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf. When a region is in at least Phase 4, the Roadmap permitted schools to reopen for in-person learning with certain safety protocols. *MI Safe Schools*, at 21. In practice, Michigan treated in-person K–12 instruction more permissively than the terms of the MI Safe Start Plan and the Roadmap. The MI Safe Start plan permitted schools to reopen for in-person instruction only in Phases 5 and 6, *MI Safe Start*, at 2, and MDHHS permitted K–8 schools to remain open for in-person instruction even when all regions were at the highest risk level, 11/15/20 MDHHS Order.

AMERICAN OVERSIGHT

Since then, MDHHS has issued several orders slightly changing the circumstances for when a mask is required. The March 2, 2021 Order, which is the focus of the parties' briefing,[2] provides in relevant part:

> 7. **Face mask requirement at gatherings.**
>
> (a) All persons participating in gatherings are required to wear a face mask.
>
> (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
>
> (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
>
> (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
>
> . . .
>
> 8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:
>
> (a) Are younger than 5 years old, outside of a child care organization or camp setting (which are subject to requirements set out in section 7(e));
>
> (b) Cannot medically tolerate a face mask;

[2]Defendants acknowledge that MDHHS has made "minor alterations" to the exceptions between the 10/09/20 MDHHS Order and the 03/02/21 MDHHS Order, and thus, refer to "the orders" collectively. Hertel & Nessel Br. at 8 n.6. For instance, during the winter surge in COVID-19 cases, MDHHS prohibited any non-essential personal care services that required removal of face masks, most organized sports, and indoor dining. 11/15/20 MDHHS Order. Accordingly, we use "MDHHS Orders" to refer to the orders leading up to the rescission of the mask requirement.

AMERICAN OVERSIGHT

(c) Are eating or drinking while seated at a food service establishment or at a private residence;

(d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;

(e) Are swimming;

(f) Are receiving a medical or personal care service for which removal of the face mask is necessary;

(g) Are asked to temporarily remove a face mask for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

(j) Are engaging in a religious service;

(k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or

(l) Are participating in a testing program specified in MDHHS's document entitled Guidance for Athletics issued February 7, 2021, and are engaged in practice or competition where the wearing of a mask would be unsafe.

03/02/21 MDHHS Order. In accordance with Mich. Comp. Laws § 333.2261, "violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both." *Id.* § 10(e). Further, MDHHS promulgated emergency rules stating that a violation of the MDHHS Orders carries "a penalty of up to $1,000 for each violation or day that a violation continues." MDHHS Emergency Rules (Oct. 20, 2020).

On May 14, 2021, in response to CDC guidance that fully vaccinated persons no longer need to wear a mask in most settings, MDHHS added fully vaccinated persons to the list of exceptions to the mask requirement. 05/14/2021 MDHHS Order. One month later, MDHHS rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement, because of the reduction in COVID-19 test positivity rates, case rates, hospitalizations, and deaths, the availability of COVID-19 vaccines, the availability of therapeutics, such as monoclonal antibodies, and warmer weather. 06/17/21 MDHHS Order. The 06/17/21 MDHHS Order became effective June 22, 2021. *Id.*

AMERICAN OVERSIGHT

MDHHS's rescission coincided with summer break, which leaves open the question of what restrictions MDHHS may impose for the 2021–2022 school year. MDHHS's interim guidance for schools recommends that schools use multiple prevention strategies, including face masks, to limit transmission in school. MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Guidance_for_Operating_Schools_Safely_728838_7.pdf.

Other public-health authorities have weighed in on mitigation measures for in-person education for the 2021–22 school year. In consideration of new evidence regarding the B.1.617.2 (Delta) coronavirus variant, the CDC's guidance for K–12 schools now recommends that all persons wear a mask indoors at school regardless of vaccination status. *Guidance for COVID-19 Prevention in K-12 Schools*, CDC (updated Aug. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html. The American Academy of Pediatrics ("AAP") also recommends that all students and staff—regardless of whether they are fully vaccinated against COVID-19—wear a mask indoors at school as a "necessary measure[] to limit the community spread of SARS-CoV-2 to ensure schools can remain open and safe for all students." *COVID-19 Guidance for Safe Schools*, Am. Acad. Pediatrics (last updated July 18, 2021), available at https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/. Masks, according to the AAP, are part of a "multi-pronged, layered approach" that together "will make in-person learning safe and possible." *Id.*

Some states and localities have adopted universal mask requirements in line with public health authorities' recommendations. *See, e.g.*, Kalamazoo Cnty. Health Dep't 08/18/2021 Order (requiring that children in grades K–6 and those providing services to children in grades K–16 wear a mask in school settings); Ky. E.O. 2021-585 (Aug. 10, 2021); Cal. Dep't Pub. Health, *COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year* (July 12, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx (requiring that all persons, including children in grades K–5, wear masks at school); *K-12 School Updates*, Del. Div. Pub. Health (May 12,

AMERICAN OVERSIGHT

2021), https://coronavirus.delaware.gov/schools-and-students/school-updates/ (same). Other states have recommended, but not required, students in grades K–12 to wear masks in school. *See, e.g.*, Ohio Dep't Pub. Health (July 26, 2021), https://coronavirus.ohio.gov/static/responsible/schools/K-12-Schools-Guidance.pdf.

Despite the CDC's and the AAP's guidance and the decisions of other states to impose mask requirements in school, Whitmer has stated that she does not expect MDHHS to issue a mask requirement or other pandemic orders "in the near future and maybe not ever." Dave Boucher & Kristen Jordan Shamus, *Whitmer: No New State Mask Rule Expected Despite Updated CDC Guidance*, DET. FREE PRESS (July 27, 2021), https://www.freep.com/story/news/health/2021/07/27/whitmer-no-new-state-mask-rule-despite-updated-cdc-guidance/5385179001/. Hertel has indicated that she "expect[s] and encourage[s] schools when they go back to have mask requirements for kids younger than 12 and those who haven't been vaccinated." *MDHHS Director: State Urging Schools to Have Mask Mandates for Kids Under 12, Those Not Vaccinated*, WXYZ-Det. (July 22, 2021), https://www.wxyz.com/news/coronavirus/mdhhs-director-state-urging-schools-to-have-mask-mandates-for-kids-under-12-those-not-vaccinated.

C. Plaintiffs' Lawsuit

On October 22, 2020, Plaintiffs filed a complaint in the U.S. District Court for the Western District of Michigan. Plaintiffs allege that the MDHHS Orders violate their rights to free exercise, equal protection, substantive due process, freedom of speech, and freedom of association. R. 1 (Compl. ¶¶ 135–41, 163–85) (Page ID #22–23, 27–30). In addition to these constitutional claims, Plaintiffs argued that the 10/05/20 MDHHS Order is an unlawful exercise of authority under Michigan law and violates the Michigan constitution's separation of powers and non-delegation clauses. *Id.* ¶¶ 142–62 (Page ID #24–26).

The declaration submitted by the principal of Plaintiff Resurrection School, Jacob Allstott, attests that MDHHS's mask requirement for students in grades K–5 violates Resurrection School's sincerely held religious beliefs because it interferes with the school's religiously oriented disciplinary policies and prevents younger students from partaking fully in a

AMERICAN OVERSIGHT

Catholic education.[3] R. 8-1 (Allstott Decl. ¶¶ 41–58) (Page ID #178–80). The declarations submitted by the Plaintiff parents assert that their children find masks uncomfortable and distracting from their religious education, and that the mask requirement conflicts with "the right [as a parent] to choose a school for them which corresponds to their own convictions." R. 8-2 (Mianecki Decl. ¶ 59) (Page ID #190) (quoting Catechism of the Catholic Church ("CCC") § 2229); R. 8-3 (Smith Decl. ¶ 40) (Page ID #197–98).

Plaintiff Christopher Mianecki attests that wearing a mask in the classroom "interferes with [his children's] ability to engage in their elementary school classroom and its Catholic, religious teachings." R. 8-2 (Mianecki Decl. ¶ 52) (Page ID #189). He provides specific examples of how the requirement that children wear masks in the classroom affects his three children who are enrolled at Resurrection School. He states that wearing a mask negatively impacts his children's focus, *id.* ¶ 33 (Page ID #187), "diverts [their] attention away from the lesson taught in class," *id.* ¶ 36 (Page ID #187), and "negatively affect[s] [their] ability to breathe effectively," *id.* ¶ 38 (Page ID #187).

Plaintiff Stephanie Smith states that her child, F.S., is unable to wear a mask because he "suffer[s] from breathing issues," R. 8-3 (Smith Decl. ¶ 8) (Page ID #194), and "is highly susceptible to respiratory infections that quickly turn into additional infections such as bronchitis," *Id.* ¶ 9 (Page ID #194). Despite Smith's observation that F.S. is unable to wear a mask because of his health conditions, F.S.'s pediatrician determined that F.S. did not qualify for a medical exemption.[4] *Id.* ¶ 11 (Page ID #194). As a result, Smith is "educating F.S. at home where he is not mandated to wear a mask, and F.S. is on a long-term absence from his Catholic

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[3]In the initial complaint, Plaintiffs also argued that "[i]n accordance with the teachings of the Catholic faith, Resurrection School believes that every human has dignity and is made in God's image and likeness. Unfortunately, a mask shields our humanity. And because God created us in His image, we are masking that image." R. 1 (Compl. ¶ 22) (Page ID #5).

[4]The MDHHS Orders exempted children who "[c]annot medically tolerate a face mask" from complying with the face mask requirements. 03/02/21 MDHHS Order § 8(b). The MDHHS Orders clarify that "[a]n individual's verbal representation that they are not wearing a face mask because they fall within a specified exception . . . may be accepted." *Id.* § 7(d). Organizations may choose to require documentation that an individual cannot medically tolerate a face mask. *See, e.g.*, Diocese of Lansing, *Return to Learn: Phase 4 Plan*, https://www.dioceseoflansing.org/education/phase-4-plan (requiring that students and staff obtain a "written and signed verification by a physician" in order not to wear a mask while at school).

AMERICAN OVERSIGHT

school." *Id.* ¶ 16 (Page ID #195). Smith and her husband "cannot give F.S. the same Catholic education that he receives at Catholic school with his classmates." *Id.* ¶ 20 (Page ID #195).[5]

Plaintiffs moved for a temporary restraining order ("TRO") and a preliminary injunction seeking to enjoin Defendants from enforcing the 10/05/20 MDHHS Order against Resurrection School and the other plaintiffs. R. 7 (Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #65–70). The district court denied Plaintiffs' expedited ex parte motion for a TRO, concluding that Plaintiffs could not establish that they would experience irreparable harm without the order because they had unreasonably delayed in filing for emergency ex parte injunctive relief.[6] R. 11 (Order Denying Mot. for TRO at 3–4) (Page ID #207–08). Defendants then filed motions to dismiss, R. 13 (Gordon & Nessel Joint Mot. to Dismiss) (Page ID #215–18); R. 15 (Vail & Siemon, Mot. to Dismiss) (Page ID #475–76), and responses in opposition to Plaintiffs' request for a preliminary injunction, R. 18 (Gordon & Nessel, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #565–60); R. 19 (Vail & Siemon, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #602–04).

After Defendants responded to Plaintiffs' initial complaint and motion for a TRO and preliminary injunction, Plaintiffs filed an amended complaint. R. 21 (First Am. Compl.) (Page ID #636–68). The First Amended Complaint narrowed Plaintiffs' claims to violations of free exercise, equal protection, and substantive due process, and the Michigan constitutional and state-law claims. *Id.* The district court determined that the amended complaint did not render Defendants' motions to dismiss moot and required Plaintiffs to respond to the motions to dismiss. R. 23 (12/10/20 Order) (Page ID #692).

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[5]We are troubled by public statements suggesting that Resurrection School did not require students in grades K–5 to wear masks during the entire school year, Cody Butler, *Federal Appeals Court to Hear Arguments over Michigan Mask Mandate*, WILX-Lansing (July 20, 2021), https://www.wilx.com/2021/07/20/federal-appeals-court-hear-arguments-over-michigan-mask-mandate/, when they have made contrary representations to this court and the district court.

[6]The district court noted that Whitmer and MDHHS issued executive orders requiring individuals over the age of five to wear a face covering indoors on July 17, 2020 and July 29, 2020 respectively, and thus, the "Plaintiffs cannot rely on the October 2, 2020 Opinion from the Michigan Supreme Court as the critical event." R. 11 (Order at 4) (Page ID #208).

AMERICAN OVERSIGHT

The district court denied Plaintiffs' motion for a preliminary injunction. *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897 (W.D. Mich. 2020). Applying *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020) (order), the district court determined that Plaintiffs were unlikely to succeed on the merits of their free-exercise challenge to the 10/05/2020 MDHHS Order. *Id.* at 900–01. First, the district court found that the 10/05/2020 MDHHS Order was neither motivated by animus against people of faith or a specific faith nor limited to regulating only religious activity. *Id.* at 901. The district court then determined that the order was neutral and generally applicable because it "require[d] all individuals over the age of five to wear a face mask in public. This requirement is in place whether they are attending a religious school, a secular school, running errands, or participating in some other facet of daily life." *Id.* at 901–02. The exceptions to the order are "narrow and discrete," and "apply to public schools and private schools equally, and they apply to secular schools and religious schools equally." *Id.* at 902. Thus, the district court concluded that Plaintiffs were unlikely to succeed on the merits of their free exercise claim. *Id.*

The district court dismissed Plaintiffs' claim that the Order violated their equal-protection rights by permitting individuals to remove their face covering in certain circumstances, because "[t]here is nothing in the face-mask requirement that treats similarly situated groups of individuals different." *Id.* As for Plaintiffs' state-law claims, the district court declined to address this "novel question of state law for the first time" at this stage of litigation. *Id.* Although the district court did not address Plaintiffs' substantive-due-process claim by name, it concluded at the end that "Plaintiffs have failed to establish a lik[e]lihood of success on the merits on *any* of their claims." *Id.* (emphasis added).

Plaintiffs timely appealed. R. 25 (Not. of Appeal) (Page ID #700–01). Defendants move to dismiss the appeal as moot because MDHHS has rescinded the mask requirements. No. 20-2256, R. 34 (Hertel & Nessel Mot. to Dismiss Appeal as Moot); No. 20-2256, R. 37 (Siemon & Vail Mot. to Dismiss Appeal as Moot). Plaintiffs oppose the motion. No. 20-2256, R. 38 (Pls.' Resp. Mot. to Dismiss Appeal as Moot).

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

AMERICAN OVERSIGHT

II. ANALYSIS

A. Mootness

Defendants argue that we lack jurisdiction because Plaintiffs' claims are moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "We do not have the power to adjudicate disputes that are moot, and '[t]he mootness inquiry must be made at every stage of a case.'" *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). There are two relevant exceptions to the mootness doctrine. First, voluntary cessation of the challenged conduct does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Second, a case will not become moot if the injury is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs argue that their case should proceed under both exceptions, and we address both in turn.

1. Voluntary Cessation

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Where the defendant voluntarily ceases the challenged conduct, the defendant must establish that: "there is no reasonable expectation that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[7] *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021) (quoting *Speech First v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019)). We caution that "[t]he burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

[7]The second requirement is not at issue here.

AMERICAN OVERSIGHT

We generally treat "cessation of the allegedly illegal conduct by government officials . . . with more solicitude . . . than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). "This [voluntary cessation] exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation." *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *see also Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) ("[S]elf-correction [by government officials] provides a secure foundation for a dismissal based on mootness so long as it appears genuine." (quoting *Mosley*, 920 F.2d at 415)).

Plaintiffs argue, and Defendants acknowledge, that because Defendants' "discretion to effect the change lies with one agency or individual, . . . significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim," *Speech First*, 939 F.3d at 768. Hertel & Nessel Reply at 4; Pls.' Resp. at 7. Although MDHHS, like the Defendants in *Speech First*, retains the sole authority to change the mask requirements, this case is distinguishable from *Speech First* because MDHHS rescinded the challenged orders in response to "changing circumstances." Defendants Hertel & Nessel offer evidence that the policy change was genuine, including that the policy change reflects increased access and eligibility for vaccines, that Michigan joins other states in rescinding their mask requirements,[8] and that MDHHS rescinded almost all COVID-19 orders, not merely the orders at issue here.

Although the Supreme Court has addressed mootness in the context of COVID-19 restrictions, the factual circumstances are distinguishable from those present here. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020), the Supreme Court held that the plaintiffs' challenge to a state COVID-19 pandemic order limiting attendance at religious services was not moot even though the state had relaxed the attendance limitations in response to

[8]Defendants note that as of July 2021 thirty-one states have rescinded their mask requirements. Hertel & Nessel Reply at 5 n.4 (citing Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (July 12, 2021), available at https://www.aarp.org/health/healthy-living/info2020/states-mask-mandates-coronavirus html.). This argument cuts both ways because many states have imposed mask requirements for K–12 instruction, *see* Part I.B, and some states and localities have recently reimposed broad indoor mask requirements following a new surge in COVID-19 cases, *see* Nev. Exec. Directive. 047 (July 27, 2021) (requiring mask usage by all persons in areas with substantial or high transmission of COVID-19); La. Procl. No. 2021-137 (Aug. 2, 2021) (implementing a statewide mask mandate).

AMERICAN OVERSIGHT

declining COVID-19 cases. The Court reasoned that the plaintiffs "remain under a constant threat" that the state will reimpose attendance limits without notice and "bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* at 68. The state health department assigned areas to different risk categories based on the severity of the COVID-19 outbreak, and imposed defined restrictions on activity. *Id.* at 66. The state continued to use this framework, meaning that the plaintiffs remained at risk of restrictions on attendance at religious services if the number of COVID-19 cases, deaths, and hospitalizations increased. *Id.* at 68. Here, Defendants do not presently use a similar framework for imposing mask requirements and other pandemic restrictions. To the contrary, Defendants at present have rescinded all pandemic restrictions.

Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), the Supreme Court held that the plaintiffs' challenge to the state COVID-19 pandemic order limiting gatherings, including gatherings for at-home religious activities, was not moot even though the defendants altered the guidance during litigation. The Court explained that

> even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Id. at 1297 (quoting *Catholic Diocese of Brooklyn*, 141 S. Ct. at 68). In concluding that plaintiffs' challenge was not moot, the Court noted that "the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Id.* (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.)).

The *Tandon* Court's conclusion rested on its perception that state officials had a "track record" of altering COVID-19 guidance, and that it had previously "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" four times. 141 S. Ct. at 1297. In contrast here, Defendants have been consistent in their approach to mask requirements. For the 2020–21 school year, excluding a few weeks at the beginning of the school year, Defendants required students in grades K–5 to wear masks in the classroom.

AMERICAN OVERSIGHT

MDHHS altered its mask requirements only in May 2021 in response to the CDC's guidance that individuals who were vaccinated are unlikely to transmit COVID-19, and MDHHS eliminated the mask requirements in June 2021 in response to sustained decreases in the number of COVID-19 cases, hospitalizations, and deaths and the wide availability of safe and effective vaccines.

As for our own circuit, in an unpublished case reviewing a COVID-19 public-health order, we declined to apply the voluntary-cessation exception to mootness where the Governor replaced an executive order with a recommendation. *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 938 (6th Cir. 2020) (order); *cf. Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 566 (6th Cir. 2020) (per curiam) (remanding to the district court to permit it to consider "whether these cases have become moot in light of the Governor's new orders"). In distinguishing the case from *Catholic Diocese of Brooklyn*, we emphasized that "there, unlike here, the challenged order remained in force subject to the apparent whims of the Governor, to whom a presumption of regularity did not apply." *Pleasant View Baptist Church*, 838 F. App'x at 939.[9]

In some ways, Defendants' argument that their rescission of the challenged MDHHS orders moots Plaintiffs' claims is stronger than the one accepted in *Pleasant View Baptist Church*. In *Pleasant View Baptist Church*, we relied on the Governor's public statements that he would rely on recommendations instead of mandates, which he made prior to the widespread availability of effective vaccines. MDHHS's rescission of the challenged orders, by contrast, reflects widespread availability of and increased eligibility for effective COVID-19 vaccines. On the other hand, *Pleasant View Baptist Church* involved school closures, which are a more onerous public health measure than requiring that students wear masks at school. In fact, MDHHS and other public-health authorities recommend that all persons wear masks in school to ensure that schools can maintain in-person learning. *See, e.g.*, MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-

[9]Plaintiffs suggest without explanation that "*Tandon* adopted a different analysis from *Pleasant View Baptist Church* and a different standard." Pls.' Resp. at 12. Plaintiffs' argument is unavailing. The *Tandon* Court arrived at a different conclusion regarding mootness than we did in *Pleasant View Baptist Church* because the Court was responding to the distinct facts of that case, not because it applied a different standard.

AMERICAN OVERSIGHT

19_Guidance_for_Operating_Schools_Safely_728838_7.pdf. ("Schools can layer multiple prevention strategies developed by the Centers for Disease Control and Prevention (CDC) to prevent transmission within school buildings, reduce disruptions to in-person learning, and help protect the people who are not fully vaccinated, which currently includes all children under the age of 12 years.").

We conclude that Defendants cannot meet the heavy burden of establishing that it is "absolutely clear" that they will not reimpose a mask requirement, especially for children younger than twelve who cannot be vaccinated. We do not doubt the sincerity of MDHHS's statements that they have no intention to reimpose a mask requirement like the one challenged by Defendants. We also recognize that the rescission of all pandemic orders, including the mask requirement, is unique because it reflects the wide availability of safe and effective vaccines. At the same time, the FDA has not yet authorized their use in persons younger than twelve, the group comprising students in grades K–5. MDHHS has previously reimposed certain pandemic emergency orders and tightened mask requirements in response to increasing COVID-19 cases, hospitalizations, and deaths. Considering the very real possibility that MDHHS may be faced again with escalating COVID-19 cases, hospitalizations, and deaths, we hold that Defendants have not met their "heavy burden" of showing that it is "absolutely clear" that they will not reimpose impose a mask requirement, including for children in grades K–5 receiving in-person instruction. Defendants' rescission of the challenged MDHHS Orders does not moot Plaintiffs' claims.

2. Capable of Repetition, Yet Evading Review

Plaintiffs' claims further come within the exception to the mootness doctrine for actions that are "capable of repetition, yet evading review." Pls.' Resp. at 10–14. This exception is limited "to situations where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). As the party asserting this exception, Plaintiffs bear the burden of proof. *Lawrence*

AMERICAN OVERSIGHT

v. Blackwell, 430 F.3d 368, 371 (6th Cir. 2005). Plaintiffs satisfy both requirements for this exception.

Plaintiffs have satisfied the first prong. Although Plaintiffs filed their complaint and motion for a preliminary injunction in October 2020, the school year ended prior to when this case could reach the court of appeals. It is true that Plaintiffs did not take advantage of opportunities to expedite our review of the case.[10] Nonetheless, the Supreme Court has found periods of up to two years to be too short to be fully litigated. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 390–91 (6th Cir. 2001) (holding that two years to challenge to a local ordinance prohibiting individuals with a sex-crime history to work for a sexually oriented business was too short in duration). Specific to the educational context, we have held, albeit in an unpublished decision, that an individualized education program lasting a school year is too short in duration to litigate to conclusion. *Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 980 (6th Cir. 2012).

Plaintiffs also satisfy the second requirement of the "capable of repetition, yet evading review" exception. This is in part because the standard is a forgiving one. "Recurrence of the issue need not be more probable than not; instead, the controversy must be capable of repetition." *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016). This standard provides that "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* at 716.

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[10]Plaintiffs note that "[t]he District Court's decision resulted in nine months of orders that stripped Appellants from their sincerely held right to religious exercise, equal protection of the law, and substantive due process." Pls.' Resp. at 13. But Plaintiffs are at least partly responsible for delays in this litigation. Plaintiffs delayed in filing their complaint in federal court until October 22, 2020 and their emergency motion for a TRO or preliminary injunction until October 27, 2020, even though Governor Whitmer issued her initial executive order requiring that students in grades K–5 wear masks on September 25, 2020, E.O. 2020-185 § 1 (Sept. 25, 2020), and MDHHS issued its first order on October 5, 2020, 10/05/20 MDHHS Order §§ 2–3. Plaintiffs also failed to take advantage of opportunities to expedite the litigation. For instance, Plaintiffs could have filed a motion for an injunction pending appeal, as other parties challenging COVID-19 pandemic orders have done, *see, e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020) (granting the plaintiffs' motion for an injunction pending appeal fifteen days after the district court denied their request for a preliminary injunction and twenty-four days after the plaintiffs filed their complaint), or requested expedited briefing or expedited consideration of their appeal.

AMERICAN OVERSIGHT

Although Defendants provide ample reasons—namely the availability of and expanded eligibility for COVID-19 vaccines—that a mandatory requirement that students in grades K–5 wear masks in the classroom is unlikely, that is not the standard. Rather, we look to whether the controversy is capable of repetition. MDHHS acknowledged in its order rescinding the mask requirements that "the COVID-19 pandemic continues to constitute an epidemic in Michigan." 06/17/21 MDHHS Order. Both the CDC's and MDHHS's guidance recommend that students in grades K–12 wear masks in the classroom. This is sufficient to establish that Plaintiffs' claims are capable of repetition, yet evading review.

True, in the election context, we have determined that lawsuits challenging election procedures in light of the COVID-19 pandemic and attendant restrictions are not capable of repetition, yet evading review. Most recently in *Thompson v. DeWine*, -- F.4th --, 2021 WL 3183692 (6th Cir. July 28, 2021), we held that the plaintiffs' challenge to the signature requirements for ballot initiatives was moot as to the 2021 election. In *Thompson*, the plaintiffs argued that "COVID-19 remains a 'full blown crisis' hampering their efforts to gather signatures for 2021 initiatives," and thus their challenge fell under the capable of repetition, yet evading review exception to the mootness doctrine. *Id.* at *4. We concluded, however, that "advancements in the COVID-19 vaccine and treatment" made COVID-19 unlikely to threaten seriously the plaintiffs' ability to collect signatures for the 2021 ballot initiatives. *Id.*; *see also Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) ("Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." (citing *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (June 15, 2021)).[11]

These election cases, however, are distinguishable from the present case. First, our decisions in those cases were contingent on the availability of COVID-19 safe and effective

[11]Unfortunately, the daily number of COVID-19 cases, hospitalizations, and deaths has since trended significantly upwards. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (accessed on Aug. 2, 2021).

AMERICAN OVERSIGHT

vaccinations and treatment, which are presently authorized for use by persons old enough to vote and sign petitions for ballot initiatives, but not for children in grades K–5. Second, in-person instruction meaningfully differs from participation in the electoral process in a way that increases the risk of contracting and transmitting COVID-19. Whereas participating in the electoral process is a "discrete, individualized, often brief activit[y]," in-person classroom instruction involves "indoor gatherings occurring for hours a day on a daily basis." Hertel & Nessel Br. at 36. Finally, although COVID-19 may not pose a serious enough disruption to the electoral process, it may still pose a significant enough problem to compel MDHHS to mandate that persons, especially individuals not yet able to be vaccinated, wear masks. Accordingly, we conclude that Plaintiffs' claim is not moot and turn to the merits of their challenge.

B. Standard of Review

We review for abuse of discretion a district court's denial of a preliminary injunction. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). "While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, we review the district court's legal conclusions *de novo* and its factual findings for clear error." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). We have cautioned that "[t]his standard of review is 'highly deferential' to the district court's decision." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007) (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). To summarize, "[w]e 'review the District Court's legal rulings *de novo*' (including its First Amendment conclusion), 'and its ultimate conclusion [as to whether to grant the preliminary injunction] for abuse of discretion.'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 454 (6th Cir. 2014) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005)).

In determining whether to grant a preliminary injunction, we consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). Where, as in this case, Plaintiffs "seek[] a preliminary injunction on the basis of a potential constitutional

AMERICAN OVERSIGHT

violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am.*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Accordingly, we focus our attention on whether Plaintiffs can establish a likelihood of success on the merits.

C. Free-Exercise Challenge

Plaintiffs argue that MDHHS's Orders violate their sincerely held religious beliefs because they require students in grades K–5 at religious schools to wear a face covering. We do not question the sincerity of Plaintiffs' beliefs that wearing a mask in the classroom violates their Catholic faith. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Defendants largely do not question the sincerity of the Plaintiffs' religious objection to wearing a mask in the classroom.[12]

We begin with the familiar framework for free-exercise claims. Where a challenged law is neutral and of general applicability and has merely an "incidental effect" on Plaintiffs' religious beliefs, Defendants need not show a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) (holding that if burdening the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Where the challenged law does not meet these requirements, Defendants must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32. This rule, in part, reflected practical concerns with requiring governments to satisfy the stringent standard of establishing a compelling interest for "all actions thought to be religiously commanded." *Smith*,

[12]Defendants Vail and Siemon contend in their brief that "Appellants do not cite to any sources to support their position that the Catholic faith or Catholic theology is in any way opposed to the use of prophylactic masks during a global pandemic," Vail & Siemon Br. at 6, or "provide any examples of ways in which masks interfere with or burden their religious beliefs," *id.* at 19. Plaintiffs' objections to masks admittedly are confusing and at times, digress into secular, rather than religious concerns. Nevertheless, a plaintiff's "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

AMERICAN OVERSIGHT

494 U.S. at 888. Requiring governments to show more than a rational basis for a law of neutral and general applicability would:

> open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888–89 (citations omitted).

A law, of course, is not neutral and of general applicability if it discriminates on its face. *Hartmann v. Stone*, 68 F.3d 973, 976, 978 (6th Cir. 1995). Relatedly, "[a] law might be motivated by animus toward people of faith in general or one faith in particular." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam). Even if a law appears neutral and is devoid of animus, it is not neutral and of general applicability if it is "riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

We considered the intersection between religious schools and COVID-19 orders in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). In *Beshear*, the plaintiffs argued that a Kentucky order that temporarily prohibited in-person instruction at public and private K–12 schools violated their free-exercise rights. We concluded, in a published opinion, that the plaintiffs were unlikely to succeed on their claims that the order violated the Free Exercise Clause of the First Amendment, and thus stayed the district court's preliminary injunction. *Id.* at 511. First, we determined that the order was "neutral and of general applicability" because it "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." *Id.* at 509. Accordingly, the order "need not be justified by a compelling governmental interest." *Id.* Thus, deferring to "the Governor's determination regarding the health and safety of the Commonwealth at this point in time," we concluded that the plaintiffs were unlikely to succeed on the merits of their free-exercise challenge. *Id.* at 510. The Supreme Court denied the plaintiffs' petition for a writ of certiorari without reaching the merits of the case because of the "timing and the impending expiration of the Order." *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003806

In the present case, the district court applied *Beshear* and correctly concluded that because the requirement to wear a facial covering applied to students in grades K–5 at both religious and non-religious schools, it was neutral and of general applicability. We agree with the district court's application of *Beshear*.

Plaintiffs argue that a subsequent case, *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020) (order), conflicts with the district court's order here. In *Monclova Christian Academy*, the panel concluded that a county health-department order requiring all schools in the county to close for in-person learning was subject to strict scrutiny. Although the order temporarily prohibiting in-person education applied to public and religious K–12 schools alike, the panel construed the relevant comparator as secular businesses such as "gyms, tanning salons, office buildings, and the Hollywood Casino" that the health order had permitted to remain open, not non-religious K–12 schools. *Id.* at 482. Accordingly, the panel held that health order was not neutral and of general applicability and applied strict scrutiny to the challenged order. Applying this standard, the panel concluded that the health-department order was not narrowly tailored to serve a compelling state interest and granted plaintiffs' motion for a preliminary injunction. Following the framework of *Monclova Christian Academy*, Plaintiffs argue that the district court erred by failing to compare MDHHS's interest in requiring that students in grades K–5 wear masks in the classroom with MDHHS's interest in allowing persons not to wear masks in certain, secular circumstances. Pls.' Br. at 30.

Beshear and *Monclova Christian Academy*, however, seemingly conflict with one another. Indeed, the panel in *Monclova Christian Academy* recognized that *Beshear* could pose an issue but contended that the decision in *Beshear* did not consider the "broader question" of "whether an order closing public and parochial schools violates the Clause if it leaves *other* comparable secular actors less restricted than the closed parochial schools." *Id.* at 481. Thus, according to the panel in *Monclova Christian Academy*, it was free to consider in the first instance whether the relevant comparators were secular actors regulated by the specific order or a broader set of secular businesses. *Id.* As Plaintiffs and amici here suggest, *Monclova Christian Academy*'s interpretation of *Beshear* is incorrect. Amici Br. at 9. In *Beshear*, we did consider whether the appropriate comparator was other non-religious schools or other non-school entities

AMERICAN OVERSIGHT

and held that the former was the appropriate comparator. The plaintiffs and amici in *Beshear* argued at the district court and in their appellate briefs that the law was not neutral and of general applicability because it prohibited in-person education at K–12 religious schools while permitting secular activities to continue. *See, e.g.*, Pls.-Appellees' Resp. Mot. for Stay Pending Appeal, at 3–5, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Pleasant View Baptist Church et al. as Amici Curiae Supporting Respondents, at 5–10, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Multiple Private Kentucky Religious Schools as Amici Curiae Supporting Respondents, at 9–12, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Accordingly, as this issue was "brought to the attention of the court" and "ruled upon" in the earlier case, we must follow *Beshear* rather than *Monclova Christian Academy*. *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)); *see also United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021) ("Forced to choose between conflicting precedents, we must follow the first one.").

Tandon v. Newsom, 141 S. Ct. 1294 (2021), does not compel a different comparator. In *Tandon*, the Supreme Court concluded that the plaintiffs were likely to succeed on the merits of their free-exercise challenge to a California order limiting all gatherings in homes, religious and non-religious, to three households. *Id.* at 1297. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. In concluding that the restriction was not neutral and of general applicability, the Court noted that "California treats some *comparable* secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." *Id.* (emphasis added). Identifying a comparable secular activity for religious schools other than a public or private nonreligious school is difficult. Schools educating students in grades K–5 are unique in bringing together students not yet old enough to

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003808

be vaccinated against COVID-19 in an indoor setting and every day.[13] Accordingly, the proper comparable secular activity in this case remains public and private nonreligious schools.

Even under this broader conception of comparable secular activity, the MDHHS orders are not so riddled with secular exceptions as to fail to be neutral and generally applicable. The exceptions to the MDHHS Orders were narrow and discrete. First, many of the exceptions, such as medical intolerance to mask use, eating and drinking, swimming, or receiving a medical treatment during which a mask cannot be worn, are "inherently incompatible with" wearing a mask. Hertel & Nessel Br. at 30. Contact sports where participants cannot safely remain masked must adhere to a testing protocol. 03/02/2021 MDHHS Order § 6(a)(2). Here, Plaintiffs seek to exempt children in grades K–5 at religious schools from having to wear a mask during an activity in which wearing a mask is possible, albeit undesirable for Plaintiffs. Second, almost all exceptions to the MDHHS Orders—aside from children younger than five years old and those medically unable to wear a mask—are short in duration and lower risk (medical and personal care services requiring removal of a mask; voting). Hertel & Nessel Br. at 30–31. Some of the exceptions have a stringent social distancing requirement (public speaking with twelve feet of distance) or are outdoors where the risk of COVID-19 transmission is reduced (outdoor, physically distanced exercise). *Id.* at 33. Third, The MDHHS Orders also exempt activities that are necessary to fulfill "equally important obligations to its citizens' health and safety" (firefighters, police officers, and emergency medical personnel "actively engaged in a public safety role . . . where wearing a face mask would *seriously interfere* in the performance of their public safety responsibilities," 03/02/21 MDHHS Order § 8(i) (emphasis added)). Hertel & Nessel Br. at 33–34. By contrast, as Defendants aptly describe it, "plaintiffs' activity comprises all-day, indoor mixing of the same groups of people, five days a week for months on end." *Id.* at 33. Thus, unlike in *Monclova Christian School*, where the challenged order exempted an array of secular activities that the panel viewed as posing a greater risk than in-person instruction, the exceptions to the MDHHS Orders are narrow and largely limited to activities of lesser risk than in-person instruction.

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[13]Perhaps the only other comparable secular activity, childcare organizations, were subject to the same requirement that children ages five years and older wear a mask. 03/02/21 MDHHS Order § 7(e).

AMERICAN OVERSIGHT

Finally, all exceptions to the MDHHS Orders were available to Plaintiffs if they had chosen to engage in that activity. Hertel & Nessel Br. at 27. Plaintiffs were able to remove their face coverings to eat lunch at school, swim during physical education class, participate in Mass at school, engage in distanced public speaking on a religious topic, or exercise outdoors while physically distanced during recess. *Id.* Under the MDHHS orders, persons medically unable to wear a face covering, such as Smith's son, could go without a face covering at school. Because the MDHHS Orders are not so riddled with exceptions for comparable secular activities as to render the mask requirement not neutral and of general applicability, we review the MDHHS Orders for whether the state has a rational basis.

Other cases cited by Plaintiffs do not change this standard. At oral argument, Plaintiffs argued that the Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), pronounced a different standard. In *Fulton*, the Supreme Court concluded that the city's refusal to contract with Catholic Social Services for the provision of foster care because the agency's religious beliefs prevented it from certifying same-sex couples violated the organization's free-exercise rights. *Id.* at 1882. The *Fulton* majority's narrow holding focused on a contract provision that permitted the commissioner of the city's Department of Human Services to grant exemptions to the non-discrimination clause in her "sole discretion." *Id.* at 1878. The contract's grant of unfettered discretion meant that the non-discrimination clause was not neutral and of general applicability, and thus, was subject to strict scrutiny. *Id.* at 1881. Although the plaintiffs and some of the concurring justices asked that the Court reconsider *Smith*, the majority declined to do so because the city's policy was not neutral and of general applicability, and thus, fell outside the scope of *Smith*. *Id.* at 1876–77.

Plaintiffs cite the Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), for the principle that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,'" (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Pls.' Br. at 26. Plaintiffs' reliance on *Our Lady of Guadalupe School* is misplaced. In *Our Lady of Guadalupe School*, the Supreme Court concluded that a form of immunity from employment-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003810

discrimination claims brought by certain employees, the ministerial exception, extended to two teachers who taught religion and participated in religious activities. *Id.* at 2066. The Supreme Court, however, emphasized that religious institutions' ability to decide "matters of church government" and "faith and doctrine," "does not mean that religious institutions enjoy a general immunity from secular laws." *Id.* at 2060. MDHHS Orders requiring all persons ages five and older to wear a mask in public—including in the classroom—is not comparable to infringing on the school's authority to select their ministers and religious educators. Thus, *Our Lady of Guadalupe School* provides no help to Plaintiffs.

Plaintiffs' citation to *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), is also misplaced. According to Plaintiffs, *Thomas* compels us to "defer[] [to] Plaintiffs' understanding of their own religious beliefs" and not conclude that "any burden to Plaintiffs' religious beliefs was 'incidental.'" Pls.' Br. at 22 (quoting *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897, 902 (W.D. Mich. 2020)). *Thomas*, however, stands for the proposition that we should defer to a plaintiff's characterization of her opposition to a law as religious. *Thomas*, 450 U.S. at 714.

Plaintiffs also argue that we should apply strict scrutiny to MDHHS's Orders because the orders violate both their free-exercise rights and their rights as parents to direct the education of their children. Pls.' Br. at 32.[14] This hybrid-rights theory stems from dicta in *Smith* explaining that a plaintiff may establish a violation of the Free Exercise Clause by showing that a neutral and generally applicable law violates "the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881.

Although some circuits have recognized hybrid-rights claims, we have consistently declined to recognize hybrid-rights claims. For instance, in *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine*, 5 F.3d 177 (6th Cir. 1993), we

[14]In support of this hybrid-rights argument, Plaintiffs cite language from the Supreme Court's order in *Danville Christian Academy* declining to grant Plaintiffs' application for a writ of certiorari. Pls.' Br. at 32 ("Even if this Court were to deem Defendants' orders generally applicable, which they are not, Plaintiffs' free exercise claim also requires heightened scrutiny because the 'application of a neutral, generally applicable law to religiously motivated action implicates the right of parents to direct the education of their children.'" (quoting *Danville Christian Acad.*, 141 S. Ct. at 528)). Plaintiffs' reference is misleading, because the Supreme Court was merely repeating an argument raised by amici, not assessing the merits of this argument.

AMERICAN OVERSIGHT

considered the merits of a veterinary student's claim that her college's policy of requiring students to dissect animals violated the Free Exercise Clause and other constitutional provisions. We declined to apply strict scrutiny to her hybrid claim, reasoning that "[w]e do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights." *Id.* at 180. Simply put, this outcome would be "completely illogical." *Id.* "[T]herefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated," we explained that we would "not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Id.* Since then, we have consistently declined to recognize a hybrid-rights theory. *See Pleasant View Baptist Church*, 838 F. App'x at 940–41 (Donald, J., concurring) (collecting cases). We decline to recognize a hybrid-rights claim here.

Applying rational-basis review, we hold that the MDHHS Orders are rationally related to a legitimate government interest. To satisfy rational-basis review, Defendants must show "only that the regulation bear[s] some rational relation to a legitimate state interest." *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). Here, Defendants had a legitimate state interest in controlling the spread of COVID-19 in Michigan. Plaintiffs apparently concede this point, acknowledging that "COVID-19 poses real challenges and concerns to everyone and requires a robust response." Pls.' Br. at 4. Further, Defendants cite more than ample evidence that requiring masks in the school setting minimizes the spread of COVID-19. *See* Hertel & Nessel Br. at 4–5; Vail & Siemon Br. at 8; R. 16-2 (Aff. of Vail) (Page ID #535–62). Although Plaintiffs question the effectiveness of masks, even they admit that "masks serve a purpose when students cannot socially distance and do not object to (and, indeed, enforce) mask wearing in the hallways and common areas of the school." Pls.' Br. at 5–6.

We conclude that the MDHHS Orders do not violate the Free Exercise Clause because the MDHHS Orders are neutral and of general applicability and satisfy rational-basis review.

AMERICAN OVERSIGHT

D. Equal-Protection Claim

Plaintiffs argue that the MDHHS Orders violate the Equal Protection Clause because the Orders exempt certain secular activities but not religious education, and, alternatively, because the Orders lack a rational basis. Plaintiffs also fault the district court for failing to cite caselaw explaining why the MDHHS Orders satisfy the Equal Protection Clause.

To establish an equal-protection violation, "a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)). We have explained that "[t]he threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

Plaintiffs' equal-protection challenge is confusing, is largely a repackaging of its free-exercise argument, and is ultimately meritless. First, Plaintiffs fail to satisfy this threshold requirement of showing that the state has treated similarly situated persons differently than Plaintiffs. Plaintiffs argue that the MDHHS Orders result in "disparate treatment" because they permit persons to remove their masks while engaging in certain secular activities and in religious worship in a house of worship, while requiring students in grades K–5 at religious schools to wear masks. This is a free-exercise challenge, not an equal-protection challenge. Seemingly recognizing that this is a free-exercise challenge, Plaintiffs open their argument by stating that "the challenged measures burden Plaintiffs' fundamental rights to the free exercise of religion under the First Amendment in violation of the equal protection guarantee of the Fourteenth Amendment." Pls.' Br. at 34. Further, there is no "disparate treatment" because the MDHHS Orders did not distinguish between certain groups of children. The MDHHS Orders required all children ages five and older to wear masks in public, subject to a few universal exceptions that were available to Plaintiffs.

AMERICAN OVERSIGHT

Plaintiffs' argument that the requirement that children ages five years and older wear masks in the classroom lacks any rational basis is equally unavailing. Although unclear from the brief, Plaintiffs appear to argue that the MDHHS Orders lack any rational basis because the Orders exempted activities that Plaintiffs perceive as riskier than the in-person education of students in grades K–5. Pls.' Br. at 34. One could also include Plaintiffs' general belief that masks do not work to limit the transmission of COVID-19 within this argument. *Id.* at 5. As discussed in Part II.C, however, the MDHHS Orders satisfy rational-basis review. Accordingly, we conclude that Plaintiffs' equal-protection claim fails.

E. Substantive-Due-Process Claim

Finally, Plaintiffs argue that the MDHHS Orders violate their substantive-due-process rights. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see also Kiser v. Kamdar*, 831 F.3d 784, 791 (6th Cir. 2016) (declining to consider the plaintiff's substantive-due-process challenge because it was really a commercial-speech case).

Plaintiffs' challenge to the MDHHS Orders lies in the First Amendment's Free Exercise Clause, and thus, their substantive-due-process claim is duplicative. The district court admittedly did not explicitly address the merits of Plaintiffs substantive-due-process claim. We nonetheless conclude that Plaintiffs' substantive-due-process claim is without merit.

III. CONCLUSION

For the foregoing reasons, we hold that Plaintiffs' challenge to the mask requirement for children in grades K–5 in all schools in Michigan is not moot. We **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction.

AMERICAN OVERSIGHT

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's conclusions on mootness, in part A of the opinion. However, I dissent on the merits on the primary issue, that is, whether the district court correctly denied the petition for the granting of a preliminary injunction.

I do not quarrel with the fact that the district court had the authority to deny the motion for preliminary injunction under the facts of this case, but it did not have the benefit of the more recent case *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). It also did not have the benefit of the decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), which was handed down later in the same month that the district court made its ruling. *Monclova* held that in cases such as this, the court should look at all comparators, not just the public schools. *Id.* at 480. The district court here compared the restrictions in this matter with those followed in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Yet *Monclova* is more consistent with *Tandon* than *Beshear*. The court did not consider other comparable secular activities beyond the public schools. I feel it is a mistake for this court to uphold the denial of the preliminary injunction on the interpretation from *Tandon* without giving the district court an opportunity to consider it in light of all the evidence before it. Therefore, I would remand to the district court to review the case in light of the decision in *Tandon*.

AMERICAN OVERSIGHT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-2256

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; STEPHANIE SMITH, individually and as next friend on behalf of her minor child F.S.,

Plaintiffs - Appellants,

v.

ELIZABETH HERTEL, in her official capacity as the Director of the Michigan Department of Health and Human Services; DANA NESSEL, in her official capacity as Attorney General of the State of Michigan; LINDA VAIL, in her official capacity as the Health Officer of Ingham County; CAROL A. SIEMON, in her official capacity as the Ingham County Prosecuting Attorney,

Defendants - Appellees.

FILED
Aug 23, 2021
DEBORAH S. HUNT, Clerk

Before: SILER, MOORE, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Plaintiffs' motion for a preliminary injunction is AFFIRMED on the merits.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

AMERICAN OVERSIGHT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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AMERICAN OVERSIGHT

Re: Case No. 20-2256, *Resurrection School, et al v. Elizabeth Hertel, et al*
Originating Case No. : 1:20-cv-01016

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Thomas Dorwin

Enclosures

Mandate to issue.

AMERICAN OVERSIGHT

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0191p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; STEPHANIE SMITH, individually and as next friend on behalf of her minor child F.S.,

Plaintiffs-Appellants,

v.

ELIZABETH HERTEL, in her official capacity as the Director of the Michigan Department of Health and Human Services; DANA NESSEL, in her official capacity as Attorney General of the State of Michigan; LINDA VAIL, in her official capacity as the Health Officer of Ingham County; CAROL A. SIEMON, in her official capacity as the Ingham County Prosecuting Attorney,

Defendants-Appellees.

No. 20-2256

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:20-cv-01016—Paul Lewis Maloney, District Judge.

Argued: July 21, 2021

Decided and Filed: August 23, 2021

Before: SILER, MOORE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, for Appellants. Daniel J. Ping, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Elizabeth Hertel. Ann M. Sherman, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee Dana Nessel.

AMERICAN OVERSIGHT

ON BRIEF: Erin Elizabeth Mersino, GREAT LAKES JUSTICE CENTER, Lansing, Michigan, Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Daniel J. Ping, Joseph T. Froehlich, Ann M. Sherman, Rebecca A. Berels, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for State of Michigan Appellees. Bonnie G. Toskey, Sarah K. Osburn, COHL, STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellees Linda Vail and Carol Siemon. Alex J. Luchenitser, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amici Curiae.

MOORE, J., delivered the opinion of the court in which DONALD, J., joined, and SILER, J., joined in part. SILER, J. (pg. 31), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. To control the spread of COVID-19, the Michigan Department of Health and Human Services ("MDHHS") required that all persons five years of age and older wear a mask in indoor public settings, including while attending public and private K–12 schools. Plaintiffs Resurrection School, a Catholic elementary school in Lansing, Michigan, and two parents with children enrolled at the school, on behalf of themselves and their minor children, challenge the mask requirement as a violation of their free exercise of religion, equal protection, and substantive due process rights. Since Plaintiffs filed suit, MDHHS has rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement. We hold that Plaintiffs' challenge to the mask requirement is not moot, and we **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction on the merits.

I. BACKGROUND

A. COVID-19 in Michigan

COVID-19 is a novel respiratory infection first discovered in December 2019. Since then, 925,377 Michigan residents have been diagnosed with COVID-19 and 20,076 Michigan residents have died from the disease. Mich. COVID-19 Dashboard, Cumulative Confirmed Cases and Deaths Among Confirmed Cases, https://www.michigan.gov/coronavirus/0,9753,7-

AMERICAN OVERSIGHT

406-98163_98173---,00.html (accessed Aug. 19, 2021). Although young children have been largely spared the worst of the disease's impact, six children ages 5–14 have died of COVID-19 in Michigan, *Number of COVID-19, Pneumonia and Influenza Deaths by Age of Death, Michigan Occur[r]ences*, MDHHS, https://www.mdch.state.mi.us/osr/Provisional/CvdTable2.asp (accessed Aug. 19, 2021), and 1,280 children ages 0-17 have been hospitalized with COVID-19, COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (accessed Aug. 19, 2021). One-hundred-and-sixty-one children in Michigan who recovered from COVID-19 went on to develop Multisystem Inflammatory Syndrome in Children ("MIS-C"), a condition causing inflammation and damage to organs. MIS-C Data and Reporting, MDHHS, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_104661---,00.html (accessed Aug. 19, 2021); *see also* R. 16-2 (Vail Aff. ¶ 7) (Page ID #538) (describing MIS-C and other long-term complications of COVID-19 infection). Children infected with COVID-19 can spread the disease to their parents and grandparents, teachers and school staff, and other medically vulnerable Michiganders.

COVID-19 primarily spreads through airborne particles that accumulate in enclosed spaces with inadequate ventilation, respiratory droplets produced when a person coughs, sneezes, or talks, and occasionally through contact with objects contaminated with the virus. *How COVID-19 Spreads*, CDC (July 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. Individuals infected with COVID-19 can spread the disease while asymptomatic and pre-symptomatic, and many individuals infected with COVID-19 experience mild symptoms. *See* R. 14-6 Ex. 5 (Nathan Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, 26 Emerg. Infect. Dis. (July 2020)) (Page ID #297–303). These features make COVID-19 difficult to control. As a result, universal community use of masks is a widely accepted method to prevent the spread of COVID-19, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html, despite Plaintiffs' contentions to the contrary, R. 21 (First Amended Compl. ¶¶ 75–77) (Page ID #648–49).

AMERICAN OVERSIGHT

Since Plaintiffs filed their lawsuit in October 2020, the Food and Drug Administration ("FDA") has authorized three COVID-19 vaccines for emergency use, including one for use in persons twelve years of age and older. *Different COVID-19 Vaccines*, CDC (May 27, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html. Two of the vaccine manufacturers, Pfizer-BioNTech and Moderna, are testing their vaccines in children ages six months to eleven years old. Apoorva Mandavilli, *In the U.S., Vaccines for the Youngest Are Expected This Fall*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/health/us-vaccines-children-fall.html. Although initially Pfizer-BioNTech hoped to apply for emergency authorization of the vaccine for children ages five to eleven years old in September, and Moderna sometime in the fall, *id.*, the FDA has requested that the two vaccine manufacturers increase the size of their studies, which may delay the FDA's authorization of the vaccine for children younger than twelve, *see* Sheryl Gay Stolberg et al., *At the F.D.A.'s Urging, Pfizer-BioNTech and Moderna Are Expanding Their Trials for Children 5 to 11*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/us/politics/fda-covid-vaccine-trials-children.html.

B. Michigan's Mask Requirement

Masks have been a significant part of Michigan's COVID-19 response, especially prior to the widespread availability of safe and effective vaccines. Beginning on April 27, 2020, Michigan required all persons "able to medically tolerate a face covering" to wear a face covering "when in any enclosed public space." E.O. 2020-59 § 15(a) (Apr. 24, 2020); *see also* E.O. 2020-147 § 1 (July 10, 2020) (reiterating that all persons ages five and older must wear a face covering in public except in limited circumstances or if medically unable to wear a face covering).

In preparation for the 2020–2021 school year, Governor Gretchen Whitmer issued the MI Safe Schools Roadmap ("Roadmap"), which outlined safety recommendations and requirements for K–12 schools. *MI Safe Schools: Michigan's 2020-21 Return to School Roadmap* (June 30, 2020), https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf. The Roadmap varied its prescriptions based on the prevalence of COVID-19 in the

AMERICAN OVERSIGHT

community and the grade of the students. *Id.* at 9.[1] The Roadmap strongly recommended, but did not require, students in grades K–5 to wear a face covering in the classroom so long as they did not come into contact with students in another class. *MI Safe Schools*, at 22; *see also* E.O. 2020-142 § (2)(b)(1)(E) (June 30, 2020) (incorporating requirement into an executive order).

On September 25, 2020, citing "the higher incidence of [COVID-19] cases among children in recent months," "the clear effectiveness of masking as mitigation strategy," and the "absence of a widespread vaccine," Whitmer issued an executive order mandating that children in grades K-5 also wear a face covering in classrooms. E.O. 2020-185 § 1 (Sept. 25, 2020). A few days later, the Michigan Supreme Court concluded that the 1945 law under which Whitmer had been issuing executive orders regarding the COVID-19 pandemic was an improper delegation of legislative power in violation of the Michigan Constitution. *See In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1 (Mich. 2020). MDHHS then issued an order reinstating the requirement that children in grades K–5 wear a face covering in the classroom. 10/05/20 MDHHS Order §§ 2–3. MDHHS issued another near-identical order on October 9, 2020. 10/09/20 MDHHS Order. The Ingham County Health Department, which includes Lansing, also issued its own emergency order requiring all persons who leave their home or place of residence to wear a face covering, including children in grades K-5. Ingham Cnty. E.O. 2020-21 (Oct. 4, 2020); *see also* R. 16-2 Ex B. (Vail Aff. ¶¶ 13–22) (Page ID #539–41) (describing the Ingham County order). On October 23, 2020, the Ingham County Health Department rescinded its order after it confirmed that the MDHHS Orders included all requirements of the county order. *Id.* ¶ 23 (Page ID #541).

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[1]The Roadmap corresponds to the MI Safe Start Plan, which adopted a six-phase approach to reopening the state based on the prevalence of disease. In Phase 1, a region is experiencing "[i]ncreasing number of new cases every day, likely to overwhelm the health system" and only critical infrastructure is permitted to remain open, whereas in Phase 6, the region has community immunity sufficient to minimize community spread and restrictions are lifted. *MI Safe Start: A Plan to Re-engage Michigan's Economy*, at 2 (May 7, 2020), https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf. When a region is in at least Phase 4, the Roadmap permitted schools to reopen for in-person learning with certain safety protocols. *MI Safe Schools*, at 21. In practice, Michigan treated in-person K–12 instruction more permissively than the terms of the MI Safe Start Plan and the Roadmap. The MI Safe Start plan permitted schools to reopen for in-person instruction only in Phases 5 and 6, *MI Safe Start*, at 2, and MDHHS permitted K–8 schools to remain open for in-person instruction even when all regions were at the highest risk level, 11/15/20 MDHHS Order.

AMERICAN OVERSIGHT

Since then, MDHHS has issued several orders slightly changing the circumstances for when a mask is required. The March 2, 2021 Order, which is the focus of the parties' briefing,[2] provides in relevant part:

> 7. **Face mask requirement at gatherings.**
>
> (a) All persons participating in gatherings are required to wear a face mask.
>
> (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
>
> (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
>
> (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
>
> . . .
>
> 8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:
>
> (a) Are younger than 5 years old, outside of a child care organization or camp setting (which are subject to requirements set out in section 7(e));
>
> (b) Cannot medically tolerate a face mask;

[2]Defendants acknowledge that MDHHS has made "minor alterations" to the exceptions between the 10/09/20 MDHHS Order and the 03/02/21 MDHHS Order, and thus, refer to "the orders" collectively. Hertel & Nessel Br. at 8 n.6. For instance, during the winter surge in COVID-19 cases, MDHHS prohibited any non-essential personal care services that required removal of face masks, most organized sports, and indoor dining. 11/15/20 MDHHS Order. Accordingly, we use "MDHHS Orders" to refer to the orders leading up to the rescission of the mask requirement.

AMERICAN OVERSIGHT

(c) Are eating or drinking while seated at a food service establishment or at a private residence;

(d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;

(e) Are swimming;

(f) Are receiving a medical or personal care service for which removal of the face mask is necessary;

(g) Are asked to temporarily remove a face mask for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

(j) Are engaging in a religious service;

(k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or

(l) Are participating in a testing program specified in MDHHS's document entitled Guidance for Athletics issued February 7, 2021, and are engaged in practice or competition where the wearing of a mask would be unsafe.

03/02/21 MDHHS Order. In accordance with Mich. Comp. Laws § 333.2261, "violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both." *Id.* § 10(e). Further, MDHHS promulgated emergency rules stating that a violation of the MDHHS Orders carries "a penalty of up to $1,000 for each violation or day that a violation continues." MDHHS Emergency Rules (Oct. 20, 2020).

On May 14, 2021, in response to CDC guidance that fully vaccinated persons no longer need to wear a mask in most settings, MDHHS added fully vaccinated persons to the list of exceptions to the mask requirement. 05/14/2021 MDHHS Order. One month later, MDHHS rescinded almost all COVID-19 pandemic emergency orders, including the challenged mask requirement, because of the reduction in COVID-19 test positivity rates, case rates, hospitalizations, and deaths, the availability of COVID-19 vaccines, the availability of therapeutics, such as monoclonal antibodies, and warmer weather. 06/17/21 MDHHS Order. The 06/17/21 MDHHS Order became effective June 22, 2021. *Id.*

AMERICAN OVERSIGHT

MDHHS's rescission coincided with summer break, which leaves open the question of what restrictions MDHHS may impose for the 2021–2022 school year. MDHHS's interim guidance for schools recommends that schools use multiple prevention strategies, including face masks, to limit transmission in school. MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Guidance_for_Operating_Schools_Safely_728838_7.pdf.

Other public-health authorities have weighed in on mitigation measures for in-person education for the 2021–22 school year. In consideration of new evidence regarding the B.1.617.2 (Delta) coronavirus variant, the CDC's guidance for K–12 schools now recommends that all persons wear a mask indoors at school regardless of vaccination status. *Guidance for COVID-19 Prevention in K-12 Schools*, CDC (updated Aug. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html. The American Academy of Pediatrics ("AAP") also recommends that all students and staff—regardless of whether they are fully vaccinated against COVID-19—wear a mask indoors at school as a "necessary measure[] to limit the community spread of SARS-CoV-2 to ensure schools can remain open and safe for all students." *COVID-19 Guidance for Safe Schools*, Am. Acad. Pediatrics (last updated July 18, 2021), available at https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/. Masks, according to the AAP, are part of a "multi-pronged, layered approach" that together "will make in-person learning safe and possible." *Id.*

Some states and localities have adopted universal mask requirements in line with public health authorities' recommendations. *See, e.g.*, Kalamazoo Cnty. Health Dep't 08/18/2021 Order (requiring that children in grades K–6 and those providing services to children in grades K–16 wear a mask in school settings); Ky. E.O. 2021-585 (Aug. 10, 2021); Cal. Dep't Pub. Health, *COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year* (July 12, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx (requiring that all persons, including children in grades K–5, wear masks at school); *K-12 School Updates*, Del. Div. Pub. Health (May 12,

AMERICAN OVERSIGHT

2021), https://coronavirus.delaware.gov/schools-and-students/school-updates/ (same). Other states have recommended, but not required, students in grades K–12 to wear masks in school. *See, e.g.*, Ohio Dep't Pub. Health (July 26, 2021), https://coronavirus.ohio.gov/static/responsible/schools/K-12-Schools-Guidance.pdf.

Despite the CDC's and the AAP's guidance and the decisions of other states to impose mask requirements in school, Whitmer has stated that she does not expect MDHHS to issue a mask requirement or other pandemic orders "in the near future and maybe not ever." Dave Boucher & Kristen Jordan Shamus, *Whitmer: No New State Mask Rule Expected Despite Updated CDC Guidance*, DET. FREE PRESS (July 27, 2021), https://www.freep.com/story/news/health/2021/07/27/whitmer-no-new-state-mask-rule-despite-updated-cdc-guidance/5385179001/. Hertel has indicated that she "expect[s] and encourage[s] schools when they go back to have mask requirements for kids younger than 12 and those who haven't been vaccinated." *MDHHS Director: State Urging Schools to Have Mask Mandates for Kids Under 12, Those Not Vaccinated*, WXYZ-Det. (July 22, 2021), https://www.wxyz.com/news/coronavirus/mdhhs-director-state-urging-schools-to-have-mask-mandates-for-kids-under-12-those-not-vaccinated.

C. Plaintiffs' Lawsuit

On October 22, 2020, Plaintiffs filed a complaint in the U.S. District Court for the Western District of Michigan. Plaintiffs allege that the MDHHS Orders violate their rights to free exercise, equal protection, substantive due process, freedom of speech, and freedom of association. R. 1 (Compl. ¶¶ 135–41, 163–85) (Page ID #22–23, 27–30). In addition to these constitutional claims, Plaintiffs argued that the 10/05/20 MDHHS Order is an unlawful exercise of authority under Michigan law and violates the Michigan constitution's separation of powers and non-delegation clauses. *Id.* ¶¶ 142–62 (Page ID #24–26).

The declaration submitted by the principal of Plaintiff Resurrection School, Jacob Allstott, attests that MDHHS's mask requirement for students in grades K–5 violates Resurrection School's sincerely held religious beliefs because it interferes with the school's religiously oriented disciplinary policies and prevents younger students from partaking fully in a

AMERICAN OVERSIGHT

Catholic education.[3] R. 8-1 (Allstott Decl. ¶¶ 41–58) (Page ID #178–80). The declarations submitted by the Plaintiff parents assert that their children find masks uncomfortable and distracting from their religious education, and that the mask requirement conflicts with "the right [as a parent] to choose a school for them which corresponds to their own convictions." R. 8-2 (Mianecki Decl. ¶ 59) (Page ID #190) (quoting Catechism of the Catholic Church ("CCC") § 2229); R. 8-3 (Smith Decl. ¶ 40) (Page ID #197–98).

Plaintiff Christopher Mianecki attests that wearing a mask in the classroom "interferes with [his children's] ability to engage in their elementary school classroom and its Catholic, religious teachings." R. 8-2 (Mianecki Decl. ¶ 52) (Page ID #189). He provides specific examples of how the requirement that children wear masks in the classroom affects his three children who are enrolled at Resurrection School. He states that wearing a mask negatively impacts his children's focus, *id.* ¶ 33 (Page ID #187), "diverts [their] attention away from the lesson taught in class," *id.* ¶ 36 (Page ID #187), and "negatively affect[s] [their] ability to breathe effectively," *id.* ¶ 38 (Page ID #187).

Plaintiff Stephanie Smith states that her child, F.S., is unable to wear a mask because he "suffer[s] from breathing issues," R. 8-3 (Smith Decl. ¶ 8) (Page ID #194), and "is highly susceptible to respiratory infections that quickly turn into additional infections such as bronchitis," *Id.* ¶ 9 (Page ID #194). Despite Smith's observation that F.S. is unable to wear a mask because of his health conditions, F.S.'s pediatrician determined that F.S. did not qualify for a medical exemption.[4] *Id.* ¶ 11 (Page ID #194). As a result, Smith is "educating F.S. at home where he is not mandated to wear a mask, and F.S. is on a long-term absence from his Catholic

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[3]In the initial complaint, Plaintiffs also argued that "[i]n accordance with the teachings of the Catholic faith, Resurrection School believes that every human has dignity and is made in God's image and likeness. Unfortunately, a mask shields our humanity. And because God created us in His image, we are masking that image." R. 1 (Compl. ¶ 22) (Page ID #5).

[4]The MDHHS Orders exempted children who "[c]annot medically tolerate a face mask" from complying with the face mask requirements. 03/02/21 MDHHS Order § 8(b). The MDHHS Orders clarify that "[a]n individual's verbal representation that they are not wearing a face mask because they fall within a specified exception . . . may be accepted." *Id.* § 7(d). Organizations may choose to require documentation that an individual cannot medically tolerate a face mask. *See, e.g.*, Diocese of Lansing, *Return to Learn: Phase 4 Plan*, https://www.dioceseoflansing.org/education/phase-4-plan (requiring that students and staff obtain a "written and signed verification by a physician" in order not to wear a mask while at school).

AMERICAN OVERSIGHT

school." *Id.* ¶ 16 (Page ID #195). Smith and her husband "cannot give F.S. the same Catholic education that he receives at Catholic school with his classmates." *Id.* ¶ 20 (Page ID #195).[5]

Plaintiffs moved for a temporary restraining order ("TRO") and a preliminary injunction seeking to enjoin Defendants from enforcing the 10/05/20 MDHHS Order against Resurrection School and the other plaintiffs. R. 7 (Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #65–70). The district court denied Plaintiffs' expedited ex parte motion for a TRO, concluding that Plaintiffs could not establish that they would experience irreparable harm without the order because they had unreasonably delayed in filing for emergency ex parte injunctive relief.[6] R. 11 (Order Denying Mot. for TRO at 3–4) (Page ID #207–08). Defendants then filed motions to dismiss, R. 13 (Gordon & Nessel Joint Mot. to Dismiss) (Page ID #215–18); R. 15 (Vail & Siemon, Mot. to Dismiss) (Page ID #475–76), and responses in opposition to Plaintiffs' request for a preliminary injunction, R. 18 (Gordon & Nessel, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #565–60); R. 19 (Vail & Siemon, Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj.) (Page ID #602–04).

After Defendants responded to Plaintiffs' initial complaint and motion for a TRO and preliminary injunction, Plaintiffs filed an amended complaint. R. 21 (First Am. Compl.) (Page ID #636–68). The First Amended Complaint narrowed Plaintiffs' claims to violations of free exercise, equal protection, and substantive due process, and the Michigan constitutional and state-law claims. *Id.* The district court determined that the amended complaint did not render Defendants' motions to dismiss moot and required Plaintiffs to respond to the motions to dismiss. R. 23 (12/10/20 Order) (Page ID #692).

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[5]We are troubled by public statements suggesting that Resurrection School did not require students in grades K–5 to wear masks during the entire school year, Cody Butler, *Federal Appeals Court to Hear Arguments over Michigan Mask Mandate*, WILX-Lansing (July 20, 2021), https://www.wilx.com/2021/07/20/federal-appeals-court-hear-arguments-over-michigan-mask-mandate/, when they have made contrary representations to this court and the district court.

[6]The district court noted that Whitmer and MDHHS issued executive orders requiring individuals over the age of five to wear a face covering indoors on July 17, 2020 and July 29, 2020 respectively, and thus, the "Plaintiffs cannot rely on the October 2, 2020 Opinion from the Michigan Supreme Court as the critical event." R. 11 (Order at 4) (Page ID #208).

AMERICAN OVERSIGHT

The district court denied Plaintiffs' motion for a preliminary injunction. *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897 (W.D. Mich. 2020). Applying *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020) (order), the district court determined that Plaintiffs were unlikely to succeed on the merits of their free-exercise challenge to the 10/05/2020 MDHHS Order. *Id.* at 900–01. First, the district court found that the 10/05/2020 MDHHS Order was neither motivated by animus against people of faith or a specific faith nor limited to regulating only religious activity. *Id.* at 901. The district court then determined that the order was neutral and generally applicable because it "require[d] all individuals over the age of five to wear a face mask in public. This requirement is in place whether they are attending a religious school, a secular school, running errands, or participating in some other facet of daily life." *Id.* at 901–02. The exceptions to the order are "narrow and discrete," and "apply to public schools and private schools equally, and they apply to secular schools and religious schools equally." *Id.* at 902. Thus, the district court concluded that Plaintiffs were unlikely to succeed on the merits of their free exercise claim. *Id.*

The district court dismissed Plaintiffs' claim that the Order violated their equal-protection rights by permitting individuals to remove their face covering in certain circumstances, because "[t]here is nothing in the face-mask requirement that treats similarly situated groups of individuals different." *Id.* As for Plaintiffs' state-law claims, the district court declined to address this "novel question of state law for the first time" at this stage of litigation. *Id.* Although the district court did not address Plaintiffs' substantive-due-process claim by name, it concluded at the end that "Plaintiffs have failed to establish a lik[e]lihood of success on the merits on *any* of their claims." *Id.* (emphasis added).

Plaintiffs timely appealed. R. 25 (Not. of Appeal) (Page ID #700–01). Defendants move to dismiss the appeal as moot because MDHHS has rescinded the mask requirements. No. 20-2256, R. 34 (Hertel & Nessel Mot. to Dismiss Appeal as Moot); No. 20-2256, R. 37 (Siemon & Vail Mot. to Dismiss Appeal as Moot). Plaintiffs oppose the motion. No. 20-2256, R. 38 (Pls.' Resp. Mot. to Dismiss Appeal as Moot).

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

AMERICAN OVERSIGHT

II. ANALYSIS

A. Mootness

Defendants argue that we lack jurisdiction because Plaintiffs' claims are moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "We do not have the power to adjudicate disputes that are moot, and '[t]he mootness inquiry must be made at every stage of a case.'" *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). There are two relevant exceptions to the mootness doctrine. First, voluntary cessation of the challenged conduct does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Second, a case will not become moot if the injury is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs argue that their case should proceed under both exceptions, and we address both in turn.

1. Voluntary Cessation

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Where the defendant voluntarily ceases the challenged conduct, the defendant must establish that: "there is no reasonable expectation that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[7] *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021) (quoting *Speech First v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019)). We caution that "[t]he burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

[7]The second requirement is not at issue here.

AMERICAN OVERSIGHT

We generally treat "cessation of the allegedly illegal conduct by government officials . . . with more solicitude . . . than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). "This [voluntary cessation] exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation." *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *see also Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) ("[S]elf-correction [by government officials] provides a secure foundation for a dismissal based on mootness so long as it appears genuine." (quoting *Mosley*, 920 F.2d at 415)).

Plaintiffs argue, and Defendants acknowledge, that because Defendants' "discretion to effect the change lies with one agency or individual, . . . significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim," *Speech First*, 939 F.3d at 768. Hertel & Nessel Reply at 4; Pls.' Resp. at 7. Although MDHHS, like the Defendants in *Speech First*, retains the sole authority to change the mask requirements, this case is distinguishable from *Speech First* because MDHHS rescinded the challenged orders in response to "changing circumstances." Defendants Hertel & Nessel offer evidence that the policy change was genuine, including that the policy change reflects increased access and eligibility for vaccines, that Michigan joins other states in rescinding their mask requirements,[8] and that MDHHS rescinded almost all COVID-19 orders, not merely the orders at issue here.

Although the Supreme Court has addressed mootness in the context of COVID-19 restrictions, the factual circumstances are distinguishable from those present here. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020), the Supreme Court held that the plaintiffs' challenge to a state COVID-19 pandemic order limiting attendance at religious services was not moot even though the state had relaxed the attendance limitations in response to

[8]Defendants note that as of July 2021 thirty-one states have rescinded their mask requirements. Hertel & Nessel Reply at 5 n.4 (citing Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (July 12, 2021), available at https://www.aarp.org/health/healthy-living/info2020/states-mask-mandates-coronavirus html.). This argument cuts both ways because many states have imposed mask requirements for K–12 instruction, *see* Part I.B, and some states and localities have recently reimposed broad indoor mask requirements following a new surge in COVID-19 cases, *see* Nev. Exec. Directive. 047 (July 27, 2021) (requiring mask usage by all persons in areas with substantial or high transmission of COVID-19); La. Procl. No. 2021-137 (Aug. 2, 2021) (implementing a statewide mask mandate).

AMERICAN OVERSIGHT

declining COVID-19 cases. The Court reasoned that the plaintiffs "remain under a constant threat" that the state will reimpose attendance limits without notice and "bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* at 68. The state health department assigned areas to different risk categories based on the severity of the COVID-19 outbreak, and imposed defined restrictions on activity. *Id.* at 66. The state continued to use this framework, meaning that the plaintiffs remained at risk of restrictions on attendance at religious services if the number of COVID-19 cases, deaths, and hospitalizations increased. *Id.* at 68. Here, Defendants do not presently use a similar framework for imposing mask requirements and other pandemic restrictions. To the contrary, Defendants at present have rescinded all pandemic restrictions.

Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), the Supreme Court held that the plaintiffs' challenge to the state COVID-19 pandemic order limiting gatherings, including gatherings for at-home religious activities, was not moot even though the defendants altered the guidance during litigation. The Court explained that

> even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Id. at 1297 (quoting *Catholic Diocese of Brooklyn*, 141 S. Ct. at 68). In concluding that plaintiffs' challenge was not moot, the Court noted that "the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Id.* (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.)).

The *Tandon* Court's conclusion rested on its perception that state officials had a "track record" of altering COVID-19 guidance, and that it had previously "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" four times. 141 S. Ct. at 1297. In contrast here, Defendants have been consistent in their approach to mask requirements. For the 2020–21 school year, excluding a few weeks at the beginning of the school year, Defendants required students in grades K–5 to wear masks in the classroom.

AMERICAN OVERSIGHT

MDHHS altered its mask requirements only in May 2021 in response to the CDC's guidance that individuals who were vaccinated are unlikely to transmit COVID-19, and MDHHS eliminated the mask requirements in June 2021 in response to sustained decreases in the number of COVID-19 cases, hospitalizations, and deaths and the wide availability of safe and effective vaccines.

As for our own circuit, in an unpublished case reviewing a COVID-19 public-health order, we declined to apply the voluntary-cessation exception to mootness where the Governor replaced an executive order with a recommendation. *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 938 (6th Cir. 2020) (order); *cf. Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 566 (6th Cir. 2020) (per curiam) (remanding to the district court to permit it to consider "whether these cases have become moot in light of the Governor's new orders"). In distinguishing the case from *Catholic Diocese of Brooklyn*, we emphasized that "there, unlike here, the challenged order remained in force subject to the apparent whims of the Governor, to whom a presumption of regularity did not apply." *Pleasant View Baptist Church*, 838 F. App'x at 939.[9]

In some ways, Defendants' argument that their rescission of the challenged MDHHS orders moots Plaintiffs' claims is stronger than the one accepted in *Pleasant View Baptist Church*. In *Pleasant View Baptist Church*, we relied on the Governor's public statements that he would rely on recommendations instead of mandates, which he made prior to the widespread availability of effective vaccines. MDHHS's rescission of the challenged orders, by contrast, reflects widespread availability of and increased eligibility for effective COVID-19 vaccines. On the other hand, *Pleasant View Baptist Church* involved school closures, which are a more onerous public health measure than requiring that students wear masks at school. In fact, MDHHS and other public-health authorities recommend that all persons wear masks in school to ensure that schools can maintain in-person learning. *See, e.g.*, MDHHS, *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Community Transmission* (June 25, 2021), https://www.michigan.gov/documents/coronavirus/COVID-

[9]Plaintiffs suggest without explanation that "*Tandon* adopted a different analysis from *Pleasant View Baptist Church* and a different standard." Pls.' Resp. at 12. Plaintiffs' argument is unavailing. The *Tandon* Court arrived at a different conclusion regarding mootness than we did in *Pleasant View Baptist Church* because the Court was responding to the distinct facts of that case, not because it applied a different standard.

AMERICAN OVERSIGHT

19_Guidance_for_Operating_Schools_Safely_728838_7.pdf. ("Schools can layer multiple prevention strategies developed by the Centers for Disease Control and Prevention (CDC) to prevent transmission within school buildings, reduce disruptions to in-person learning, and help protect the people who are not fully vaccinated, which currently includes all children under the age of 12 years.").

We conclude that Defendants cannot meet the heavy burden of establishing that it is "absolutely clear" that they will not reimpose a mask requirement, especially for children younger than twelve who cannot be vaccinated. We do not doubt the sincerity of MDHHS's statements that they have no intention to reimpose a mask requirement like the one challenged by Defendants. We also recognize that the rescission of all pandemic orders, including the mask requirement, is unique because it reflects the wide availability of safe and effective vaccines. At the same time, the FDA has not yet authorized their use in persons younger than twelve, the group comprising students in grades K–5. MDHHS has previously reimposed certain pandemic emergency orders and tightened mask requirements in response to increasing COVID-19 cases, hospitalizations, and deaths. Considering the very real possibility that MDHHS may be faced again with escalating COVID-19 cases, hospitalizations, and deaths, we hold that Defendants have not met their "heavy burden" of showing that it is "absolutely clear" that they will not reimpose impose a mask requirement, including for children in grades K–5 receiving in-person instruction. Defendants' rescission of the challenged MDHHS Orders does not moot Plaintiffs' claims.

2. Capable of Repetition, Yet Evading Review

Plaintiffs' claims further come within the exception to the mootness doctrine for actions that are "capable of repetition, yet evading review." Pls.' Resp. at 10–14. This exception is limited "to situations where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). As the party asserting this exception, Plaintiffs bear the burden of proof. *Lawrence*

AMERICAN OVERSIGHT

v. Blackwell, 430 F.3d 368, 371 (6th Cir. 2005). Plaintiffs satisfy both requirements for this exception.

Plaintiffs have satisfied the first prong. Although Plaintiffs filed their complaint and motion for a preliminary injunction in October 2020, the school year ended prior to when this case could reach the court of appeals. It is true that Plaintiffs did not take advantage of opportunities to expedite our review of the case.[10] Nonetheless, the Supreme Court has found periods of up to two years to be too short to be fully litigated. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 390–91 (6th Cir. 2001) (holding that two years to challenge to a local ordinance prohibiting individuals with a sex-crime history to work for a sexually oriented business was too short in duration). Specific to the educational context, we have held, albeit in an unpublished decision, that an individualized education program lasting a school year is too short in duration to litigate to conclusion. *Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 980 (6th Cir. 2012).

Plaintiffs also satisfy the second requirement of the "capable of repetition, yet evading review" exception. This is in part because the standard is a forgiving one. "Recurrence of the issue need not be more probable than not; instead, the controversy must be capable of repetition." *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016). This standard provides that "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* at 716.

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[10]Plaintiffs note that "[t]he District Court's decision resulted in nine months of orders that stripped Appellants from their sincerely held right to religious exercise, equal protection of the law, and substantive due process." Pls.' Resp. at 13. But Plaintiffs are at least partly responsible for delays in this litigation. Plaintiffs delayed in filing their complaint in federal court until October 22, 2020 and their emergency motion for a TRO or preliminary injunction until October 27, 2020, even though Governor Whitmer issued her initial executive order requiring that students in grades K–5 wear masks on September 25, 2020, E.O. 2020-185 § 1 (Sept. 25, 2020), and MDHHS issued its first order on October 5, 2020, 10/05/20 MDHHS Order §§ 2–3. Plaintiffs also failed to take advantage of opportunities to expedite the litigation. For instance, Plaintiffs could have filed a motion for an injunction pending appeal, as other parties challenging COVID-19 pandemic orders have done, *see, e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020) (granting the plaintiffs' motion for an injunction pending appeal fifteen days after the district court denied their request for a preliminary injunction and twenty-four days after the plaintiffs filed their complaint), or requested expedited briefing or expedited consideration of their appeal.

AMERICAN OVERSIGHT

Although Defendants provide ample reasons—namely the availability of and expanded eligibility for COVID-19 vaccines—that a mandatory requirement that students in grades K–5 wear masks in the classroom is unlikely, that is not the standard. Rather, we look to whether the controversy is capable of repetition. MDHHS acknowledged in its order rescinding the mask requirements that "the COVID-19 pandemic continues to constitute an epidemic in Michigan." 06/17/21 MDHHS Order. Both the CDC's and MDHHS's guidance recommend that students in grades K–12 wear masks in the classroom. This is sufficient to establish that Plaintiffs' claims are capable of repetition, yet evading review.

True, in the election context, we have determined that lawsuits challenging election procedures in light of the COVID-19 pandemic and attendant restrictions are not capable of repetition, yet evading review. Most recently in *Thompson v. DeWine*, -- F.4th --, 2021 WL 3183692 (6th Cir. July 28, 2021), we held that the plaintiffs' challenge to the signature requirements for ballot initiatives was moot as to the 2021 election. In *Thompson*, the plaintiffs argued that "COVID-19 remains a 'full blown crisis' hampering their efforts to gather signatures for 2021 initiatives," and thus their challenge fell under the capable of repetition, yet evading review exception to the mootness doctrine. *Id.* at *4. We concluded, however, that "advancements in the COVID-19 vaccine and treatment" made COVID-19 unlikely to threaten seriously the plaintiffs' ability to collect signatures for the 2021 ballot initiatives. *Id.*; *see also Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) ("Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." (citing *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (June 15, 2021)).[11]

These election cases, however, are distinguishable from the present case. First, our decisions in those cases were contingent on the availability of COVID-19 safe and effective

[11]Unfortunately, the daily number of COVID-19 cases, hospitalizations, and deaths has since trended significantly upwards. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (accessed on Aug. 2, 2021).

AMERICAN OVERSIGHT

vaccinations and treatment, which are presently authorized for use by persons old enough to vote and sign petitions for ballot initiatives, but not for children in grades K–5. Second, in-person instruction meaningfully differs from participation in the electoral process in a way that increases the risk of contracting and transmitting COVID-19. Whereas participating in the electoral process is a "discrete, individualized, often brief activit[y]," in-person classroom instruction involves "indoor gatherings occurring for hours a day on a daily basis." Hertel & Nessel Br. at 36. Finally, although COVID-19 may not pose a serious enough disruption to the electoral process, it may still pose a significant enough problem to compel MDHHS to mandate that persons, especially individuals not yet able to be vaccinated, wear masks. Accordingly, we conclude that Plaintiffs' claim is not moot and turn to the merits of their challenge.

B. Standard of Review

We review for abuse of discretion a district court's denial of a preliminary injunction. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). "While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, we review the district court's legal conclusions *de novo* and its factual findings for clear error." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). We have cautioned that "[t]his standard of review is 'highly deferential' to the district court's decision." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007) (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). To summarize, "[w]e 'review the District Court's legal rulings *de novo*' (including its First Amendment conclusion), 'and its ultimate conclusion [as to whether to grant the preliminary injunction] for abuse of discretion.'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 454 (6th Cir. 2014) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005)).

In determining whether to grant a preliminary injunction, we consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). Where, as in this case, Plaintiffs "seek[] a preliminary injunction on the basis of a potential constitutional

AMERICAN OVERSIGHT

violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am.*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Accordingly, we focus our attention on whether Plaintiffs can establish a likelihood of success on the merits.

C. Free-Exercise Challenge

Plaintiffs argue that MDHHS's Orders violate their sincerely held religious beliefs because they require students in grades K–5 at religious schools to wear a face covering. We do not question the sincerity of Plaintiffs' beliefs that wearing a mask in the classroom violates their Catholic faith. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Defendants largely do not question the sincerity of the Plaintiffs' religious objection to wearing a mask in the classroom.[12]

We begin with the familiar framework for free-exercise claims. Where a challenged law is neutral and of general applicability and has merely an "incidental effect" on Plaintiffs' religious beliefs, Defendants need not show a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) (holding that if burdening the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Where the challenged law does not meet these requirements, Defendants must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32. This rule, in part, reflected practical concerns with requiring governments to satisfy the stringent standard of establishing a compelling interest for "all actions thought to be religiously commanded." *Smith*,

[12]Defendants Vail and Siemon contend in their brief that "Appellants do not cite to any sources to support their position that the Catholic faith or Catholic theology is in any way opposed to the use of prophylactic masks during a global pandemic," Vail & Siemon Br. at 6, or "provide any examples of ways in which masks interfere with or burden their religious beliefs," *id.* at 19. Plaintiffs' objections to masks admittedly are confusing and at times, digress into secular, rather than religious concerns. Nevertheless, a plaintiff's "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

AMERICAN OVERSIGHT

494 U.S. at 888. Requiring governments to show more than a rational basis for a law of neutral and general applicability would:

> open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888–89 (citations omitted).

A law, of course, is not neutral and of general applicability if it discriminates on its face. *Hartmann v. Stone*, 68 F.3d 973, 976, 978 (6th Cir. 1995). Relatedly, "[a] law might be motivated by animus toward people of faith in general or one faith in particular." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam). Even if a law appears neutral and is devoid of animus, it is not neutral and of general applicability if it is "riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

We considered the intersection between religious schools and COVID-19 orders in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). In *Beshear*, the plaintiffs argued that a Kentucky order that temporarily prohibited in-person instruction at public and private K–12 schools violated their free-exercise rights. We concluded, in a published opinion, that the plaintiffs were unlikely to succeed on their claims that the order violated the Free Exercise Clause of the First Amendment, and thus stayed the district court's preliminary injunction. *Id.* at 511. First, we determined that the order was "neutral and of general applicability" because it "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." *Id.* at 509. Accordingly, the order "need not be justified by a compelling governmental interest." *Id.* Thus, deferring to "the Governor's determination regarding the health and safety of the Commonwealth at this point in time," we concluded that the plaintiffs were unlikely to succeed on the merits of their free-exercise challenge. *Id.* at 510. The Supreme Court denied the plaintiffs' petition for a writ of certiorari without reaching the merits of the case because of the "timing and the impending expiration of the Order." *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020).

AMERICAN OVERSIGHT

In the present case, the district court applied *Beshear* and correctly concluded that because the requirement to wear a facial covering applied to students in grades K–5 at both religious and non-religious schools, it was neutral and of general applicability. We agree with the district court's application of *Beshear*.

Plaintiffs argue that a subsequent case, *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020) (order), conflicts with the district court's order here. In *Monclova Christian Academy*, the panel concluded that a county health-department order requiring all schools in the county to close for in-person learning was subject to strict scrutiny. Although the order temporarily prohibiting in-person education applied to public and religious K–12 schools alike, the panel construed the relevant comparator as secular businesses such as "gyms, tanning salons, office buildings, and the Hollywood Casino" that the health order had permitted to remain open, not non-religious K–12 schools. *Id.* at 482. Accordingly, the panel held that health order was not neutral and of general applicability and applied strict scrutiny to the challenged order. Applying this standard, the panel concluded that the health-department order was not narrowly tailored to serve a compelling state interest and granted plaintiffs' motion for a preliminary injunction. Following the framework of *Monclova Christian Academy*, Plaintiffs argue that the district court erred by failing to compare MDHHS's interest in requiring that students in grades K–5 wear masks in the classroom with MDHHS's interest in allowing persons not to wear masks in certain, secular circumstances. Pls.' Br. at 30.

Beshear and *Monclova Christian Academy*, however, seemingly conflict with one another. Indeed, the panel in *Monclova Christian Academy* recognized that *Beshear* could pose an issue but contended that the decision in *Beshear* did not consider the "broader question" of "whether an order closing public and parochial schools violates the Clause if it leaves *other* comparable secular actors less restricted than the closed parochial schools." *Id.* at 481. Thus, according to the panel in *Monclova Christian Academy*, it was free to consider in the first instance whether the relevant comparators were secular actors regulated by the specific order or a broader set of secular businesses. *Id.* As Plaintiffs and amici here suggest, *Monclova Christian Academy*'s interpretation of *Beshear* is incorrect. Amici Br. at 9. In *Beshear*, we did consider whether the appropriate comparator was other non-religious schools or other non-school entities

AMERICAN OVERSIGHT

and held that the former was the appropriate comparator. The plaintiffs and amici in *Beshear* argued at the district court and in their appellate briefs that the law was not neutral and of general applicability because it prohibited in-person education at K–12 religious schools while permitting secular activities to continue. *See, e.g.*, Pls.-Appellees' Resp. Mot. for Stay Pending Appeal, at 3–5, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Pleasant View Baptist Church et al. as Amici Curiae Supporting Respondents, at 5–10, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020); Brief for Multiple Private Kentucky Religious Schools as Amici Curiae Supporting Respondents, at 9–12, *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Accordingly, as this issue was "brought to the attention of the court" and "ruled upon" in the earlier case, we must follow *Beshear* rather than *Monclova Christian Academy*. *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)); *see also United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021) ("Forced to choose between conflicting precedents, we must follow the first one.").

Tandon v. Newsom, 141 S. Ct. 1294 (2021), does not compel a different comparator. In *Tandon*, the Supreme Court concluded that the plaintiffs were likely to succeed on the merits of their free-exercise challenge to a California order limiting all gatherings in homes, religious and non-religious, to three households. *Id.* at 1297. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. In concluding that the restriction was not neutral and of general applicability, the Court noted that "California treats some *comparable* secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." *Id.* (emphasis added). Identifying a comparable secular activity for religious schools other than a public or private nonreligious school is difficult. Schools educating students in grades K–5 are unique in bringing together students not yet old enough to

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003842

be vaccinated against COVID-19 in an indoor setting and every day.[13] Accordingly, the proper comparable secular activity in this case remains public and private nonreligious schools.

Even under this broader conception of comparable secular activity, the MDHHS orders are not so riddled with secular exceptions as to fail to be neutral and generally applicable. The exceptions to the MDHHS Orders were narrow and discrete. First, many of the exceptions, such as medical intolerance to mask use, eating and drinking, swimming, or receiving a medical treatment during which a mask cannot be worn, are "inherently incompatible with" wearing a mask. Hertel & Nessel Br. at 30. Contact sports where participants cannot safely remain masked must adhere to a testing protocol. 03/02/2021 MDHHS Order § 6(a)(2). Here, Plaintiffs seek to exempt children in grades K–5 at religious schools from having to wear a mask during an activity in which wearing a mask is possible, albeit undesirable for Plaintiffs. Second, almost all exceptions to the MDHHS Orders—aside from children younger than five years old and those medically unable to wear a mask—are short in duration and lower risk (medical and personal care services requiring removal of a mask; voting). Hertel & Nessel Br. at 30–31. Some of the exceptions have a stringent social distancing requirement (public speaking with twelve feet of distance) or are outdoors where the risk of COVID-19 transmission is reduced (outdoor, physically distanced exercise). *Id.* at 33. Third, The MDHHS Orders also exempt activities that are necessary to fulfill "equally important obligations to its citizens' health and safety" (firefighters, police officers, and emergency medical personnel "actively engaged in a public safety role . . . where wearing a face mask would *seriously interfere* in the performance of their public safety responsibilities," 03/02/21 MDHHS Order § 8(i) (emphasis added)). Hertel & Nessel Br. at 33–34. By contrast, as Defendants aptly describe it, "plaintiffs' activity comprises all-day, indoor mixing of the same groups of people, five days a week for months on end." *Id.* at 33. Thus, unlike in *Monclova Christian School*, where the challenged order exempted an array of secular activities that the panel viewed as posing a greater risk than in-person instruction, the exceptions to the MDHHS Orders are narrow and largely limited to activities of lesser risk than in-person instruction.

[13]Perhaps the only other comparable secular activity, childcare organizations, were subject to the same requirement that children ages five years and older wear a mask. 03/02/21 MDHHS Order § 7(e).

AMERICAN OVERSIGHT

Finally, all exceptions to the MDHHS Orders were available to Plaintiffs if they had chosen to engage in that activity. Hertel & Nessel Br. at 27. Plaintiffs were able to remove their face coverings to eat lunch at school, swim during physical education class, participate in Mass at school, engage in distanced public speaking on a religious topic, or exercise outdoors while physically distanced during recess. *Id.* Under the MDHHS orders, persons medically unable to wear a face covering, such as Smith's son, could go without a face covering at school. Because the MDHHS Orders are not so riddled with exceptions for comparable secular activities as to render the mask requirement not neutral and of general applicability, we review the MDHHS Orders for whether the state has a rational basis.

Other cases cited by Plaintiffs do not change this standard. At oral argument, Plaintiffs argued that the Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), pronounced a different standard. In *Fulton*, the Supreme Court concluded that the city's refusal to contract with Catholic Social Services for the provision of foster care because the agency's religious beliefs prevented it from certifying same-sex couples violated the organization's free-exercise rights. *Id.* at 1882. The *Fulton* majority's narrow holding focused on a contract provision that permitted the commissioner of the city's Department of Human Services to grant exemptions to the non-discrimination clause in her "sole discretion." *Id.* at 1878. The contract's grant of unfettered discretion meant that the non-discrimination clause was not neutral and of general applicability, and thus, was subject to strict scrutiny. *Id.* at 1881. Although the plaintiffs and some of the concurring justices asked that the Court reconsider *Smith*, the majority declined to do so because the city's policy was not neutral and of general applicability, and thus, fell outside the scope of *Smith*. *Id.* at 1876–77.

Plaintiffs cite the Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), for the principle that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,'" (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Pls.' Br. at 26. Plaintiffs' reliance on *Our Lady of Guadalupe School* is misplaced. In *Our Lady of Guadalupe School*, the Supreme Court concluded that a form of immunity from employment-

AMERICAN OVERSIGHT

discrimination claims brought by certain employees, the ministerial exception, extended to two teachers who taught religion and participated in religious activities. *Id.* at 2066. The Supreme Court, however, emphasized that religious institutions' ability to decide "matters of church government" and "faith and doctrine," "does not mean that religious institutions enjoy a general immunity from secular laws." *Id.* at 2060. MDHHS Orders requiring all persons ages five and older to wear a mask in public—including in the classroom—is not comparable to infringing on the school's authority to select their ministers and religious educators. Thus, *Our Lady of Guadalupe School* provides no help to Plaintiffs.

Plaintiffs' citation to *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), is also misplaced. According to Plaintiffs, *Thomas* compels us to "defer[] [to] Plaintiffs' understanding of their own religious beliefs" and not conclude that "any burden to Plaintiffs' religious beliefs was 'incidental.'" Pls.' Br. at 22 (quoting *Resurrection Sch. v. Gordon*, 507 F. Supp. 3d 897, 902 (W.D. Mich. 2020)). *Thomas*, however, stands for the proposition that we should defer to a plaintiff's characterization of her opposition to a law as religious. *Thomas*, 450 U.S. at 714.

Plaintiffs also argue that we should apply strict scrutiny to MDHHS's Orders because the orders violate both their free-exercise rights and their rights as parents to direct the education of their children. Pls.' Br. at 32.[14] This hybrid-rights theory stems from dicta in *Smith* explaining that a plaintiff may establish a violation of the Free Exercise Clause by showing that a neutral and generally applicable law violates "the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881.

Although some circuits have recognized hybrid-rights claims, we have consistently declined to recognize hybrid-rights claims. For instance, in *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine*, 5 F.3d 177 (6th Cir. 1993), we

[14]In support of this hybrid-rights argument, Plaintiffs cite language from the Supreme Court's order in *Danville Christian Academy* declining to grant Plaintiffs' application for a writ of certiorari. Pls.' Br. at 32 ("Even if this Court were to deem Defendants' orders generally applicable, which they are not, Plaintiffs' free exercise claim also requires heightened scrutiny because the 'application of a neutral, generally applicable law to religiously motivated action implicates the right of parents to direct the education of their children.'" (quoting *Danville Christian Acad.*, 141 S. Ct. at 528)). Plaintiffs' reference is misleading, because the Supreme Court was merely repeating an argument raised by amici, not assessing the merits of this argument.

AMERICAN OVERSIGHT

considered the merits of a veterinary student's claim that her college's policy of requiring students to dissect animals violated the Free Exercise Clause and other constitutional provisions. We declined to apply strict scrutiny to her hybrid claim, reasoning that "[w]e do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights." *Id.* at 180. Simply put, this outcome would be "completely illogical." *Id.* "[T]herefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated," we explained that we would "not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Id.* Since then, we have consistently declined to recognize a hybrid-rights theory. *See Pleasant View Baptist Church*, 838 F. App'x at 940–41 (Donald, J., concurring) (collecting cases). We decline to recognize a hybrid-rights claim here.

Applying rational-basis review, we hold that the MDHHS Orders are rationally related to a legitimate government interest. To satisfy rational-basis review, Defendants must show "only that the regulation bear[s] some rational relation to a legitimate state interest." *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). Here, Defendants had a legitimate state interest in controlling the spread of COVID-19 in Michigan. Plaintiffs apparently concede this point, acknowledging that "COVID-19 poses real challenges and concerns to everyone and requires a robust response." Pls.' Br. at 4. Further, Defendants cite more than ample evidence that requiring masks in the school setting minimizes the spread of COVID-19. *See* Hertel & Nessel Br. at 4–5; Vail & Siemon Br. at 8; R. 16-2 (Aff. of Vail) (Page ID #535–62). Although Plaintiffs question the effectiveness of masks, even they admit that "masks serve a purpose when students cannot socially distance and do not object to (and, indeed, enforce) mask wearing in the hallways and common areas of the school." Pls.' Br. at 5–6.

We conclude that the MDHHS Orders do not violate the Free Exercise Clause because the MDHHS Orders are neutral and of general applicability and satisfy rational-basis review.

AMERICAN OVERSIGHT

D. Equal-Protection Claim

Plaintiffs argue that the MDHHS Orders violate the Equal Protection Clause because the Orders exempt certain secular activities but not religious education, and, alternatively, because the Orders lack a rational basis. Plaintiffs also fault the district court for failing to cite caselaw explaining why the MDHHS Orders satisfy the Equal Protection Clause.

To establish an equal-protection violation, "a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)). We have explained that "[t]he threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

Plaintiffs' equal-protection challenge is confusing, is largely a repackaging of its free-exercise argument, and is ultimately meritless. First, Plaintiffs fail to satisfy this threshold requirement of showing that the state has treated similarly situated persons differently than Plaintiffs. Plaintiffs argue that the MDHHS Orders result in "disparate treatment" because they permit persons to remove their masks while engaging in certain secular activities and in religious worship in a house of worship, while requiring students in grades K–5 at religious schools to wear masks. This is a free-exercise challenge, not an equal-protection challenge. Seemingly recognizing that this is a free-exercise challenge, Plaintiffs open their argument by stating that "the challenged measures burden Plaintiffs' fundamental rights to the free exercise of religion under the First Amendment in violation of the equal protection guarantee of the Fourteenth Amendment." Pls.' Br. at 34. Further, there is no "disparate treatment" because the MDHHS Orders did not distinguish between certain groups of children. The MDHHS Orders required all children ages five and older to wear masks in public, subject to a few universal exceptions that were available to Plaintiffs.

AMERICAN OVERSIGHT

Plaintiffs' argument that the requirement that children ages five years and older wear masks in the classroom lacks any rational basis is equally unavailing. Although unclear from the brief, Plaintiffs appear to argue that the MDHHS Orders lack any rational basis because the Orders exempted activities that Plaintiffs perceive as riskier than the in-person education of students in grades K–5. Pls.' Br. at 34. One could also include Plaintiffs' general belief that masks do not work to limit the transmission of COVID-19 within this argument. *Id.* at 5. As discussed in Part II.C, however, the MDHHS Orders satisfy rational-basis review. Accordingly, we conclude that Plaintiffs' equal-protection claim fails.

E. Substantive-Due-Process Claim

Finally, Plaintiffs argue that the MDHHS Orders violate their substantive-due-process rights. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see also Kiser v. Kamdar*, 831 F.3d 784, 791 (6th Cir. 2016) (declining to consider the plaintiff's substantive-due-process challenge because it was really a commercial-speech case).

Plaintiffs' challenge to the MDHHS Orders lies in the First Amendment's Free Exercise Clause, and thus, their substantive-due-process claim is duplicative. The district court admittedly did not explicitly address the merits of Plaintiffs substantive-due-process claim. We nonetheless conclude that Plaintiffs' substantive-due-process claim is without merit.

III. CONCLUSION

For the foregoing reasons, we hold that Plaintiffs' challenge to the mask requirement for children in grades K–5 in all schools in Michigan is not moot. We **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction.

AMERICAN OVERSIGHT

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's conclusions on mootness, in part A of the opinion. However, I dissent on the merits on the primary issue, that is, whether the district court correctly denied the petition for the granting of a preliminary injunction.

I do not quarrel with the fact that the district court had the authority to deny the motion for preliminary injunction under the facts of this case, but it did not have the benefit of the more recent case *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). It also did not have the benefit of the decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), which was handed down later in the same month that the district court made its ruling. *Monclova* held that in cases such as this, the court should look at all comparators, not just the public schools. *Id.* at 480. The district court here compared the restrictions in this matter with those followed in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). Yet *Monclova* is more consistent with *Tandon* than *Beshear*. The court did not consider other comparable secular activities beyond the public schools. I feel it is a mistake for this court to uphold the denial of the preliminary injunction on the interpretation from *Tandon* without giving the district court an opportunity to consider it in light of all the evidence before it. Therefore, I would remand to the district court to review the case in light of the decision in *Tandon*.

AMERICAN OVERSIGHT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-2256

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, individually and as next friend on behalf of his minor children C.M., Z.M., and N.M.; STEPHANIE SMITH, individually and as next friend on behalf of her minor child F.S.,

Plaintiffs - Appellants,

v.

ELIZABETH HERTEL, in her official capacity as the Director of the Michigan Department of Health and Human Services; DANA NESSEL, in her official capacity as Attorney General of the State of Michigan; LINDA VAIL, in her official capacity as the Health Officer of Ingham County; CAROL A. SIEMON, in her official capacity as the Ingham County Prosecuting Attorney,

Defendants - Appellees.

FILED
Aug 23, 2021
DEBORAH S. HUNT, Clerk

Before: SILER, MOORE, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Plaintiffs' motion for a preliminary injunction is AFFIRMED on the merits.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

AMERICAN OVERSIGHT

Message

From: Eighth Circuit U.S. Court of Appeals Clerks Office [via_no_reply@ca8.uscourts.gov]
Sent: 8/25/2021 10:00:19 AM
To: Sauer, John [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f134eb2c5f6846bdb89d9c697c5ff5c5-Sauer, John]
Subject: Opinion Descriptions for 08/25/2021

Opinions Descriptions For: 08/25/2021

DISCLAIMER: The following unofficial case summaries are prepared by the clerk's office as a courtesy to the reader. They are not part of the opinion of the court.

http://media.ca8.uscourts.gov/opndir/21/08/191340P.pdf 08/25/2021 United States v. Arkansas Department of Educ.
U.S. Court of Appeals Case No: 19-1340
and No: 19-1342
and No: 19-1348
and No: 19-1349
U.S. District Court for the Western District of Arkansas - El Dorado
[PUBLISHED] [Per Curiam - Before Erickson, Melloy and Kobes, Circuit Judges]
Civil case - School Desegregation. Four Arkansas school district sought modification of decades-old desegregation orders so that they could be exempt from newly passed amendments to the Arkansas school choice law. The district court granted the motions and modified the desegregation orders to explicitly limit the transfer of students between school districts; the State appealed the modifications, and this court affirmed; the State sought rehearing and the U.S., participating in the case for the first time, asked the court to reconsider the matter; additional briefing was then permitted. Held: The district court erred in finding that the repeal of Arkansas's 1989 school choice act and the subsequent adoption of the 2017 amendments to a 2015 act significantly changed Arkansas law in a manner allowing for modification of the consent decrees; because no vestige of discrimination traces back to interdistrict school transfers, the district court abused its discretion in expanding the consent decrees to prohibit such transfers. Judge Melloy, dissenting.

http://media.ca8.uscourts.gov/opndir/21/08/201487P.pdf 08/25/2021 United States v. Wakinyan McArthur
U.S. Court of Appeals Case No: 20-1487
U.S. District Court for the District of Minnesota
[PUBLISHED] [Per Curiam - Before Smith, Chief Judge, and Colloton and Erickson, Circuit Judges]
Criminal case - Sentencing. For the court's prior opinion vacating defendant's conviction on one of two counts alleging using and carrying a firearm during a crime of violence, vacating his entire sentence and remanding the matter for resentencing on the remaining counts under the sentencing package doctrine, see U.S. v. McArthur, 850 F.3d 925 (8th Cir. 2017); on remand, a new sentence was imposed and McArthur again appealed, with this court concluding that 18 U.S.C. Sec. 924(c)(3)(B)'s residual clause was unconstitutionally vague and that his conviction for carrying and using a firearm in relation to a drug trafficking crime must be vacated; the matter was again remanded for resentencing under the sentencing package doctrine, See U.S. v. McArthur, 784 F. App'x 459 (8th Cir. 2019). Following resentencing, McArthur appeals the application of certain sentencing enhancements. Held: (1) the district court did not err in making its drug quantity calculation; (2) the court did not clearly err in applying an enhancement under Guideline Sec. 2D1.1(b)(12) for maintaining a stash house; and (3) the court did not clearly err in imposing an enhancement under Guidelines Sec. 2D1.1(b)(14)(E) for committing the offenses as part of pattern of criminal conduct engaged in as a livelihood.

http://media.ca8.uscourts.gov/opndir/21/08/202058P.pdf 08/25/2021 United States v. James Salkil
U.S. Court of Appeals Case No: 20-2058
U.S. District Court for the Southern District of Iowa - Eastern
[PUBLISHED] [Colloton, Author, with Smith, Chief Judge, and Erickson, Circuit Judge]
Criminal case - Criminal law and sentencing. The district court did not err in determining the traffic stop was not unduly extended as the police obtained defendant's consent within the time reasonably required to complete the mission of the traffic stop; once officers lawfully secured consent to the search, any delay occasioned by the search did not constitute an unlawful extension of the search; the enhancement imposed

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under Guidelines 2K2.1(b)(6) does not amount to impermissible double counting; in any event, the district court varied downward to offset the increase, leaving defendant no basis for complaint; the sentence, a downward variance, was not substantively unreasonable.

http://media.ca8.uscourts.gov/opndir/21/08/202062P.pdf 08/25/2021 Rosebud Sioux Tribe v. USA
U.S. Court of Appeals Case No: 20-2062
U.S. District Court for the District of South Dakota - Central
[PUBLISHED] [Erickson, Author, with Shepherd and Kobes, Circuit Judges]
Civil case - Indian law. The district court did not err in declaring the United States has a duty to provide "competent physician-led healthcare" to the Rosebud Sioux Tribe and its members. In light of the promises the United States made to the Tribe more than 150 years ago in the Fort Laramie Treaty, and relevant legislation since that time, such as the Snyder Act and the Indian Health Care Improvement Act, the district court correctly articulated the existence and scope of the duty, and the declaratory judgment entered by the district court is affirmed. Judge Kobes, dissenting.

http://media.ca8.uscourts.gov/opndir/21/08/202361U.pdf 08/25/2021 United States v. Tray Miller
U.S. Court of Appeals Case No: 20-2361
U.S. District Court for the Southern District of Iowa - Eastern
[UNPUBLISHED] [Per Curiam - Before Colloton, Wollman and Kobes, Circuit Judges]
Criminal case - Sentencing. Argument that violation of the Iowa drug statute did not constitute a controlled substance offense for the purposes of Chapter 4 of the Guidelines because it included inchoate offenses is foreclosed by Circuit precedent; no error on this record in imposing a four-level enhancement under Guidelines Sec. 2K2.1(b)(4)(B) for possession of a firearm with an altered or obliterated serial number; the absence of a specific response from the district court to defendant's request for a two-level variance because the serial number guidelines is outdated was not an obvious procedural error, and defendant failed to show a reasonable probability that the sentence would have been different if the district court had added an explanation on the record.

http://media.ca8.uscourts.gov/opndir/21/08/202521P.pdf 08/25/2021 Rodenburg LLP v. Cincinnati Insurance Company
U.S. Court of Appeals Case No: 20-2521
U.S. District Court for the District of North Dakota - Eastern
[PUBLISHED] [Wollman, Author, with Colloton and Kobes, Circuit Judges]
Civil case - Contracts. Cincinnati issued the plaintiff law firm a commercial liability policy and plaintiff sought coverage and a defense when it was sued for wrongful garnishment, violation of the Fair Debt Collection Practices Act and other tort-based claims after it mistakenly garnished a person's wages; the district court did not err in determining that the injury was excluded from coverage under the "violation of statutes" exclusion; because the injured party's complaint alleged only injuries arising from the law firm's violation of the Fair Debt Collection Practices Act, Cincinnati did not breach is contractual duty to defend plaintiff.

http://media.ca8.uscourts.gov/opndir/21/08/202803U.pdf 08/25/2021 Nancy Woods v. Circuit Attorney's Office
U.S. Court of Appeals Case No: 20-2803
U.S. District Court for the Eastern District of Missouri - St. Louis
[UNPUBLISHED] [Per Curiam - Before Loken, Wollman, and Stras, Circuit Judges]
Civil case - Employment discrimination. The district court did not err in determining plaintiff had failed to produce direct evidence of age or race discrimination; applying the McDonnell Douglas analysis, plaintiff failed to show the stated reasons for her discharge were pretexts for intentional age and race discrimination; denial of plaintiff's discovery-related motions did not amount to a gross abuse of discretion.

http://media.ca8.uscourts.gov/opndir/21/08/203397P.pdf 08/25/2021 United States v. Jackie Busey
U.S. Court of Appeals Case No: 20-3397
U.S. District Court for the Western District of Missouri - Jefferson City
[PUBLISHED] [Colloton, Author, with Wollman and Kobes, Circuit Judges]
Criminal case - Criminal law. With respect to defendant's argument that the court should not have admitted out-of-court hearsay statements made by a deputy marshal who did not testify at defendant's revocation proceeding, other admissible evidence supported the findings that defendant violated the provisions of his supervised release.

http://media.ca8.uscourts.gov/opndir/21/08/211174P.pdf 08/25/2021 United States v. Johnathan Mitchell
U.S. Court of Appeals Case No: 21-1174

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U.S. District Court for the Northern District of Iowa - Cedar Rapids
[PUBLISHED] [Kelly, Author, with Loken and Erickson, Circuit Judges]
Criminal case - Competency - Involuntary Medication. Given the purpose of involuntary medication under Sell v. U.S., 539 U.S. 166 (2003) is to ensure the defendant is competent enough to participate in trial, adopting a rule that categorically prohibits the involuntary medication of a defendant who had regained competency for some period of time, but is unable to maintain it, would frustrate that purpose where an important governmental interest is at stake; accordingly, the district court did not err in concluding it had the authority to order defendant's involuntary medication for the purpose of rendering and maintaining his competency for trial; the district court's order is narrowly tailored to minimize the intrusion on defendant's protected liberty interests while furthering the government's interest in timely prosecution.

http://media.ca8.uscourts.gov/opndir/21/08/211557U.pdf 08/25/2021 United States v. Richard Huff
U.S. Court of Appeals Case No: 21-1557
U.S. District Court for the Southern District of Iowa - Western
[UNPUBLISHED] [Per Curiam - Before Benton, Kelly, and Erickson, Circuit Judges]
Criminal case - Criminal law. Anders case. Defendant's appeal waiver is valid, enforceable, and applicable to the sentencing issue raised, and the appeal is dismissed.

----------VIA TRANSMISSION----------

United States Court of Appeals for the Eighth Circuit
Circuit Clerks Office
Voice: 314-244-2400 Fax: 314-244-2780

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Message

From: Werdehausen, Megan [/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WERDEM]
Sent: 8/25/2021 9:39:58 PM
To: Derrick Griswold [frank91169116@gmail.com]
Subject: Griswold Sunshine Law Request

Your records request was received by our custodian of records. Due to the dates and the volume of records to be searched, the earliest we expect responsive records, if any, to be available is October 6, 2021. In the event they are available earlier, we will provide them as soon as they are available.

Please note that we reserve the right to close responsive records in whole or in part pursuant to law, including but not limited to §§ 610.021 and 610.035 RSMo.

Thanks,
Megan This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

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Delivery Report

From: postmaster@ago.mo.gov [postmaster@ago.mo.gov]
Sent: 8/25/2021 10:53:45 AM
To: Justin.Smith@ago.mo.gov [justin.smith@ago.mo.gov]
Subject: Undeliverable: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
Attachments: Cert-stage Amicus Br. in Seattle's Union Gospel Mission

Your message

To: cori.mills@alaska.gov; jessie.alloway@alaska.gov; ninia.dizon@alaska.gov; Beau.Roysden@azag.gov; Drew.Ensign@azag.gov; nicholas.bronni@arkansasag.gov; vincent.wagner@arkansasag.gov; dylan.jacobs@arkansasag.gov; Henry.Whitaker@myfloridalegal.com; James.Percival@myfloridalegal.com; Jeffrey.DeSousa@myfloridalegal.com; Daniel.Bell@myfloridalegal.com; APinson@law.ga.gov; brian.kane@ag.idaho.gov; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; Kian.Hudson@atg.in.gov; jeff.chanay@ag.ks.gov; Brant.Laue@ag.ks.gov; Chad.Meredith@ky.gov; Matt.Kuhn@ky.gov; murrille@ag.louisiana.gov; StJohnJ@ag.louisiana.gov; Whitney.Lipscomb@ago.ms.gov; Scott.Stewart@ago.ms.gov; Justin.Matheny@ago.ms.gov; Sauer, John; Smith, Justin; Christian.Corrigan@mt.gov; Brent.Mead2@mt.gov; David.Dewhirst@mt.gov; Jim.Campbell@nebraska.gov; Daniel.E.Will@doj.nh.gov; Anthony.J.Galdieri@doj.nh.gov; wstenehjem@nd.gov; masagsve@nd.gov; tseibel@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; May.Davis@ohioago.gov; mithun.mansinghani@oag.ok.gov; zach.west@oag.ok.gov; ESmith@scag.gov; HKirkland@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Paul.Swedlund@state.sd.us; Sarah.Campbell@ag.tn.gov; Andree.Blumstein@ag.tn.gov; sarah.campbell@ag.tn.gov; Judd.Stone@oag.texas.gov; Grant.Dorfman@oag.texas.gov; Benjamin.Wilson@oag.texas.gov; melissaholyoak@agutah.gov; rcantrell@agutah.gov; Lindsay.S.See@wvago.gov; Thomas.T.Lampman@wvago.gov; Jessica.A.Lee@wvago.gov; james.kaste@wyo.gov; ryan.schelhaas@wyo.gov
CC: Wilson, Thomas
Subject: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
Sent: 8/25/2021 10:50:53 AM

Delivery has failed to these recipients or groups:

Justin.Smith@ago.mo.gov (justin.smith@ago.mo.gov)
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
For more information about this error, see DSN code 5.7.1 in Exchange Online - Office 365.

Diagnostic information for administrators:

Generating server: AGOPMAIL01.ago.state.mo.us

justin.smith@ago.mo.gov
Remote Server returned '550 5.7.1 TRANSPORT.RULES.RejectMessage; the message was rejected by organization policy'

Original message headers:

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        by momail15.mo.gov with ESMTP id 3anq0u0nmc-1
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From: "LaCour, Edmund"
To: "cori.mills@alaska.gov" ,
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, "Drew.Ensign@azag.gov" ,
"nicholas.bronni@arkansasag.gov" ,
"vincent.wagner@arkansasag.gov" ,
"dylan.jacobs@arkansasag.gov" ,
"Henry.Whitaker@myfloridalegal.com" ,
"James.Percival@myfloridalegal.com" ,
"Jeffrey.DeSousa@myfloridalegal.com" ,
"Daniel.Bell@myfloridalegal.com" ,
"APinson@law.ga.gov" , "brian.kane@ag.idaho.gov"
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"julia.payne@atg.in.gov" , "Kian.Hudson@atg.in.gov"
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"Brant.Laue@ag.ks.gov" , "Chad.Meredith@ky.gov"
, "Matt.Kuhn@ky.gov" ,
"murrille@ag.louisiana.gov" ,
"StJohnJ@ag.louisiana.gov" ,
"Whitney.Lipscomb@ago.ms.gov" ,
"Scott.Stewart@ago.ms.gov" ,
"Justin.Matheny@ago.ms.gov" ,
"john.sauer@ago.mo.gov" , "Justin.Smith@ago.mo.gov"
, "Christian.Corrigan@mt.gov"
, "Brent.Mead2@mt.gov" ,
"David.Dewhirst@mt.gov" , "Jim.Campbell@nebraska.gov"
, "Daniel.E.Will@doj.nh.gov"
, "Anthony.J.Galdieri@doj.nh.gov"
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"nasagsve@nd.gov" , "tseibel@nd.gov" ,
"Benjamin.flowers@ohioattorneygeneral.gov"
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, "mithun.mansinghani@oag.ok.gov"
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, "ESmith@scag.gov" ,
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"steven.blair@state.sd.us" ,
"Sherri.Wald@state.sd.us" ,
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"Sarah.Campbell@ag.tn.gov" ,
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"Grant.Dorfman@oag.texas.gov" ,
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"melissaholyoak@agutah.gov" ,
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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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Table of Contents

Table of Authorities 3

Jurisdictional Statement 6

Statement of Facts and Procedural Background 7

Points Relied On 9

Argument 11

Point I. 14

A. Standard of Review and Preservation of Error 14

B. Argument 15

Point II 18

A. Standard of Review and Preservation of Error 18

B. Argument 19

Point III 21

A. Standard of Review and Preservation of Error 21

B. Argument 21

Conclusion 24

Certification of Service and of Compliance with Rule 84.06(b) and (c) 26

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003861

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Authorities

Cases

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 11

Asberry v. Bannes-Shaughnessy,
734 S.W.2d 250 (Mo. App. E.D. 1987) 11

B.S. v. State,
966 S.W.2d 343 (Mo. App. E.D. 1998) 10, 12, 19

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 9, 16

Boyd v. Boone Mgmt., Inc.,
676 S.W.2d 24 (Mo. App. W.D. 1984) 14, 19, 21

Brinson v. Whittico, M.D.,
793 S.W.2d 632 (Mo. App. E.D. 1990) 10, 23

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 17

Charron v. State,
257 S.W.3d 147 (Mo. App. W.D. 2008) 11, 20

Chastain v. Geary,
539 S.W.3d 841 (Mo. App. W.D. 2017) 15

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 17

Doss v. Brown,
419 S.W.3d 784 (Mo. App. W.D. 2012) 15

Eaton v. Doe,
563 S.W.3d 745 (Mo. App. E.D. 2018) 17

AMERICAN OVERSIGHT

Empire Dist. Elec. Co. v. Coverdell,
588 S.W.3d 225 (Mo. App. S.D. 2019) 11

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 20

Healthcare Servs. of the Ozarks, Inc. v. Copeland,
198 S.W.3d 604 (Mo. banc 2006) 16

Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit,
277 S.W.3d 740 (Mo. App. W.D. 2008) 19

Mo. Coal. for Env't v. State,
579 S.W.3d 924 (Mo. banc 2019) 17

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 17

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) ..... Passim

Peachtree Apartments v. Pallo,
317 S.W.3d 189 (Mo. App. E.D. 2010) 10, 12, 18

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 8

Querry v. State Highway & Transp. Comm'n,
60 S.W.3d 630 (Mo. App. W.D. 2001) 15

Rosenfeld v. Thoele,
28 S.W.3d 446 (Mo. App. E.D. 2000) 10, 19

Schultz v. Warren Cty.,
249 S.W.3d 898 (Mo. App. E.D. 2008) 10, 22

Schweich v. Nixon,
408 S.W.3d 769 (Mo. banc 2013) 10, 22

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003863

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 11, 19

Sexton v. Jenkins & Assocs.,
152 S.W.3d 270 (Mo. banc 2004) 12

State v. West,
548 S.W.3d 406 (Mo. App. W.D. 2018) 14, 18, 21

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D. 1988) 9, 16, 17

Statutes

Section § 115.427, RSMo 7, 8

Section § 510.150, RSMo 9, 10, 15, 19, 22

Other Authorities

35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 21

Missouri Constitution, article 5, section 3 ..... 6, 12

Missouri Supreme Court Rule 67.01 11

Missouri Supreme Court Rule 84.14 ..... 14, 20, 21, 22, 24

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003864

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of Cole County entered on April 20, 2020. Following this Court's order allowing Appellants to file a Notice of Appeal by Special Order pursuant to Rule 81.07(a), the Notice of Appeal was filed on September 23, 2020.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Western District of the Court of Appeals. § 474.050.

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Statement of Facts and Procedural Background

On June 8, 2017, Appellants, Missouri State Conference of the National Association for the Advancement of Colored People and the League of Women Voters of Missouri, filed a Petition seeking injunctive and declaratory relief with respect to Missouri Revised Statute § 115.427. That statute, which went into effect on June 1, 2017, drastically reduced voters' options for identifying themselves in order to vote in person. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, 17AC-CC00309 (19th Jud. Cir. Ct.).[1] On December 6, 2017, the trial court granted Respondents' Motion for Judgment on the Pleadings and dismissed Appellants' Petition for failure to state a claim. *Id.*

After this Court reversed that decision, the case was reinstated in November 2018 and proceeded at the trial court in case number 17AC-CC00309-01. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD81484; D83-84. On June 18, 2019, Appellants filed their Third Amended Petition. D98-106. After trial on the merits, the trial court dismissed the Third Amended Petition for lack of standing, mootness, and/or ripeness. The trial court did not address the merits of Plaintiffs' claims, but nonetheless dismissed the Petition *with prejudice.* That jurisdictional, or justiciability, dismissal with prejudice was error and is the issue in this appeal.

In Count I of the Third Amended Petition, Appellants asserted that § 115.427.1 cannot be enforced under § 115.427.6(3) because insufficient state funds were

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[1] On June 30, 2017, Appellant Christine Dragonette was added as a party with the filing of the First Amended Petition.

AMERICAN OVERSIGHT

appropriated from the general revenue to properly implement § 115.427.1. D98 pp. 19-23. In Count II, Appellants asserted that the requirement in § 115.427.5 was violated by the failure to provide the public accurate and non-misleading "Advance Notice" about the law restricting the options for identifying oneself at the polls. D98 pp. 24-26.

The court held a bench trial from August 19 - 23, 2019. Thereafter, on April 20, 2020, the circuit court entered its final judgment, dismissing Count I with prejudice for lack of standing and mootness, and dismissing Count II with prejudice as moot and not ripe in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). D165.

On May 19, 2020, Appellants moved the court to amend its judgment to be a dismissal without prejudice. D166. The trial court did not rule on this post-trial motion. Appellants then filed a notice of appeal on August 26, 2020. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD83987. However, the parties then disputed whether the post-trial motion was *authorized*, which would have delayed the date upon which the judgment became final for appeal. Appellants then filed a motion to file a notice of appeal by special order, which was sustained. Appellants' Notice of Appeal was filed on September 23, 2020.

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MO-AG-22-0644-A-003867

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Points Relied On

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I WITH PREJUDICE FOR LACK OF STANDING BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR LACK OF STANDING SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT STANDING IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012)**

***W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988)**

Section 510.150, RSMo.

II. THE CIRCUIT COURT ERRED IN DISMISSING COUNTS I AND II WITH PREJUDICE BASED ON MOOTNESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR MOOTNESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT MOOTNESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

AMERICAN OVERSIGHT

Peachtree Apartments v. Pallo, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010)

Rosenfeld v. Thoele, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000)

B.S. v. State, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998)

Section 510.150, RSMo.

III. THE CIRCUIT COURT ERRED IN DISMISSING COUNT II WITH PREJUDICE BASED ON RIPENESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR RIPENESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT RIPENESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 21 (Mo. banc 2003)

Schweich v. Nixon, 408 S.W.3d 769, 779 (Mo. banc 2013)

Schultz v. Warren Cty., 249 S.W.3d 898, 902 (Mo. App. E.D. 2008)

Brinson v. Whittico, M.D., 793 S.W.2d 632, 634 (Mo. App. E.D. 1990)

Section 510.150, RSMo.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003869

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Argument

This appeal presents a discrete question of law: when a circuit court finds that it lacks subject-matter jurisdiction in a case because of a lack of standing, mootness, or ripeness, should it dismiss with or without prejudice? The answer is clear: when a circuit court lacks subject-matter jurisdiction to resolve a dispute's underlying merits, it should dismiss claims *without* prejudice. *See Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice."); *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986) ("Inasmuch as the trial court did not have jurisdiction … the dismissal is without prejudice to any further action appellant may wish to take"); *see also Asberry v. Bannes-Shaughnessy*, 734 S.W.2d 250, 252 (Mo. App. E.D. 1987) (explaining that the burden of proof on a motion for lack of subject matter jurisdiction "is lower since it is not a decision on the merits, the dismissal is without prejudice and because any action taken by a court lacking subject matter jurisdiction is void").

Whether a trial court dismisses a claim with or without prejudice is significant. "[D]ismissal with prejudice bars the assertion of the same cause of action or claim against the same party." Rule 67.01. *Accord Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d

AMERICAN OVERSIGHT

225, 237 (Mo. App. S.D. 2019). On the other hand, "[d]ismissal without prejudice is usually not an adjudication on the merits of the claim and does not affect the plaintiff's right to refile the action." *Sexton v. Jenkins & Assocs.*, 152 S.W.3d 270, 273 (Mo. banc 2004). In certain circumstances, not applicable here, Appellants acknowledge that "a dismissal without prejudice may be considered a judgment on the merits of issues, such as jurisdiction, that are actually litigated and decided." *Id*. In this appeal, Appellants do not challenge the trial court's factual findings. Instead, Appellants assert only that the trial court erred in dismissing their claims *with prejudice*, thus preventing any chance they may have to vindicate their rights if they gain standing, the case is no longer moot, and the issues become ripe for adjudication.

The Missouri Constitution confers jurisdiction upon the circuit courts over "cases and matters." Mo. Const. art. V, sec. 14(a). "Article V of the Missouri Constitution governs subject-matter jurisdiction, which is the court's authority to render a judgment in a particular category of case." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010); *see also Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) ("Subject-matter jurisdiction concerns 'the nature of the cause of action or the relief sought 'and exists only when the court 'has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.'" (citations omitted)). The Missouri Constitution "requires a case to be justiciable in order for the circuit court to have subject-matter jurisdiction over it." *Id.*; *see also B.S. v. State*, 966 S.W.2d 343, 344 (Mo. App. E.D. 1998).

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Appellants do not dispute that a trial court lacks subject-matter jurisdiction to decide the merits of a case where: (1) the plaintiff lacks standing; (2) the case is moot and no exception applies; or (3) the case is not ripe. But where the circuit court dismisses a case on one or more of these jurisdictional issues, it ought to do so *without* prejudice because any decision on the merits is inappropriate.

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Point I

The circuit court erred in dismissing Count I with prejudice for lack of standing because Missouri law requires that claims dismissed for lack of standing should be dismissed without prejudice, in that standing is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal is purely a question of law. Appellants do not dispute the underlying facts. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*"). The review here is straightforward because Appellants do not dispute the trial court's finding that they lack standing, only the court's act of dismissing the claims *with* prejudice based on that finding.

The error was preserved for appeal. Although no post-trial motion was required to preserve the issue, Appellants tried to resolve it with the trial court before filing this appeal by filing a post-trial motion to amend the judgment to reflect dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment

AMERICAN OVERSIGHT

as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

This Court has routinely found that a dismissal for lack of standing is a dismissal for want of subject matter jurisdiction. *See, e.g.*, *Chastain v. Geary*, 539 S.W.3d 841, 848 (Mo. App. W.D. 2017) ("[T]he court does not have subject matter jurisdiction to decide substantive issues if the party lacks standing."); *Doss v. Brown*, 419 S.W.3d 784, 787 (Mo. App. W.D. 2012) ("A trial court does not have subject matter jurisdiction if a petitioner lacks standing to bring the action."); *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 637 (Mo. App. W.D. 2001) (same).

"Subject-matter jurisdiction concerns the nature of the cause of action or the relief sought and exists only when the court has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." *Mo. Soybean Ass'n,* 102 S.W.3d at 21 (internal quotation omitted). "A dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Here, there should have been no adjudication on the merits where dismissal was for a lack of standing because "[w]hether considered a claim for lack of subject matter jurisdiction or lack of authority, a court, in disposing of a case for lack of standing, cannot reach the merits."[2]

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[2] In *Borges*, this Court noted that "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." 358 S.W.3d at 183. Like *Borges*, that issue need not be decided here; the solution in the present case is simply to dismiss the claim without prejudice because the

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Borges v. Mo. Pub. Entity Risk Mgmt. Fund, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012); *see also W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent].").

"Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. banc 2006). Consequently, a dismissal for lack of standing should be without prejudice. *See*, *e.g.*, *Borges*, 358 S.W.3d at 183-84 ("[O]nce it determined that [Plaintiffs] lacked standing, the trial court was without authority to reach any substantive claim, and, thus, dismissal should have been entered . . . . Therefore, we affirm the circuit court's finding that [Plaintiffs] lacked standing and enter the order the circuit court should have entered, dismissing without prejudice [Plaintiffs'] petition."); *Eaton v. Doe*, 563 S.W.3d 745, 750 (Mo. App. E.D. 2018) ("[B]ecause we have concluded the dismissal is due to a lack of standing, we modify the dismissal to be without prejudice, rather than with prejudice . . . . We affirm the judgment of the trial court as modified.").[3]

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trial court could not reach the merits if its dismissal was because Appellants lacked standing.

[3] The limited exception in which the Missouri Supreme Court has affirmed a dismissal for lack of standing with prejudice is distinguishable. *See Mo. Coal. for Env't v.*

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The trial court erred in dismissing Count I with prejudice for lack of standing, and this Court should enter judgment dismissing Count I without prejudice.[4]

State, 579 S.W.3d 924, 928 (Mo. banc 2019) (affirming dismissal with prejudice for lack of standing where plaintiffs conceded lack of taxpayer standing and where the Court held standing was not created by a statute). Plaintiffs' standing in that case could not be cured because it was foreclosed as a matter of law. There is no such lack of standing here. Appellants' lack of associational standing under the circuit court's order would be cured if individual Plaintiff members are denied their right to vote upon presenting themselves at the polls without a photo ID. D165 p. 2 ("The potential injured party would have to first, timely present himself to the polls and second, be eligible to vote. One cannot claim to be injured by a photo ID requirement unless they [are] otherwise eligible to vote, actually try to vote…but [are] not allowed to vote for a lack of a photo ID."). *See W. Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 583 (Mo. App. W.D. 1988) (holding plaintiff was entitled to amend petition to cure defects with regard to standing).

[4] Appellants also acknowledge other cases include an unchallenged dismissal with prejudice on the basis of standing. Those cases, however, do not provide guidance because the issue of the denial being with (as opposed to without) prejudice was not raised or discussed. *See Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

AMERICAN OVERSIGHT

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Point II

The circuit court erred in dismissing Counts I and II with prejudice based on mootness because Missouri law requires that claims dismissed for mootness should be dismissed without prejudice, in that mootness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

As noted *supra*, although the Court defers "to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). "A circuit court does not have subject-matter jurisdiction under [a]rticle V, section 14(a) to adjudicate a case that is not justiciable because it has become moot." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010). The issue before this Court is purely a question of law and thus subject to *de novo* review. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*").

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v.*

AMERICAN OVERSIGHT

Boone Mgmt., Inc., 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

A dismissal for mootness is a dismissal for want of subject-matter jurisdiction and as such should be without prejudice. *See*, *e.g.*, *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000) ("Moot cases should generally be dismissed, as the circuit court lacks subject matter jurisdiction."); *B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998) ("Because plaintiffs 'cause of action was moot, it was not justiciable and the trial court did not have subject matter jurisdiction over it."); *see also Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. W.D. 2008) (raising mootness sua sponte after explaining that "[p]arties cannot . . . confer subject matter jurisdiction upon a court"). When courts lack subject matter jurisdiction to resolve the merits of a dispute, the claims should be dismissed without prejudice. *Compare* § 510.150 ("A dismissal with prejudice operates as an adjudication upon the merits."), *with Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of

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subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice.").

Accordingly, because the law is clear that dismissal for mootness cannot be on the merits and thus must be without prejudice, appellate courts routinely modify such judgments. *See Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476, 485 (Mo. App. E.D. 2010) ("We remand the cause to the circuit court with instructions to vacate its judgment and to dismiss [Plaintiffs'] petition without prejudice due to the mootness of the controversy"); Defenses, 35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 ("Moot cases should be dismissed without prejudice.").

The trial court erred in dismissing Counts I and II with prejudice for mootness, and this Court should enter judgment dismissing Counts I and II without prejudice.

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Point III

The circuit court erred in dismissing Count II with prejudice based on ripeness because Missouri law requires that claims dismissed for ripeness should be dismissed without prejudice, in that ripeness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal—whether a claim that is not ripe should be dismissed with or without prejudice—is purely a question of law and is subject to *de novo* review.

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

Ripeness implicates the justiciability of a claim and therefore any dismissal should not reach the merits of the case. As noted, however, "[a] dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Because the trial court cannot reach the

AMERICAN OVERSIGHT

merits if it determines a claim is not ripe for adjudication, dismissals on ripeness grounds have been modified by appellate courts, including the Missouri Supreme Court, to dismissals without prejudice. *See Mo. Soybean Ass'n*, 102 S.W.3d at 29 ("[B]ecause the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice."); *Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013) ("While the lack of standing and ripeness does not implicate the merits of the Auditor's claims as to his own appropriation, it does preclude relief in this action. Accordingly, pursuant to Rule 84.14, this Court will issue the ruling that the trial court should have entered. The Auditor's claims are dismissed without prejudice."); *see also Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008) ("[B]ecause the controversy was not ripe for judicial review, the circuit court's judgment is one without prejudice . . . . The circuit court's judgment of dismissal is hereby modified to explicitly state that the dismissal is due to lack of ripeness and is one without prejudice.").

In addition, modifying the trial court's judgment to dismissal without prejudice on Count II is particularly warranted in this case as a prudential matter. The court made clear that Appellants 'request for mandatory injunctive relief could be cured and would become ripe if the Secretary of State failed to provide adequate advance notice to the public under the terms of the *Priorities USA* injunction:

> The Court finds that the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*. The Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public. The original manner in which he tried to fulfill that obligation was found to be

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> deficient. The question of whether or not the Secretary's subsequent information campaigns avoid this deficiency is not yet ripe.

D165 pp. 5-6.

Should the Secretary of State fail to provide sufficient required advance notice, including by making inaccurate statements regarding the narrowing of identification options for voters in Missouri, Appellants should not be barred from seeking the appropriate mandatory injunctive relief in the future. *Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990) ("The judgment is reversed and the cause remanded. Because the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication.").

Thus, the circuit court erred in dismissing Count II with prejudice based on ripeness, and this Court should enter judgment dismissing Count II without prejudice.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003882

Conclusion

Because Appellants' claims were dismissed based on jurisdictional grounds of standing and mootness and justiciability grounds of ripeness, the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on February 2, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,762 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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WD84028

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs-Appellants,

v.

STATE OF MISSOURI, et al.,

Defendants-Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

INTRODUCTION 4

STATEMENT OF FACTS 6

ARGUMENT 11

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I). 11

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion. 11

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing. 14

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III). 18

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion. 18

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims. 19

C. The trial court properly dismissed Count II with prejudice as unripe. 22

CONCLUSION 24

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF AUTHORITIES

Cases

Allen v. City of Greenville, MO,
336 S.W.3d 508 (Mo. App. S.D. 2011) 12

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 13

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 16

Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.,
92 S.W.3d 232 (Mo. App. W.D. 2002) 12

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 16

Eckel v. Eckel,
540 S.W.3d 476 (Mo. App. W.D. 2018) 16

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 21

Gohlston v. Lightfoot,
825 S.W.2d 864 (Mo. App. W.D. 1992) 14, 20

Jennings v. City of Kansas City,
812 S.W.2d 724 (Mo. App. W.D. 1991) 15

Mahoney v. Doerhoff Surgical Servs., Inc.,
807 S.W.2d 503 (Mo. banc 1991) 19

McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.,
339 F.3d 1087 (9th Cir. 2003) 20

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 20

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

AMERICAN OVERSIGHT

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) 4, 12, 18

Osuji v. Missouri Dept. of Social Services, Div. of Family Services,
34 S.W.3d 251 (Mo. App. E.D. 2000) 19

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 11

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 4, 6, 7, 8, 23

Rickmyer v. Browne,
995 F.Supp.2d 989 (D.Minn.2014) 19

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999) 11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 13

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. 1982) 11

State Conference of Nat'l Ass'n for Advancement of Colored People v. State,
563 S.W.3d 138 (Mo. App. W.D. 2018) 6, 8, 9, 10, 16

Timber Point Properties III, LLC v. Bank of Am., N.A.,
2014 WL 7005195 (W.D. Mo. Dec. 10, 2014) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 4, 11, 19

Statutes

Section 115.427, RSMo 6

Rules

Missouri Supreme Court Rule 67.03 13

Mo. Sup. Ct. R. 81.05(a)(1) 15

Mo. Sup. Ct. R. 84.04(d) 16

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003889

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

INTRODUCTION

The circuit court correctly issued a final judgment ruling that Plaintiffs lack standing to bring an insufficient-appropriations claim under Missouri's voter-identification law, that all of their claims are moot in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448, 461 (Mo. banc 2020), and that their statutory claims about insufficient advance notice of Missouri's voter identification requirements are not ripe. On appeal, Plaintiffs do not argue the merits of any of those determinations. Rather, they contend only that the trial court erred in dismissing their claims *with prejudice*. For three principal reasons, this Court should affirm the trial court's with-prejudice dismissals and thereby reinforce the prevailing rule that trial courts have discretion to dismiss claims with or without prejudice based on the circumstances present in a case.

First, Plaintiffs apply the wrong standard of review of a trial court's decision to dismiss cases with or without prejudice; this Court should review for abuse of discretion and not exercise *de novo* review. *See Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) ("This court will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court."); *cf. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (*de novo* review of the merits of the dismissal may be appropriate where "the facts are uncontested.").

AMERICAN OVERSIGHT

Second, under the correct standard of review, the trial court properly exercised its discretion in dismissing Count I with prejudice for lack of standing. The trial court issued its judgment after a weeklong trial on Plaintiffs' third amended petition, the judgment references evidence elicited at trial, and the parties contested the facts of Plaintiffs' standing to bring the case. It would be futile, and it would prejudice Respondents, to transform the trial court's judgment into a mere dismissal without prejudice and allow Plaintiffs to bring the same suit again.

Third, the trial court correctly dismissed, with prejudice, Counts I and II as moot and Count II as unripe because there is no realistic probability that Plaintiffs can cure those problems in light of the Supreme Court's permanent injunctions in *Priorities USA*. Plaintiffs have not appealed the merits of the mootness question, and thus they have conceded that issue. It would be futile to allow them to bring their suit again, and nothing in Missouri law mandates that dismissals for mootness be without prejudice. The trial court also correctly dismissed Count II as unripe. Count II is purely a statutory claim where all the relief requested was provided in the *Priorities USA* injunctions based on the facts Plaintiffs pleaded, and Plaintiffs have not identified subsequent Voter ID advertising that violates those injunctions.

For these reasons, this Court should affirm the trial court's judgment dismissing Counts I and II of the Third Amended Petition with prejudice.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

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STATEMENT OF FACTS

Backed by a constitutional amendment ("Voter ID Amendment") approved by popular vote, in 2016 the State adopted its current voter identification statute that allows for voting with both photo and non-photo forms of identification. § 115.427, RSMo (the "Voter ID Law"). After a constitutional challenge to certain aspects of the Voter ID Law's requirements, the Missouri Supreme Court largely upheld the statute last year in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). But the Court affirmed a trial court's declaration that the statute's affidavit requirement for some non-photo forms of identification was unconstitutional. And it upheld the lower court's injunctions against disseminating certain advertising materials about the Voter ID Law, including "materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show," *Id.* at 460–61, and "materials which represent that a photo identification card is required to vote," (D165, p.5).

A. The Third Amended Petition's claims and early procedural history.

Plaintiffs in this case are two organizations and one individual Missouri voter. They filed the original Petition in June 2017, and the case has previously been before this Court in an earlier stage of litigation. *See State Conference of Nat'l Ass'n for Advancement of Colored People v. State*, 563 S.W.3d 138 (Mo.

AMERICAN OVERSIGHT

App. W.D. 2018) (hereinafter "*NAACP I*"). After this Court remanded the case to the circuit court for further proceedings, Plaintiffs filed their Third Amended Petition after a lower court's ruling in *Priorities USA* but before the Supreme Court's opinion. (D98).

In Count I, Plaintiffs brought a statutory claim seeking declaratory and injunctive relief that the personal identification requirements in the Voter ID Law may not be enforced due to insufficient legislative appropriations in fiscal years 2017 to 2019. (D98, p.23). In Count II, they sought various prohibitory and mandatory injunctions against advertising materials under § 115.427.5 of the Voter ID Law. (D98, pp.24–26). Specifically, in Count II Plaintiffs asked the trial court to:

> A. Issue an injunction barring the Secretary of State from telling the public that there is a photo ID requirement and/or from instructing poll workers to ask for photo IDs when voters come to the polls;
>
> B. Issue an injunction directing the Secretary of State to provide public notice that there is no photo ID required for voting in Missouri;
>
> C. Issue an injunction directing the Secretary of State to provide correct information to the public about the non-photo options;
>
> D. Issue an injunction directing the Secretary of State to take down misleading advertisements that are still being used or made available to the public;
>
> E. Allow such other and further relief as is proper under the circumstances.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

(D98, p.26).

The trial court presided over a weeklong trial in August 2019, where the court heard the testimony of several witnesses and admitted into evidence the parties' joint stipulated facts and exhibits. (D120–121). The parties did not stipulate to Plaintiffs' standing to bring the case. (*Id.*; D117). Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing (D117, ¶¶14–18), raised lack of standing as an affirmative defense (*id.* at p. 7), and argued in their post-trial brief that Plaintiffs lack standing based on the evidence.

B. The parties brief the effect of the Priorities USA *decision.*

On January 14, 2020, the Supreme Court issued its opinion in *Priorities USA*. The next day, the trial court asked the parties to submit memoranda concerning the effect of *Priorities USA* on this case. (D159). For Plaintiffs' appropriations claim in Count I, Respondents argued that it was moot because the Priorities USA decision already provided the only relief sought by Plaintiffs: a declaration and injunction that the Voter ID Law's identification requirements cannot be enforced. (D162, p.3). As to Plaintiffs' statutory claims in Count II regarding insufficient advance notice of the Voter ID Law's personal identification requirements, Respondents argued that *Priorities USA* also mooted these claims. *Priorities USA* upheld permanent injunctions

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

against those very requirements, "any proposed negative relief was already granted," and "[n]either [§ 115.427.5] nor the order require additional notice campaigns or any of the other remedies Plaintiffs propose." (D162, p.4-6).

Plaintiffs responded to Respondents' *Priorities USA* arguments, contending that Count I is not moot because their relief requested—an order "directing that voters cannot be asked to show a Photo ID at the polls"—is not encompassed by *Priorities USA*. (D160 at p.3). For Count II, Plaintiffs agreed that "the *Priorities USA* remedial order prevents further dissemination of such misleading information," but they contended that it "does not affirmatively correct the existing misimpression." (D160, p.2). They asserted that the Voter ID Law's "obligation to provide advance notice necessarily requires the provision of accurate and non-misleading information." (*Id.*). In other words, Plaintiffs disagreed that *Priorities USA* precluded their claims in this case for a mandatory injunction to promote corrective advertisements.

C. The trial court's final judgment and post-judgment developments.

On April 20, 2020, the trial court issued a final judgment holding that Plaintiffs lacked standing to bring their claims in Count I, that Count I is moot under *Priorities USA*, and that Count II is both moot and not ripe under *Priorities USA*. (D165).

As to Count I, the trial court discussed what evidence a plaintiff must show to demonstrate injury under the photo ID requirement: "the potential

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

injured party would have to first, timely present himself to the polls and second, be eligible to vote." (*Id.* at p.2). In a footnote, the court highlighted evidence actually introduced at trial regarding the ability of voters to vote with non-photo forms of identification. (*Id.* at n.5). The court held that the two organization plaintiffs lack associational standing and organizational standing, and it further held that taxpayer standing is not a theory on which the individual plaintiff here, Christine Dragonette, can base a claim for insufficient appropriations. (*Id.* at p.3). The court alternatively found that the injunctions upheld in *Priorities USA* render Count I moot, because the case held that the photo identification requirement "may not be enforced." (*Id.*).

As to Count II, the trial court compared the injunctions upheld in *Priorities USA* with the relief requested in this case. (*Id.* at p.4–6). The court held that "the prohibitory injunctions of *Priorities USA* [are] essentially the same as prayed for in this case[.]" (*Id.* at p.5). Referring to Plaintiffs' request for an injunction that the Secretary of State affirmatively issue correct advertisements, the court reasoned that "the specific mandatory injunctions requested are not required given the findings made and instructions provided to the Secretary of State in *Priorities USA*." (*Id.*). The court also held that Count II is not ripe to the extent it is based on advertisements not yet promoted. (*Id.* at p.6).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

On May 19, 2020, Plaintiffs filed a motion to modify the judgment to transform the dismissals with prejudice to dismissals without prejudice. (D166). The trial court did not rule on that motion, and Plaintiffs eventually appealed the trial court's judgment under special order by the Court permitting a late notice of appeal. (D167, D168).

ARGUMENT

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I).

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion.

The correct standard of review is one for abuse of discretion, and not *de novo* review as Plaintiffs contend. Generally, an appellate court "will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court." *Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) (citing *Smith v. City of De Soto*, 634 S.W.2d 204, 205 (Mo. App. 1982)). Application of this standard is universal in every district of the Court of Appeals. *See id.*; *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo. App. E.D. 2003) (reviewing for abuse of discretion trial court's with-prejudice dismissal of a case based on plaintiff's failure to prosecute); *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 505 (Mo. App. E.D. 1999) (holding "[t]here is no absolute right to amend a petition" and finding no

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

abuse of discretion of the lower court's with-prejudice dismissal based on failure to state a claim); *Allen v. City of Greenville, MO*, 336 S.W.3d 508, n.3 (Mo. App. S.D. 2011) (noting the court would have applied abuse of discretion review to the lower court's prejudice determination if the appellant had raised it on appeal).

An exception to that rule may apply when the question on appeal is whether the dismissal itself was proper and "the facts are uncontested." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (applying *de novo* review to the merits of the dismissal decision). But this case does not fall within any known exception to the general rule for several reasons, and Plaintiffs misapply the holding in *Mo. Soybean Ass'n*.

First, Plaintiffs have not appealed the trial court's decision on standing—they appeal only the dismissal being with prejudice. The trial court issued a final judgment after the trial, and the issue of Plaintiffs' standing was a preserved issue for trial. (*See* D117, Respondents' Answer and Affirmative Defenses, pp.15-16). The trial court did not rule on a motion to dismiss where the court would have assumed Plaintiffs' "averments in their petition are true." *Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.*, 92 S.W.3d 232, 234 (Mo. App. W.D. 2002) (reviewing *de novo* the merits of a lower court's grant of a motion to dismiss for lack of standing); *cf. Mo. Soybean Ass'n*,

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003898

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

102 S.W.3d at 21 (procedural history indicates the case was decided after a trial or hearing on a combined motion to dismiss and for summary judgment).[1]

Unlike a motion to dismiss, where the facts are uncontested, or a summary judgment motion, where there can be no disputed material facts, Respondents contested Plaintiffs' lack of standing. The issue here is not "purely a question of law" as in *Mo. Soybean Ass'n*. Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing, and Respondents raised lack of standing as an affirmative defense. (D117). Respondents also raised the issue in their post-trial brief, highlighting the lack of evidence Plaintiffs submitted at trial to support their standing. And in its final judgment the trial court referenced evidence introduced at trial as to Plaintiffs' standing. (D165, n.5).

Second, Missouri Supreme Court Rule 67.03 also supports giving the trial court discretion to issue a judgment with prejudice, stating that "Any involuntary dismissal shall be without prejudice *unless the court in its order for dismissal shall otherwise specify*." Mo. Sup. Ct. R. 67.03 (emphasis added).

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[1] In addition to *Mo. Soybean Ass'n*, other cases cited by Plaintiffs in their brief also considered dismissals without prejudice upon a motion to dismiss. *E.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 64 (Mo. App. W.D. 2004). Furthermore, other cases rested on the specific language of a previous version of Rule 67.03 or did not state a standard of review at all. *E.g.*, *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

The plain language of the Rule contemplates a court's discretion to specify the prejudicial effect of its dismissal.

Finally, review for abuse of discretion makes sense because it is the standard that governs review of denials of leave to amend a petition. *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992). In those situations, "the denial of amendment is presumed correct and the burden is on the proponent to show an abuse of discretion." *Id.* Dismissals with prejudice are analogous to denials of leave to amend a petition because both effectively prohibit a party to re-plead claims in a future action. There is no principled distinction between these two conceptually similar determinations for purposes of applying a standard of review.

For all these reasons, this Court should apply the abuse of discretion standard and confirm that Plaintiffs carry the burden to show that the trial court abused its discretion in dismissing each count of the Third Amended Petition with prejudice.

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing.

The argument section of Plaintiffs' first point on appeal is virtually devoid of legal argument, instead consisting almost exclusively of parenthetical quotations from case law. Because they apply the wrong

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

standard of review, Plaintiffs do not argue how the trial court abused its discretion for issuing a final judgment holding that they lack standing.

Under the abuse of discretion standard, "[d]iscretion means the option that the trial judge has in doing or not doing that which a litigant does not have the absolute right to demand." *Jennings v. City of Kansas City*, 812 S.W.2d 724, 735 (Mo. App. W.D. 1991). "Abuse of that discretion means an untenable judicial act that defies reason and works an injustice. . . . [or] [w]hen the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable." *Id.* Under the appropriate standard, the trial court soundly exercised its discretion.

First, because the circuit court held a trial where evidence was presented on Plaintiffs' lack of standing, it was proper for the court to decide the standing question on the merits and issue a final judgment. The trial court's decision was properly denominated a "judgment" and it became final 30 days after it was issued. Mo. Sup. Ct. R. 81.05(a)(1). Nothing about issuing a final judgment after trial is arbitrary and unreasonable, or is an injustice against Plaintiffs. During the multiple years of litigation in this case, including a trip to this Court in *NAACP I*, Plaintiffs amended their original Petition three times and had ample opportunity to develop a case with a party possessing standing.[2]

[2] Plaintiffs do not raise on appeal the merits of the trial court's judgment on standing, mootness, or ripeness. The decision below was a final judgment, the

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AMERICAN OVERSIGHT

Second, amending the trial court's final judgment to simply a dismissal order without prejudice would undermine the work of the parties and the courts in multi-year litigation, which reached a trial on the merits and resulted in a final judgment.[3] It would reward Plaintiffs the benefit of liberal re-pleading rules that accompany a dismissal without prejudice by allowing them to re-plead the same cause of action while remaining plaintiffs to that case. And it would effectively announce a rule that no Missouri case supports—that courts must always dismiss a case without prejudice due to lack of standing, even if denominated as final judgment after a contested trial. This would destabilize a customary practice in Missouri's appellate courts of affirming dismissals with prejudice, and it is not necessary in this case. *See, e.g.*, *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

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finality of which was addressed in Respondents' opposition to Plaintiffs' filing of a late notice of appeal. The finality of the judgment was necessarily affirmed by this Court's special order allowing Plaintiffs to file a late notice of appeal. Plaintiffs have elected not to appeal the merits of the judgment, and so they have forfeited those claims on appeal. *E.g.*, *Eckel v. Eckel*, 540 S.W.3d 476, n.17 (Mo. App. W.D. 2018) (an issue not presented in a point relied on is not preserved for review); *see also* Mo. Sup. Ct. R. 84.04(d).

[3] This Court's opinion in *NAACP I*, 563 S.W.3d at 142–47, thoroughly discusses the procedural history of this case and the claims Plaintiffs raised in their original, first amended, and second amended petitions.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Third, this Court should reject any argument Plaintiffs make that they can cure their pleading defects regarding standing and therefore a without-prejudice dismissal is appropriate. Plaintiffs do not squarely argue they can or will cure this defect. Instead they allude to it in a footnote in their brief as a possibility if the two organizational plaintiffs identify members who present themselves at the polls without a photo ID and suffer an injury from the Voting ID Law. (App. Br. at n.3). Plaintiffs amended their Petition three times and had over two years of litigation to find at least one member of their organizations who has standing to bring their claims. They failed to do so. But even if the organizational plaintiffs did find such an individual in their ranks, the theory of their case—and likely the factual allegations and evidence—would presumably be the same. The circuit court's judgment below is final and as such has the appropriate preclusive affect under the doctrines of collateral estoppel and res judicata. The extent of that

Lastly, the trial court held that *Priorities USA* mooted any of the pleaded claims for relief in Count I. Because Plaintiffs did not raise the merits of the mootness decision on appeal and the decision below is a final judgment, they have forfeited raising the same claims in the same form again. It would thus be futile for this Court to modify the trial court's judgment to be a dismissal without prejudice.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003903

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

For these reasons, this Court should affirm the trial court's exercise of discretion in issuing a final judgment dismissing Count I with prejudice for lack of standing.

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III).

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion.

As with the trial court's final judgment disposing of Plaintiffs' claims in Count I with prejudice, this Court should review the trial court's with-prejudice dismissals as to mootness and ripeness for abuse of discretion. Plaintiffs again cite the incorrect standard of review in light of the claims they actually raised on appeal. *De novo* review might be appropriate if Plaintiffs had contested the merits of the dismissals themselves, not merely whether the trial erred in dismissing Plaintiffs' claims with prejudice. *De novo* review was applied in *Mo. Soybean Ass'n* because the Court reviewed the substantive question of whether the trial court properly dismissed the underlying claim as unripe and for lack of subject-matter jurisdiction, not whether the trial court erred by doing so with or without prejudice. 102 S.W.3d at 22 ("a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo."). Plaintiffs here have not appealed the trial court's

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

mootness or ripeness determinations. Thus, the general rule of reviewing for abuse of discretion applies. *See Williams*, 841 S.W.2d at 198.

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims.

Plaintiffs have elected not to appeal the merits of the trial court's decision to dismiss Counts I and II as moot in light of *Priorities USA*. They have therefore forfeited that issue on appeal. Assuming, as this Court therefore must, that the trial court did properly dismiss Plaintiffs' claims as moot, the trial court appropriately exercised its discretion by dismissing them with prejudice.

The principal rationale for dismissing cases without prejudice is that it permits a party to bring another action for the same cause, if it is not otherwise barred. *See Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 506 (Mo. banc 1991). "Ordinarily, when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court." *Osuji v. Missouri Dept. of Social Services, Div. of Family Services*, 34 S.W.3d 251, 253 (Mo. App. E.D. 2000). As other courts have held, "where the pleading's deficiencies 'cannot be cured by re-pleading, because [the claims fail] as a matter of law,' dismissal with prejudice may be appropriate." *Timber Point Properties III, LLC v. Bank of Am., N.A.*, 2014 WL 7005195, at *1 (W.D. Mo. Dec. 10, 2014) (quoting *Rickmyer v. Browne*, 995 F.Supp.2d 989, 1019

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003905

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

(D.Minn.2014)); *see also McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009) ("Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend.")); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. 2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment").

There is no principled reason why a similar rule does not apply in Missouri for with-prejudice dismissals for mootness. Indeed, this same rationale inspires the analysis of a denial of leave to amend a petition, which is conceptually similar to dismissals with prejudice. *See Gohlston*, 825 S.W.2d at 869; *Bratt v. Cohn*, 969 S.W.2d 277, 284 (Mo. App. W.D. 1998) (denial of plaintiffs' motion to file second amended petition was not an abuse of discretion because it "did not cure the deficiencies of their first amended petition."). Nothing in Missouri law mandates dismissal without prejudice when the court's basis is mootness.

Plaintiffs have not argued on appeal how a subsequent lawsuit could cure the mootness problems found by the trial court in light of *Priorities USA*. And because Plaintiffs have not raised that argument, they have forfeited it. As in their first point on appeal, the argument section of their second point on appeal consists almost exclusively of parenthetical quotations from cases, not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003906

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

substantive legal argument. The Supreme Court's decision in *Priorities USA* affirmed the lower court's permanent injunctions, which—as the trial court below properly found, and which is not contested by Plaintiffs on appeal—encompasses the very relief Plaintiffs sought in this case. (D165, p.5).

The cases Plaintiffs cite in their brief are inapposite. For example, in *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476 (Mo. App. E.D. 2010), the trial court made no determination as to mootness; instead, mootness came *after* the trial court's ruling, and the trial court dismissed the case with prejudice for lack of standing. *Id.* at 477. The parties addressed the merits of the post-decision mootness question on appeal and the appellate court thus considered it on the merits. *Id.* at 483. The appellate court's decision discussed the various public-interest reasons why it vacated the lower court's standing decision and held the controversy should be dismissed without prejudice due to mootness, including because the respondent on appeal did not oppose that remedy. *Id.* at 485. None of those unique circumstances are present here, and *Friends of the San Luis* certainly does not announce a rule that circuit court dismissals due to mootness must always be without prejudice.

Deciding whether a case should be dismissed with or without prejudice is within the sound discretion of the court deciding the mootness question. Plaintiffs have failed to appeal the merits of the trial court's mootness decision. And they have altogether failed to argue in their brief how they might obtain

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

relief in a future, re-pleaded cause of action based on appropriations for Voter ID Law advertising that is not encompassed by the permanent injunctive relief ordered in *Priorities USA*.

This Court should therefore affirm the trials court's decision dismissing as moot Counts I and II with prejudice.

C. The trial court properly dismissed Count II with prejudice as unripe.

The trial court properly exercised its discretion in dismissing Count II with prejudice as unripe. Though this Court can affirm the trial court's dismissal of Count II as moot and therefore avoid ruling on Appellants' third point on appeal, there are independent and sufficient grounds to affirm the trial court's dismissal with prejudice of Count II as unripe.

The Supreme Court in *Priorities USA* affirmed lower-court injunctions concerning the Secretary of State's advertising the Voter ID Law. As the trial court in this case held, "[t]he Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public." (D165, p.5). No party has filed suit complaining of the Secretary's subsequent advertising efforts or compliance with the *Priorities USA* decision.

If a party has any good-faith allegations that the Secretary of State's Office has not complied with the permanent injunctions in *Priorities USA*, those allegations might support a claim for which a party can bring a new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003908

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

action. But Plaintiffs' claims in Count II rest on an entirely separate theory than that potential cause of action. In Count II, Plaintiffs alleged that expenditures on advertising resulted in incorrect and misleading advertising and that the Secretary of State's Office did not issue appropriate corrective advertising. (D98, pp.24–26). Count II is a strict statutory claim, resting solely on § 115.427.5 of the Voter ID Law. The Supreme Court in *Priorities USA* already analyzed claims for violations of that same statute similar to Plaintiffs' claims in Count II. *Priorities USA*, 591 S.W.3d at 459–61.

As the trial court here found, the permanent injunctions in *Priorities USA* encompass essentially the same relief Plaintiffs sought on their advertising claims and "the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*." (D165, pp. 5–6). In mentioning mandatory injunctions, the trial court was necessarily referring to the relief sought by Plaintiffs in Count II to issue new, corrective advertising (D98, p.26). The trial court was correct in ruling that the *Priorities USA* decision forecloses any relief that Plaintiffs actually requested in Count II of the Third Amended Petition based § 115.427.5, and Plaintiffs do not challenge the correctness of that portion of the judgment below.

To the extent Plaintiffs bring a future cause of action based on similar facts due to advertising of the Voter ID Law, any such allegations likely cannot

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

be premised § 115.425.7. Plaintiffs did not plead claims premised on the *Priorities USA* injunctions even though the trial court's decision in that case was issued prior to the Third Amended Petition's filing. To that end, even though the Third Amended Petition cites *Priorities USA* in Count II, it narrows the Count's focus to a "violation of the statute." (D98, p.26). Claims for relief requested in a future lawsuit based on the same facts alleged in the Third Amended Petition but premised on § 115.427.5 and not the *Priorities USA* permanent injunctions are not yet ripe, nor can they ever be ripe. *Priorities USA* forecloses the relief Plaintiffs requested based on the facts and theory of the case they pleaded. There exists a hypothetical claim based on *Priorities USA*'s permanent injunctions that may eventually be ripe, but that is not the claim in Count II of the Third Amended Petition here.

For these reasons, it would be futile to allow Plaintiffs to re-plead the same cause of action under § 115.427.5, for the same relief, and based on future—but presently unripe—facts. The trial court properly exercised its discretion in dismissing with prejudice Count II as unripe.

CONCLUSION

For the reasons stated, this Court should affirm the circuit court's decision.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003910

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 5th day of April, 2021, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 5,626 words.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003911

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED
10:39 am, May 13, 2021
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Contents

Table of Authorities 3

Argument 5

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003). 5

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits. 13

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdicton or authority to adjudicate the case on the merits after finding the claims to be moot and unripe. 18

Conclusion 23

Certification of Service and of Compliance with Rule 84.06(b) and (c) 25

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Authorities

Abbott Laboratories, Inc. v. Gardner,
387 U.S. 136 (1967) 22

Allen v. City of Greenville,
336 S.W.3d 508 (Mo. App. S.D. 2003) 7

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 12, 13

Brinson v. Whittico,
793 S.W.2d 632 (Mo. App. E.D. 1990) 22

Burnett v. Kansas City Sch. Bd.,
237 S.W.3d 237 (Mo. App.W.D.2007) 10

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 15, 16

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 15, 16

Doe v. Visionaire Corp.,
13 S.W.3d 674 (Mo. App. E.D. 2000) 13, 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 14

Minn. Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 11

Missouri Public Service Commission v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

Missouri Soybean Association v. Missouri Clean Water Commission,
102 S.W.3d 10 (Mo banc. 2003) ..... Passim

Pearson v. Koster,
367 S.W.3d 36 (Mo. banc 2012) 11

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 6, 10

AMERICAN OVERSIGHT

Priorities USA v. State,
591 S.W.3d 448 (Mo banc. 2020) .....Passim

Priorities USA,
591 S.W.3d 21

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999).....7

Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.,
821 F.3d 992 (8th Cir. 2016).....11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 12

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. W.D. 1982) 6

State ex rel. Christian Health Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv.,
229 S.W.3d 270 (Mo. App. W.D.2007) 12

State ex rel. Scherschel v. City of Kansas City,
470 S.W.3d 391 (Mo. App. W.D. 2015) 10

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D.1988) 12

Webb v. Wyciskalla,
275 S.W.3d 249 (Mo banc. 2003) 8, 12

Weinschenk v. State,
203 S.W.3d 201 (Mo. banc 2006) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 5, 6

Mo. Rev. Stat. § 115.427.....Passim

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003915

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Argument

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003).

The issue presented here is purely a question of law, the underlying facts are uncontested, and the correct standard of review in this case is *de novo*. *See* Appellants' Opening Br. at pp. 14–15, 18–19, 21.

The cases relied on by Respondents do not alter the conclusion that review of whether dismissal should have been with prejudice is *de novo*. In *Williams v. City of Kansas City*, 841 S.W.2d 193 (Mo. App. W.D. 1992), the case was dismissed with prejudice on a motion for judgment on the pleadings because the court found that the plaintiff failed to sufficiently plead claims alleging a violation of due process and conversion. *Id.* at 194–97.[1] In upholding the dismissal with prejudice as to the due process claim, this Court noted that "[w]hen a trial court concludes that pleadings do not state a cause of action, and when adequate opportunity to amend has been provided, it is not error for the trial court to dismiss with prejudice." *Id. Williams* does not support abuse-of-discretion review here. In this case, the dismissal was not based upon a finding that Appellants failed to state a claim, nor was the opportunity to amend provided but not utilized. *Williams* did not address a dismissal based on standing, mootness, or ripeness—the grounds for dismissal here. While Respondents note that the *Williams* court relied on

[1] The dismissal of the conversion claim was reversed and that claim was remanded to allow for further development of the facts so that the plaintiff could attempt to prove his claim against the City. *Williams*, 841 S.W.2d at 197; *see also id.* n.3.

AMERICAN OVERSIGHT

Smith v. City of De Soto, 634 S.W.2d 204 (Mo. App. W.D. 1982), *Smith* too is a case where the court dismissed a case with prejudice for failure to state a claim—there because the plaintiff "cite[d] no authority to support his contention a municipal corporation may be held liable in quantum meruit." *Id.* at 204–05 (noting that the law states the contrary). Like in *Williams*, the plaintiff in *Smith* sought a dismissal without prejudice so that he could amend his petition. This Court affirmed the dismissal with prejudice noting that, in the context of that case, the defendant should not have to respond to additional amended petitions because as a legal matter it would be impossible to cure the legal defect that resulted in dismissal. *Smith*, 634 S.W.2d at 205.

In *Peet v. Randolph*, 103 S.W.3d 872, 874 (Mo. App. E.D. 2003), the plaintiff sought specific performance of a real estate contract. After a summary judgment ruling for defendants, followed by an appeal and remand, the case was then ultimately dismissed with prejudice for failure to prosecute. *Id.* There, the trial court believed that the plaintiff failed to reasonably explain his failure to take any action for nearly a year following the remand and noted that it was plaintiff's responsibility to file a motion. *Id.* In finding that the court abused its discretion, the Eastern District noted that, while dismissal for failure to prosecute is typically within the trial court's judicial discretion, because of the "lack of a local rule delineating the plaintiff's responsibilities on remand, the lack of any scheduling conference or schedule on remand, this Court's mandate that a trial be held, and the plaintiff's readiness to proceed to trial, the trial court clearly abused its discretion in dismissing this case." *Id.* at 876–78 (further noting that no dismissal was appropriate, with or without prejudice, reinstating the cause of action, and ordering that it

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

be reassigned to a new trial judge). There, again, the dismissal was not based on standing, mootness, or ripeness. A case with such different facts is not authority to depart from *de novo* review on the question of law presented in this appeal.

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501, 504–05 (Mo. App. E.D. 1999), also involves a motion to dismiss for failure to state a claim. In reversing the dismissal with prejudice of three counts but affirming the dismissal of a fourth count, the Eastern District found that plaintiff had failed to plead sufficient facts to allege the necessary elements of a prima facie tort and noted that "[t]here is no absolute right to amend a petition." *Id.* at 505. In *Allen v. City of Greenville*, 336 S.W.3d 508, 511 (Mo. App. S.D. 2003), the dismissal again followed from a motion to dismiss for failure to state a claim. The Southern District reviewed the underlying decision to dismiss *de novo* and, in a footnote citing *Saidawi* and *Williams*, stated that whether to dismiss with or without prejudice, while not raised as a point on appeal, would be within the discretion of the trial court. *Id.* at 512, 512 n.3. In many cases the decision might be within the court's discretion. In this case, however, the court lacked such discretion and the dismissal should be reviewed *de novo*.

Unlike the cases relied upon by Respondents, there is no dispute here as to whether Appellants' petition stated a claim or whether they prosecuted their case. This case concluded after a week-long trial that included multiple witnesses—including significant expert testimony—and extensive post-trial briefing. Although the trial court did dismiss this case with prejudice, it never reached the merits of Appellants' claims, nor could it have. The dismissal was based only on standing (Count I), mootness (Counts I

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

and II), and ripeness (Count II). Each of these is a requirement for the circuit court's jurisdiction or authority to decide the case or justiciability, not the merits of the case itself.

"[T]he authority to render judgment in a particular case is … the definition of subject matter jurisdiction …." *Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo banc. 2003). This case is simply not like the cases relied on by Respondents. And while *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003), examined whether a declaratory judgment and injunctive relief claim could be brought at all, it is similar to the present case in that the facts were uncontested, it discussed the court's jurisdiction and authority to hear the case, and the issue on appeal was purely one of law. This Court should not depart from *Missouri Soybean Association* by holding that the abuse-of-discretion standard has universal application in all cases involving the review of a lower court's decision to dismiss a case with prejudice.

In *Missouri Soybean Association*, the lower court dismissed the case with prejudice for a lack of subject-matter jurisdiction. *Id.* at 14. There, like here, the parties did not dispute the underlying facts of the case (concerning state inclusion of rivers on a list of impaired waters that is then submitted to the EPA and triggers specific programs designed to improve the water quality), so the appeal centered on whether the plaintiffs could even bring a declaratory judgment action seeking injunctive relief challenging the promulgation of the list as rulemaking. *Id.* at 14–23. Whether the circuit court had the authority to adjudicate the case was a question of subject-matter jurisdiction. More specifically, the issue was whether plaintiffs were properly challenging "the validity of a

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

rule or the threatened application of such a rule" under § 536.050.1 such that the lower court would have the authority (i.e., subject-matter jurisdiction) to hear a declaratory judgment action. *Id.* at 22. If they were, then the court would have the power to render a declaratory judgment. If the promulgation of the list was not rulemaking, the court had no authority over the case—i.e., it lacked subject-matter jurisdiction.

While noting that, "[g]enerally the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of discretion[,]" the court went on to find that "where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Id.* at 22. Ultimately, the Missouri Supreme Court found that the promulgated list was not a rule and therefore "the circuit court lacked subject-matter jurisdiction pursuant to section 536.050.1 to render the sought-after declaratory judgment." *Id.* at 25–26 (noting further that because "the appellants could not even predict the effect such a declaratory judgment would have[,] … it would thus "not have a 'conclusive effect' or 'lay to rest the parties' controversy'" as is required by the general principles underlying declaratory judgment actions). Additionally, the supreme court noted that "the authority of the courts of this State to render declaratory judgments must be used and operate within the limits of the constitutional powers and duties of the courts" and, "[o]ne such limit is the traditional doctrine of ripeness, which, when applied in this case, also commands dismissal of the appellants' actions." *Id.* at 26. In closing, the supreme court concluded that, because the challenged list promulgated by the defendants "is not a rule and the inclusion of the

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Rivers not rulemaking, and because the controversy cannot be resolved by declaratory judgment and is not ripe for adjudication, the judgment of dismissal is affirmed. However, *because the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice*." *Id.* at 29 (emphasis added) (citing Rule 84.14).

Therefore, while dismissals may be reviewed for an abuse of discretion in certain contexts, that standard of review is not appropriate in this particular case, just as it was not appropriate in *Missouri Soybean Association*. This Court is not being asked to determine whether the dismissal itself was appropriate under the circumstances; it is instead being asked to decide a pure question of law: should the dismissal have been with or without prejudice when that dismissal was based solely on standing, mootness, and ripeness—i.e., the jurisdiction or authority of a circuit court and the justiciability of the claims raised.

In any event, even if this Court were to review the dismissal with prejudice for an abuse of discretion, the circuit court erred. Under that standard, this Court must reverse the circuit court's ruling "'if it is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration.'" *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 397 (Mo. App. W.D. 2015) (quoting *Burnett v. Kansas City Sch. Bd.*, 237 S.W.3d 237, 238–39 (Mo. App. W.D. 2007)); *see also Peet*, 103 S.W.3d at 876–77 ("Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to show a lack of careful consideration and shock the sense of justice.").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Moreover, "[a]n abuse of discretion occurs where the [trial] court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc); *see also Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) ("A district court abuses its discretion if, as relevant here, it commits an error of law."). In reviewing questions of law, this Court "reviews the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012) (quotation and citation omitted). As supported by the discussion, *infra*, not only was dismissing the claims with prejudice here unreasonable considering the bases for dismissal were a lack of subject-matter jurisdiction and non-justiciability but dismissing with prejudice under these circumstances was an erroneous legal conclusion because the circuit court had no authority to reach the merits of the case.

Rule 67.03 is irrelevant to the issues in this appeal. Although the rule states that an involuntary dismissal is "without prejudice unless the court in its order for dismissal shall otherwise specify[,]" this does not authorize a court to reach the merits of a case when it otherwise lacks jurisdiction or authority to do so. A circuit court does *not* have the discretion to overstep in this manner. Additionally, a trial court's decision to deny a party's request to amend a petition—a ruling that would be properly reviewed for an abuse of discretion—is, once again, easily distinguishable from a case like this one, where a circuit court improperly reaches the merits of a case despite lacking jurisdiction or authority to do so based upon standing, ripeness, and mootness. And, as discussed,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

infra, standing could be achieved and the circumstances could change in such a way that the claims become ripe and no longer moot.

To obtain judgment on the merits in any case, plaintiffs must have standing, the case must not be moot (or, if moot, it must meet an exception), and the case must be ripe. In other words, standing, mootness, and ripeness are prerequisites for a court to reach the merits of a case.[2] *See, e.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58,

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[2] As this Court has noted, "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012) ("affirm[ing] the circuit court's finding that Borges and Johnson lacked standing and enter[ing] the order the circuit court should have entered, dismissing without prejudice Borges and Johnson's petition" pursuant to Rule 84.14). Presumably, in *Borges*, this Court was alluding to the recent discussion of jurisdiction versus authority in *Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009), where the Missouri Supreme Court noted that "[s]ubject-matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." (noting that, unlike federal courts, the circuit courts in Missouri "have original jurisdiction over *all* cases and matters, civil and criminal"). "[T]he authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction…." *Id.* at 254.

While the law surrounding jurisdiction versus authority continues to evolve in court decisions, the issue need not be reached here. Under either theory, dismissal for standing, mootness, or ripeness should be without prejudice.

In *Borges*, before recognizing that the issue may be one of authority and not jurisdiction, this Court recognized that "[i]n the past, we have found that if a party lacks standing sufficient to maintain an action, the court necessarily does not have jurisdiction over the claims presented." *Id.* (citing *W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D.1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent]."). "Therefore, a claim that a party lacks standing has generally been treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 55.27(a)(1)." *Id.* (citing *State ex rel. Christian Health*

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits.").

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits.

The underlying facts in this case are uncontested. It makes no difference in this appeal that Appellants asserted that they had standing below and maintained that argument through the post-trial filings. In this appeal, Appellants have elected not to dispute the circuit court's ultimate finding that they lack standing to bring Count I. However, it remains true that, "once the circuit court determined that they lacked standing, it was without jurisdiction to reach the merits of their claims." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012). A plaintiff without standing "presents no legally justiciable issue," and therefore, "the trial court should have dismissed the[] petition without prejudice." *Id.* at 184. Thus, while dismissal of a claim where a plaintiff lacks standing is appropriate, what is not appropriate is a dismissal *with prejudice* that, by definition, reaches the merits of the claim.

"A dismissal with prejudice constitutes an adjudication on the merits and 'bars the assertion of the same cause of action or claim against the same party.'" *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000) (quoting Rule 67.01). As such, courts

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Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv., 229 S.W.3d 270, 276 (Mo. App. W.D.2007)).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

do not have any "discretion" to reach the merits of a case where plaintiffs lack standing. Here, the circuit court erred in making a dismissal with prejudice. However, the circuit court did not abuse any discretion, because it had no discretion to abuse under the circumstances.

Amending the dismissal to one without prejudice would not undermine any aspect of this case. While Appellants agree that everyone worked very hard to litigate this case over the span of several years, including a week-long trial and two appeals to this Court, that is simply the nature of litigation. It is not always fast or easy. Moreover, here, standing is curable and could be achieved in the future. The court's determination that these particular plaintiffs did not have standing under the circumstances does not preclude Appellants from ever having standing in the future. This further distinguishes this case from one where a decision related to standing might be based upon undisputed facts but where those facts failed to state a claim at all.

Here, even the circuit court recognized that "[s]tanding is a jurisdictional matter antecedent to the right of relief." D165 p. 2. The circuit court found that, to have standing to challenge the insufficient funding of § 115.427 in a manner that would preclude enforcement, a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification. *Id.* If a member of the organizational plaintiffs suffered this harm, according to the circuit court's order, the organization would have associational standing. Additionally, Missouri courts could—and arguably should—begin to embrace organizational standing, just as federal courts have for decades. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Thus,

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

standing to raise the claims is achievable and plaintiffs, with their thousands of members, should not be forever barred because the circuit court found they lacked standing at the time of the trial.

Amending the judgment to a dismissal without prejudice in this case would not destabilize any purported "customary practice" of appellate courts affirming dismissals with prejudice where the issue involved a party's standing. And, if it is a customary practice of appellate courts in this state to affirm dismissals with prejudice based solely upon a lack of standing then that practice should be revisited given the legal error involved and dangerous precedent it sets and the many decisions indicating that a court should not reach the merits of a case when the plaintiffs lack standing.

The cases relied on by Respondents to support this argument are inapposite. In all three of the cited cases, the dismissals were based upon the pleadings, the review of the dismissal itself was *de novo*, and the plaintiffs argued only that their pleadings were sufficient to demonstrate standing but did not raise the issue of whether the dismissal should be with or without prejudice. Therefore, none of the cases include any discussion or point of error related to the fact that the cases were denied with prejudice. In *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 117 (Mo. App. W.D. 2018), and *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017), the plaintiffs argued that they pleaded sufficient facts to establish standing to challenge violations of the Fair Credit Reporting Act (FCRA) and did not raise any argument related to the petitions being denied with prejudice. In both cases, this Court looked at the sufficiency of the pleadings to determine if the plaintiffs pled injuries establishing standing for an FCRA

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

claim. *Campbell*, 561 S.W.3d at 120–21; *see also Corozzo*, 531 S.W.3d at 572. Likewise, in *Missouri Public Service Commission v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009), the appeal followed a lower court's dismissal for lack of standing based upon the allegations in the petition and no error was asserted relating to the dismissal being with prejudice. This Court should not premise its decision in the present case on previous cases where a dismissal with prejudice based on standing was affirmed but where the "with prejudice" distinction was not raised by a party or discussed by this Court.

Moreover, the decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo banc. 2020), does not change the standing argument or foreclose the possibility that a plaintiff or member of a plaintiff organization could subsequently satisfy standing requirements. Count I of the third amended petition alleged that § 115.427.1 could not be enforced pursuant to § 115.427.6(3). There has been no change to the identification requirements in § 115.427.1 or the funding requirements in § 115.427.6(3), namely that "[a]ll costs associated with the implementation of this section shall be reimbursed from the general revenue of this state by an appropriation for that purpose. If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced." Pursuant to the circuit court's holding, standing could still be achieved regardless of the *Priorities USA* decision (i.e., a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification). The *Priorities USA* decision is limited to § 115.427.2(1) and .3 (i.e., the affidavit requirement). At any future election, even though

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

the *Priorities USA* decision requires the acceptance of non-photo forms of identification without a signed affidavit, a poll worker could still require a voter to present photo identification and turn them away if they do not. Section 115.427.1 still states that voters "shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification to elected officials." As long as that subsection remains in effect, poll workers could ask voters to present those types of photo identifications at the polls and this incorrect request could be based on the State's insufficient funding to implement the law.[3]

It is not futile to do as the law requires and amend the dismissal here to one without prejudice when the circuit court had no jurisdiction or authority to enter a dismissal *with* prejudice. If the dismissal with prejudice was to be affirmed, Appellant organizations and their members who do achieve standing would be forever barred from challenging the enforcement of § 115.427.1 pursuant to § 115.427.6(3)—relief that was *not* granted in *Priorities USA*.

[3] *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his over registration card – an acceptable form of non-photo identification under option two").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdiction or authority to adjudicate the case on the merits after finding the claims to be moot and unripe.

Like a case where there is no standing, a moot or unripe case is not justiciable. In other words, the circuit court should not have reached the merits by dismissing Counts I and II with prejudice for mootness (Counts I and II) and being unripe (Count II). Appellants could be eligible to bring a claim at a future date if the issues were no longer moot and ripe for a lawsuit, but Appellants will be forever barred if this Court affirms the dismissal with prejudice.

Count I challenged the enforcement of § 115.427.1 pursuant to § 115.427.6(3). Those specific identification (§ 115.427.1) and funding (§ 115.427.6(3)) requirements have never changed. *Priorities USA* held only that the affidavit requirement found in § 115.427.2(1) and .3 is an unconstitutional burden on the fundamental right to vote. While the *Priorities USA* court enjoined portions of § 115.427 relating specifically to the affidavit requirement, including "the dissemination of materials indicating photo identification is required to vote[,]" 591 S.W.3d at 451, Appellants' potentially broader challenge to the enforcement of § 115.427.1 pursuant to § 115.427.6(3) should not be forever barred on this basis.

Regarding mootness, the circuit court seemed to hold that by eliminating the affidavit requirement, the circuit court in *Priorities USA* also enjoined the strict photo-identification requirements of § 115.427.1 "as a practical matter," D165 pp. 3–4, thus mooting any sufficient funding argument related to the enforcement of § 115.427.1 in this

AMERICAN OVERSIGHT

case. However, a mootness finding could change regardless of the affidavit requirement. In fact, *Priorities USA* supports a finding that it is likely a poll worker will not be properly informed as to how to implement the law and may require specific § 115.427.1 photo identification and then turn away a voter who does not have it, despite the injunction in that case. *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his voter registration card – an acceptable form of non-photo identification under option two"). Thus, if an eligible voter were to go to a polling place to cast a ballot and a poll worker required that voter to present a specific form of photo identification and turned them away if they did not (i.e., they achieved standing), and if that voter (or the Appellant organization of which they are a member) alleged that the funding requirements of § 115.427.6(3) were not being met and therefore § 115.427.1 could not be enforced, a claim for relief would be stated and would not be mooted by *Priorities USA*. The funding requirements of § 115.427.6(3) continue to exist and it is well-established law that "requiring individuals to present photo identification to vote is unconstitutional." *Priorities USA*, 591 S.W.3d at 458 (citing *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006)). Although Appellants do not challenge the circuit court determination that this case was mooted under the circumstances, the *Priorities USA* decision as to affidavits should not preclude Appellants from all such future claims.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003930

Priorities USA was tried in late September and early October 2018 (first decision entered by the circuit court on October 23, 2018) and a final decision of the Missouri Supreme Court was issued on January 14, 2020 (rehearing denied January 30, 2020). This case was tried in August 2019 and a judgment dismissing Appellants' claims was signed April 20, 2020. Given the unique circumstances of the 2020 elections during the COVID-19 pandemic and the significant increase in voting absentee and by mail in Missouri, some of the scenarios that would present a live controversy may yet play out in future elections.

Count II of Appellant's petition alleged that the failure to provide correct information to the public, i.e., the "advance notice" requirement, resulted in a violation of § 115.427.5. Count II was not dismissed on standing grounds but only as being moot and unripe. In dismissing Count II, the circuit court found that the injunctive relief in *Priorities USA* mooted the need for the specific injunctive relief—albeit not precisely the same relief—requested in this case. *See* D165 pp. 5–6 (comparing the relief requested here and the injunction ordered in *Priorities USA*).[4] In making its ruling here, the circuit court noted that "the original manner in which [the State] tried to fulfill [the advance-notice] obligation was found to be deficient" in *Priorities USA* and then found that whether the State's "subsequent information campaigns avoid this deficiency is not yet ripe." D165 pp. 5–6. So, while the mootness determination at the time the circuit court

[4] For example, Appellants asked for a broader injunction regarding multiple materials that had been and were being disseminated and sought an order requiring the State to correct the existing misrepresentations they created.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

ruled in April 2020 is not challenged here, as the circuit court acknowledged in its ripeness finding, Appellants' claim related to advance notice may resurface in the future if the Secretary of State continues to provide incorrect information to voters about all of § 115.427's requirements. In other words, while the *Priorities USA* court did enjoin the State from disseminating materials representing to the public that a photo identification card is required to vote, including materials with a specific graphic indicating voters will be asked for a photo identification card without specifying the other acceptable forms of identification that can be used to vote, that injunction in a case in which Appellants were not parties should not bar them from bringing a claim in the future if the advance notice provision of § 115.427.5 is violated. *See Priorities USA*, 591 S.W.3d at 559–61; D165 p. 5.[5] As such, subsequent information campaigns by the State could make this issue ripe, in which case Appellants should be entitled to bring a suit.

The possibility of a future claim is further supported by the fact that, in *Priorities USA*, the prohibition on the dissemination of materials focused on a single advertisement—one of many used by the State—and the injunction was "limited in scope, as it enjoined the State from disseminating only those 'materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show.'" 591 S.W.3d 460–61. Thus, while it is *possible* that this limited-in-scope injunction will stop the State from disseminating

[5] As noted by the supreme court in *Priorities USA*, a political science expert "testified that materials that are incomplete and fail to describe all the forms of identification permitted by section 115.427 cause voter confusion and decrease voter turnout." 591 S.W.3d at 460.

AMERICAN OVERSIGHT

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incorrect information about the requirements of § 115.427, it in no way guarantees that will be the case. Just because no party has yet brought a lawsuit does not mean that the claim will not become ripe. However, Appellants could not currently bring this claim even if it were to become ripe because they have been barred by the circuit court's dismissal with prejudice. The advance-notice requirement found in § 115.427.5 is ongoing and the State must comply with both the law's requirements *and* the injunction issued in *Priorities USA*. The *Priorities USA* decision should not be read to mean that the claim raised in this case would never become ripe in the future.

"The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Mo. Soybean Ass'n*, 102 S.W.3d at 26 (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148–49 (1967) (overruled on other grounds)). "Filing a suit prematurely should not prevent a plaintiff from proceeding with an action when it becomes ripe." *Brinson v. Whittico*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990). "Thus, if an action is deemed premature and a trial court dismisses it for that reason, the action should be dismissed without prejudice." *Id.* (holding that, "[b]ecause the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication."). Although *an* injunction was issued in *Priorities USA*, Appellants should not be forever barred from raising any claim related to advance notice under § 115.427.5, consistent with the trial

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AMERICAN OVERSIGHT

court's acknowledgement that this issue could subsequently become ripe.

Conclusion

Because Appellants' claims were dismissed based on jurisdictional and justiciability grounds (standing, mootness, and ripeness), the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

Respectfully submitted,

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-003934

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MO-AG-22-0644-A-003935

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on May 4, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,948 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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AMERICAN OVERSIGHT

No. 21-40618

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF LOUISIANA
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A STAY PENDING APPEAL

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AMERICAN OVERSIGHT

INTRODUCTION AND SUMMARY

The district court entered an intrusive and burdensome preliminary injunction that prohibits the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) from implementing interim immigration-enforcement priorities that have successfully focused scarce resources on the most pressing threats. In doing so, the court asserted sweeping authority to micromanage the government's enforcement efforts. The injunction's terms are legally unjustified and practically untenable. And they will immediately destabilize the Nation's immigration-enforcement apparatus, with potentially severe consequences for public safety, national security, and border security. The government respectfully requests that this Court stay the injunction pending appeal or until DHS issues final enforcement priorities, whichever is earlier. The undersigned counsel has been informed by DHS that it intends to issue those priorities by the end of September. The government further requests that the Court provide relief by 12:00 p.m. on Monday, August 30, when the preliminary injunction will take effect. If the Court denies the motion, the government respectfully requests a 7-day administrative stay to allow the Solicitor General to consider seeking relief from the Supreme Court

"A principal feature of" the Nation's immigration laws "is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). This discretion derives from the Framers' constitutional design and from the immigration laws themselves. *E.g.*, 6 U.S.C. § 202(5) (vesting the Executive with

AMERICAN OVERSIGHT

authority to "[e]stablish[] national immigration enforcement policies and priorities"). This authority reflects the reality that the Executive must allocate scarce resources among many aspects of immigration enforcement.

Earlier this year, DHS and ICE issued memoranda to guide agents' exercise of that discretion. The memoranda adopted interim priorities to focus limited resources on detaining and removing noncitizens who pose the greatest threat to public safety, national security, and border security. Texas and Louisiana challenged these priorities, contending that the Immigration and Nationality Act (INA) requires the government to arrest and detain every noncitizen whom the INA classifies as a "criminal alien[]," 8 U.S.C. § 1226(c), and to arrest and detain every noncitizen with a final order of removal during the 90-day removal period, *id.* § 1231(a)(2). The district court improperly accepted both those arguments, as well as plaintiffs' procedural challenges under the Administrative Procedure Act (APA), Add.105-44.

A stay is warranted because plaintiffs are unlikely to prevail on the merits. At the outset, their claims are not amenable to judicial review. Plaintiffs lack standing to challenge the interim priorities. And the priorities are otherwise unreviewable because enforcement decisions are committed to agency discretion by law and because the priorities are not final agency action. Moreover, plaintiffs are not within the zone of interests of the statutory provisions they seek to enforce. Even if plaintiffs could clear these hurdles, their claims would fail on the merits. Neither § 1226(c) nor § 1231(a)(2) eliminates the government's enforcement discretion. Indeed, Congress has never

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003940

appropriated sufficient resources to permit DHS and ICE to fulfill these supposed statutory mandates. With respect to the APA, the district court improperly disregarded the agencies' reasoning and substituted its policy judgment for the agencies'.

Leaving the injunction in place would irreparably harm the government and the public. The injunction prohibits the government from implementing a policy that has successfully focused enforcement on the most pressing threats to national security, border security, and public safety. Conversely, plaintiffs' principal asserted injury is that the priorities will cause some unspecified fiscal injury. This injury, which is insufficient even to support standing or give rise to a cause of action under the APA, cannot justify the damage that the injunction will inflict upon the United States and the public.

STATEMENT

A. Statutory Background

The INA, 8 U.S.C. § 1101 *et seq.*, sets forth procedures for removal of noncitizens. The process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a), a discretionary decision that requires DHS to consider the enforcement priorities that Congress has authorized the Secretary to establish, *cf.* 6 U.S.C. § 202(5). An immigration judge determines whether the noncitizen is removable and, if so, whether to enter a removal order. 8 U.S.C. § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. The noncitizen can obtain administrative and judicial review of such an order.

AMERICAN OVERSIGHT

The INA also sets forth the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether [he] is to be removed." 8 U.S.C. § 1226(a). That provision "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies generally to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c) provides that DHS "shall take into custody any alien," 8 U.S.C. § 1226(c)(1), who "falls into one of several enumerated categories involving criminal offenses and terrorist activities," *Jennings*, 138 S. Ct. at 837, and "may release [such] an alien . . . only if" a specified condition not relevant here is satisfied, 8 U.S.C. § 1226(c)(2).

Once an order of removal becomes administratively final and other conditions are satisfied, the noncitizen can be removed by DHS. Section 1231 sets a "removal period" of 90 days and provides that the Secretary generally shall detain and remove the noncitizen during that period. 8 U.S.C. § 1231(a).

Both § 1226 and § 1231 contain provisions insulating the Secretary's enforcement of those sections from judicial review. Section 1226 states that the Secretary's "discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision" taken under that section "regarding the detention or release of any alien." 8 U.S.C. § 1226(e). And § 1231 provides that "[n]othing" in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any

AMERICAN OVERSIGHT

party against the United States or its agencies or officers or any other person." *Id.* § 1231(h).

The Executive has broad authority to administer and enforce the Nation's immigration laws. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483-84 (1999); 6 U.S.C. § 202(5). For decades, the Executive has exercised its enforcement discretion to prioritize which noncitizens to arrest, detain, or remove, and no administration has ever arrested, detained, and pursued removal of every noncitizen who could be covered by §§ 1226(c) and 1231(a)(2). Nor has Congress ever appropriated funds sufficient to allow the Executive to do so.

B. Factual Background

This appeal concerns two memoranda that establish interim priorities to guide DHS's and ICE's enforcement decisions.

1. The DHS Memorandum

The first memorandum was issued by DHS on January 20, 2021. Add.161 (DHS Memorandum). The memorandum called for a "Department-wide review of policies and practices concerning immigration enforcement" and adopted interim enforcement priorities pending that review. Add.163. It recognized that, "[d]ue to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States" but instead must adopt "sensible priorities" to "implement civil immigration enforcement." *Id.* Accordingly, the memorandum urged components to focus enforcement on noncitizens whose apprehension is

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003943

"necessary to protect the national security of the United States"; individuals apprehended "while attempting to unlawfully enter the United States on or after," or who were not present in the country before, November 1, 2020; and "[i]ndividuals incarcerated within federal, state, and local prisons and jails . . . who have been convicted of an 'aggravated felony'" as defined by 8 U.S.C. § 1101(a)(43) and who pose a threat to public safety. *Id.*

Importantly, "nothing" in the memorandum "prohibits the apprehension or detention of" noncitizens "who are not identified as priorities." Add.164. Furthermore, the priorities "are not intended to, do not, and may not be relied upon to create any" enforceable "right or benefit." Add.165. The interim priorities will "remain in effect until superseded by revised priorities developed in connection with the review" discussed above. Add.164. The issuance of those final priorities will render the preliminary injunction moot.

2. The ICE Memorandum

ICE issued the second memorandum, implementing the DHS Memorandum and offering further guidance with respect to the removal priorities, on February 18, 2021. Add.167 (ICE Memorandum). The memorandum recognized that "ICE operates in an environment of limited resources," and that, as a result, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." Add.169. The memorandum further explained that ICE's mission has been rendered "particularly complex" due to "several other factors,"

AMERICAN OVERSIGHT

including ongoing litigation, health and safety needs, foreign-relations concerns, and other legal requirements. *Id.* "[T]o most effectively achieve" its mission to protect "national security, border security, and public safety" in light of these factors, ICE determined that it was necessary to "exercise its well-established prosecutorial discretion." Add.170. The memorandum instructed officers to focus enforcement on the categories of noncitizens specified in the DHS memorandum. Add.171-72. The memorandum also stated that, at ICE's request, DHS had expanded the public-safety category to include "qualifying members of criminal gangs and transnational criminal organizations." Add.168.

Like the DHS Memorandum, the ICE Memorandum does not "prohibit the arrest, detention, or removal of any noncitizen." Add.170. It simply requires preapproval of enforcement actions against individuals who fall outside the presumed priorities unless an exigency makes preapproval "impracticable"—in which case approval may be requested after the action. Add.173.

C. Prior Proceedings

On August 19, 2021, the court entered a nationwide preliminary injunction prohibiting the agencies from implementing the priorities. Add.1. In the same order, the district court also imposed onerous reporting requirements. *See infra* p. 22. The government appealed the preliminary injunction to this Court. Dkt. 81. The government also asked the district court to stay the injunction pending appeal and to enter an administrative stay while the court considered the government's stay motion.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003945

Dkt. 82. The district court declined to stay the injunction pending appeal but entered a seven-day administrative stay to allow this Court to consider the government's motion. Dkt. 90.

ARGUMENT

In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). In cases involving the government, the harm to the government and the public interest merge. *Id.* at 435. Every factor strongly favors staying the preliminary injunction pending appeal.

I. The Government Is Likely To Prevail On The Merits.

The government's appeal is likely to result in vacatur of the preliminary injunction because plaintiffs' challenges to the interim priorities are not amenable to judicial review. Even if they were, plaintiffs have failed to demonstrate that the priorities are unlawful.

A. Plaintiffs' Claims Are Unreviewable.

1. Plaintiffs lack standing to sue. Notwithstanding that a litigant "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), the district court found standing (Add.20-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003946

46). The court first stated that the interim priorities would result in the release into plaintiffs' borders of an unspecified number of noncitizens whom the court believed would otherwise be detained or removed, and that some subset of these noncitizens might then commit crimes. Relying on that predicate, the court found that the States would spend money to detain released noncitizens who later reoffend. Add.27-28 (stating that Texas spends an average of approximately $60 daily per inmate). The court also found that such crimes would harm plaintiffs' "quasi-sovereign" "*parens patriae*" interest in protecting their citizens. *Id.* at 33-34.

This analysis fails at every step. To begin, the court identified no evidence that the memoranda will have the "*certainly impending*" effect of increasing criminal activity. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quotation omitted); *see California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (standing is "ordinarily substantially more difficult to establish" when the asserted injury rests on "the decision of an independent third party") (quotation omitted). The court relied (Add.23, 38-39) on anecdotes about particular noncitizens whom DHS has not detained and on generalized assertions about recidivism. But that does not support the counterintuitive proposition that crime will rise as a result of priorities that focus enforcement on noncitizens who pose the greatest risks to national security, border security, and public safety. Indeed, the record confirms that the agency's efforts to target the most dangerous noncitizens are succeeding. Add.181-82. And given ICE's limited detention resources, detaining all individuals covered by §§ 1226(c) and

AMERICAN OVERSIGHT

1231(a)(2)—a group that includes not just every individual in the removal period regardless of criminal history but also many individuals still in the removal process with only nonviolent criminal convictions—may preclude the agency from detaining more serious threats to public safety, such as gang members or noncitizens who have been charged but not yet convicted of violent offenses.

The court likewise failed to substantiate its conclusion that any marginal increase in criminal activity would cause harm to plaintiffs, much less that the incidental effects of federal enforcement decisions are judicially cognizable. The court cited no evidence that either State has incurred or will imminently incur any financial cost. Indeed, the district court's finding that Texas's "budget for detention facilities has been set months or years in advance," Add.45 (quotation omitted), belies its conclusion that the priorities will require Texas to spend more money. And the court's reliance on plaintiffs' alleged *parens patriae* injury cannot be reconciled with the settled principle that a State cannot assert any such injury against the United States. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

2. a. Plaintiffs' claims are also unreviewable as a statutory matter. The decisions that they challenge are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Decisions about how to allocate limited resources—particularly in the enforcement context—are "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions require the "complicated balancing of a number of factors" within the agency's expertise, including "whether

AMERICAN OVERSIGHT

agency resources are best spent on this violation or another" and "whether the particular enforcement action requested best fits the agency's overall policies." *Id.*

Those concerns "are greatly magnified in the deportation context." *Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (quotation omitted). Congress has charged the Executive with deciding "whether it makes sense to pursue removal at all," *Arizona v. United States*, 567 U.S. 387, 396 (2012), and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. 471, 483 (1999). That is because, in addition to the usual factors governing the exercise of discretion, immigration policy can "affect trade, investment, tourism, and diplomatic relations for the entire Nation." *Arizona*, 567 U.S. at 395; *accord Jama v. ICE*, 543 U.S. 335, 348 (2005) (explaining that removal decisions touch on "our relations with foreign powers" and implicate the "customary policy of deference to the President in matters of foreign affairs") (quotation omitted).

The district court ruled (Add.61-81) that §§ 1226(c) and 1231(a)(2) withdraw the Executive's enforcement discretion because both provisions use the word "shall." Add.70-81. But enforcement discretion has "long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). The "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Id.* The Supreme Court has thus rejected the idea that enforcement discretion can be eliminated simply because a statute uses the word "shall." *Id.* at 761; *see City of Chicago v. Morales*, 527 U.S. 41, 47

AMERICAN OVERSIGHT

n.2, 62 n.32 (1999); *Heckler*, 470 U.S. at 835. A "stronger indication" of congressional intent is required before a court may hold that Congress circumscribed Executive authority. *Gonzales*, 545 U.S. at 761.

The INA evinces no such intent. To the contrary, the traditional tools of statutory interpretation confirm that Congress did not intend either § 1226(c) or § 1231(a)(2) as a judicially enforceable mandate. Most obviously, the INA precludes enforcement decisions under both provisions from judicial review. *See* 8 U.S.C. §§ 1226(e), 1231(h). And any inference that Congress intended those provisions to be judicially enforceable is further undermined by the fact that each is itself contingent on a separate discretionary exercise of the Secretary's authority: § 1226(c) authorizes detention of the described noncitizens only "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018), while § 1231(a)(2) authorizes detention only following a final order of removal. But the decisions whether to initiate and pursue removal proceedings, to seek a final order of removal, and to take steps to execute that order are themselves separate, discretionary, unreviewable decisions of the Secretary. *Cf. AADC*, 525 U.S. at 483.

Other INA provisions likewise confirm Congress's desire to "protect[] the Executive's discretion from the courts" and in particular from "attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485-86, 485 n.9 (discussing 8 U.S.C. § 1252(g)). And Congress's appropriations decisions further undermine the district court's reasoning. Congress has consistently declined to

AMERICAN OVERSIGHT

appropriate enough funds to allow the Executive to detain all noncitizens described in §§ 1226(c) and 1231(a)(2). For example, ICE estimates that approximately 1.2 million noncitizens in the United States are subject to a final order of removal. Add.185. Many more noncitizens are subject to detention under other INA provisions. Yet Congress has only appropriated enough funds to operate approximately 34,000 detention beds nationwide. Add.179.

The cases cited by the district court (Add.64-69) do not hold that §§ 1226(c) and 1231(a)(2) eliminate the Executive's enforcement discretion. None involved a challenge to the Executive's exercise of enforcement discretion, and none presented the question whether either provision creates a judicially enforceable duty. *E.g.*, *Johnson v. Guzman-Chavez*, 141 S. Ct. 2271 (2021) (addressing which provision of the INA governs detention of certain noncitizens). It is improper to "extend[] a judicial decision beyond its holding, parsing the opinion as if it were a statute." *Mays v. Chevron Pipe Line Co.*, 968 F.3d 442, 448 (5th Cir. 2020).

b. Plaintiffs' claims are also not cognizable because they fall outside the zone of interests of §§ 1226(c) and 1231(a)(2). That inquiry asks whether Congress intended for a particular plaintiff to invoke a "particular provision of law" to challenge agency action, *Bennett v. Spear*, 520 U.S. 154, 175-76 (1987), or whether, instead, that 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, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

AMERICAN OVERSIGHT

As noted, third parties do not have a cognizable interest in the removal of a noncitizen, and the incidental financial effects of federal enforcement decisions on plaintiffs are not judicially cognizable under the INA. Nothing in §§ 1226(c) and § 1231(a)(2) suggests that Congress intended to permit States to rely on them to challenge federal immigration enforcement decisions that incidentally impact State finances.

c. Finally, plaintiffs' claims are unreviewable because the interim priorities are not final agency action. 5 U.S.C. § 704. An action is "final" only if, among other things, it determines legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). The interim priorities do not "require" any State or noncitizen "to do anything" and do not "prohibit" any State or noncitizen "from doing anything." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). They simply offer guidance to federal officers charged with exercising enforcement discretion in individual cases.

In concluding otherwise, the court suggested (Add.57-58) that the priorities altered legal obligations by directing line-level officers to make enforcement decisions that the court concluded were incompatible with the court's interpretations of §§ 1226(c) and 1231(a)(2). Those interpretations are mistaken, as explained above. But the court's reasoning is also mistaken because an action with no legal effect "on regulated entities" does not become final simply because it provides "instruction[s] to [agency] staff." *National Mining Ass'n*, 758 F.3d at 250-52. And here, the priorities

AMERICAN OVERSIGHT

confer no rights or obligations on third parties. Finally, the court emphasized (Add.59-61) that any noncitizen spared from enforcement action as a result of the memoranda could become eligible for Emergency Medicaid or for release into the United States. But those speculative downstream consequences are the result of the independent operation of other sources of law, not "direct and appreciable legal" consequences of the memoranda, *Bennett*, 520 U.S. at 178.

B. The Interim Priorities Are Lawful And Reasonable.

Even assuming that the interim priorities are reviewable, the district court's reasons for finding them unlawful do not withstand scrutiny.

1. First, the district court ruled (Add.105) that the interim priorities violate §§ 1226(c) and 1231(a)(2). As explained, however, those provisions do not override the Executive's immigration-enforcement discretion. *See supra* pp. 11-14. Even if they did impose mandatory obligations, the interim priorities would not violate them. Section 1226(c) only authorizes the detention of a noncitizen "pending the outcome of removal proceedings," *Jennings*, 138 S. Ct. at 838, and nothing in the memoranda purports to provide officials authority to release a noncitizen subject to that provision once they have exercised their antecedent discretion to pursue removal proceedings against and arrest him. More generally, the memoranda do not forbid the arrest, detention, or removal of any noncitizen. They simply require line-level officers to obtain supervisory approval to pursue enforcement against other-priority targets. Add.170, 173. The record confirms that preapproval has regularly been granted for

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003953

various individuals whose detention or removal constitutes a justified allocation of limited resources. Add.177-78.

2. Next, the district court erroneously concluded (Add.105-27) that the interim priorities lacked a rational connection between the facts found and the decision made. But that connection is apparent on the face of the memoranda. The memoranda explained that the agencies have "limited resources," Add.163, and that such resources have become further constrained by concerns arising from the pandemic and by foreign-relations considerations, Add.169. The agencies therefore directed limited resources to those actions that maximize the agencies' ability to "protect[] national security, border security, and public safety." Add.163. That straightforward explanation is all the APA requires.

The district court also concluded (Add.116-27) that the agency failed to consider the States' policy concerns and policy alternatives. As noted, however, DHS and ICE justified the priorities in terms of the relevant factors—the agencies' overarching duty to protect national security, border security, and public safety. And the court did not explain why any particular policy disagreement or policy alternative was significant enough to warrant special discussion. *Cf. Motor Vehicle Mfs. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (holding that the APA does not "require an agency to consider all policy alternatives in reaching [a] decision").

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003954

3. Finally, the district court concluded (Add.127-44) that the interim priorities were subject to notice-and-comment requirements. But the priorities are "general statements of policy" exempt from such requirements. 5 U.S.C. § 553(b)(3)(A). An agency action is a general statement of policy if it does not "impose any rights and obligations" and if it leaves "the agency and its decisionmakers free to exercise discretion" in individual cases. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted). The interim priorities do not create any rights or obligations nor do they compel or prohibit any action by any noncitizen or State. They also preserve multiple levels of discretion. DHS and ICE can revoke or amend the priorities at any time. And the priorities do not eliminate individual officers' authority to pursue noncitizens outside the priority categories. They simply urge officers to "exercise their discretion thoughtfully" and to consider "all relevant facts and circumstances" before expending scarce resources on nonpriority targets. Add.170.

II. The Remaining Factors Overwhelmingly Favor A Stay.

The government and the public will be irreparably injured if the preliminary injunction is not stayed pending appeal. These irreparable injuries outweigh the insubstantial harms that plaintiffs claim they will suffer as a result of the interim priorities. In recent years, the Supreme Court has repeatedly stayed broad injunctions against the Executive's immigration policies. *E.g.*, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. Mar. 11, 2020); *Department of Homeland Sec. v. New York*, No. 19A785

AMERICAN OVERSIGHT

(U.S. Jan. 27, 2020); *Barr v. East Bay Sanctuary Covenant*, No. 19A230 (U.S. Sept. 11, 2019); *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019). This Court should do the same here.

The preliminary injunction is "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers). The injunction usurps the Executive's constitutional and statutory authority by preventing the government from allocating scarce resources to the most serious offenders. Making matters worse, the district court has also required the government to submit monthly reports with respect to every noncitizen who would be covered by §§ 1226(c) and 1231(a)(2); to document the reasons behind every nonenforcement decision; and to retain the name of each individual officer responsible for those decisions. Add.158-59. No authority supports this extraordinary aggrandizement of judicial power at the Executive's expense.

The injunction is especially pernicious because it forbids the government from implementing a policy with proven results. As DHS and ICE anticipated when issuing the memoranda, the priorities have allowed the agencies to respond "in real time to pressing operational needs," Add.182. For example, ICE was able to "re-task[] several field operations teams" and over 300 officers to help states and localities "address increasing activity along the Southwest Border." *Id.* The priorities have also allowed the agencies to focus on "arresting and detaining the most dangerous

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003956

noncitizens." Add.180. From February through July 2021, the government processed just under 26,000 administrative arrests, nearly 20% of which involved noncitizens convicted of aggravated felonies. Add.181. By contrast, from February through July 2020, the government processed just over 39,000 administrative arrests, only 8% of which involved noncitizens convicted of aggravated felonies. *Id.* In other words, the government was able to increase its total arrests of such felons by approximately two-thirds.

More generally, upholding the injunction could destabilize the Nation's entire immigration-enforcement apparatus. Congress has not appropriated enough funds to detain every noncitizen who could come within the scope of §§ 1226(c) and 1231(a)(2). Another nationwide injunction has further resulted in the reduction of the government's available immigration-detention resources by directing ICE to enforce compliance with its Pandemic Response Requirements, which require that facilities make efforts to reduce populations to 75% of facility-capacity to enable social distancing, meaning that ICE can now operate only 26,800 detention beds. Add.179. As of August 20, 2021, 95% of those beds are occupied. Add.180. It is therefore unclear how DHS and ICE could comply with the court's injunction without adopting some other set of enforcement priorities. Yet the injunction orders the agencies to generate new guidance without any direction as to how the agencies should reconcile their enforcement efforts and limited resources with the injunction—and after holding that the previous set of priorities was both insufficiently explained and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003957

improperly promulgated without notice-and-comment rulemaking. To the extent that the court's reasoning implies that the only acceptable priorities require arresting and detaining every noncitizen who would be covered by §§ 1226(c) and 1231(a)(2), compliance would be impossible and counterproductive.

It would be particularly problematic to allow the preliminary injunction to take effect while this appeal is pending because the DHS is nearing completion of its final priorities, which will likely render this case moot before this appeal is concluded. The consequent whipsawing between priorities regimes that will occur if the preliminary injunction is permitted to take effect will further cause confusion among DHS's workforce and undermine the agency's ability to effectively protect the Nation's safety.

The harms that the injunction inflicts on the United States and the public dwarf any incidental effect of the priorities on plaintiffs. The district court's finding of irreparable harm rests entirely on allegations that are insufficient even to satisfy Article III. *See supra* pp. 9-11. Even if those alleged harms were judicially cognizable, the notion that plaintiffs will suffer sufficient irreparable financial losses from a temporary stay to overcome the United States' countervailing interests is without merit.

Finally, even assuming plaintiffs were likely to succeed on some of their claims, that would not justify the relief granted. First, "[r]emand, not vacatur," and certainly not an injunction, is the appropriate remedy when (as here) there is "a serious possibility that the agency will be able to substantiate its decision given an opportunity

AMERICAN OVERSIGHT

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). And remand without vacatur is particularly appropriate here because, as explained above, other forms of relief "would be disruptive." *Central & S.W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). Second, the nationwide scope of the district court's injunction is inappropriate. Such universal relief contravenes core principles of Article III and of equity requiring that relief be tailored to redressing a plaintiff's specific injury and cannot be justified on the record in this case. *Cf. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

Finally, the district court also imposed onerous reporting requirements, purportedly "[t]o ensure compliance" with the injunction's terms. Add.158. Those requirements direct the government to file monthly reports providing the number of known noncitizens covered by § 1226(c) or § 1231(a)(2) who were not detained in the previous month and each covered noncitizen's address and (if applicable) the crime for which he was detained. *Id.* And the government must also make and retain contemporaneous records of the rationale for each nondetention decision and the deciding official. *Id.* Although the district court indicated today that it intends to modify those requirements, *see* Dkt. 90, it has not done so yet. The district court also stated today that the reporting requirements are not part of the injunction. But the government is unaware of any authority that would support imposing such requirements unless they were incident to the injunction. Because there is no

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003959

justification for the reporting requirements independent of the injunction, we ask the Court to stay those requirements as well.

CONCLUSION

The government respectfully requests that this Court stay the injunction pending appeal or until DHS issues final enforcement priorities, which DHS has informed undersigned counsel it intends to issue by the end of September. The government further requests that the Court provide relief by 12:00 p.m. on Monday, August 30, when the preliminary injunction will take effect.

Respectfully submitted,

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AUGUST 2021

AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5124 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel on August 23, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete. I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ Sean Janda
SEAN JANDA
Counsel for Appellants

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003961

CERTIFICATE OF SERVICE

I hereby certify that, on August 23, 2021, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Sean Janda
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AMERICAN OVERSIGHT

No. 21-40618

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF LOUISIANA,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

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

ADDENDUM TO EMERGENCY MOTION FOR A STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

District Court Opinion and Order (Aug. 19, 2021) (Dkt. 79) 1

DHS Memorandum (Jan. 20, 2021) (Dkt. 1-1) 161

ICE Memorandum (Feb. 18, 2021) (Dkt. 1-2) 167

Declaration of Peter B. Berg (Aug. 20, 2021) (Dkt. 82-1) 175

Declaration of Thomas Homan (Aug. 22, 2021) (Dkt. 85-1) 187

Nick Miroff, *Why Immigration Detention Beds Became A New Issue In Trump Border Wall Fight*, WASH. POST (Feb. 19, 2019) (Doc. 85-2) 192

Declaration of Monica Burke (Aug. 23, 2021) (Doc. 87-1) 197

AMERICAN OVERSIGHT

United States District Court
Southern District of Texas
ENTERED
August 19, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

The STATE OF TEXAS; and the 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; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	§ § § §

3 (1996). That observation comes from a Senate Judiciary Committee Report addressing the problem of alien criminality in the United States. Similarly, the Supreme Court has stated "deportable criminal aliens who remain[] in the United States often commit[] more crimes before being removed." *Demore v. Kim*, 538 U.S. 510, 518, 123 S.Ct. 1708, 1715, 155 L.Ed.2d 724 (2003) (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). These observations, among others, led to the wholesale reform of our Nation's immigration laws in the 1990s.

Now, over two decades later, the States of Texas and Louisiana (the "States") seek to have the Executive Branch (the "Government")[1] adhere to two federal immigration statutes passed during that wholesale reform. The States want the Government to comply with 8 U.S.C. §§ 1226(c) and 1231(a)(2), which provide that the Government "shall" detain certain aliens when they are released from custody or during their removal period, respectively.[2] More specifically, the States move for a preliminary injunction to prohibit the Government from implementing two recent immigration memoranda which allegedly instruct Executive Branch officials to violate these laws.[3] (Dkt. No. 18).

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[1] The term "Government" used throughout this Memorandum Opinion and Order refers to the United States, the agencies, and the individuals sued in their official capacity.

[2] Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

[3] The States also seek an injunction compelling the Government to comply with the detention mandates in Sections 1226(c) and 1231(a)(2). (Dkt. No. 18).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003966

These immigration memoranda, issued on January 20 and February 18, 2021 (the "Memoranda"), purport to "prioritize" certain categories of aliens for enforcement action. (Dkt. No. 1-1); (Dkt. No. 1-2). The States point out that the priority categories enumerated in these Memoranda omit certain others—namely, aliens convicted of serious drug offenses, aliens convicted of crimes of moral turpitude, and aliens subject to a final order of removal. The States argue that federal law requires the Government to take custody of aliens falling within these overlooked categories, and the Memoranda are grinding these required detentions to a halt. Unsurprisingly, the Government disagrees and argues that the Executive Branch is simply acting within its discretion.

This case involves the intersection of several areas of administrative and immigration law. But more fundamentally, the claims made in this case implicate the separation-of-powers framework set forth in our Nation's Constitution. Put simply, the Government has instructed federal officials that "shall detain" certain aliens means "may detain" when it unambiguously mean *must* detain. Thus, the Court inquires whether the Executive Branch may direct officials to enforce a law enacted by Congress in a way that is contrary to the plain language of the law. That inquiry yields a clear answer: it may not. The Executive Branch may not instruct its officers to enforce a statute in a manner contrary to the law itself. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies . . . , faithfully executes them. The power of executing the laws [however] . . . does not include a power to revise clear

AMERICAN OVERSIGHT

statutory terms that turn out not to work in practice." (citing U.S. Const. art. II, § 3) (cleaned up)).

Having considered the pleadings, the record, and the applicable law, the Court finds the States have satisfied the requirements for a preliminary injunction. Accordingly, the States' Motion is **GRANTED**.[4]

I. BACKGROUND

At first glance, the background facts of this case are straightforward. The Government issued two memoranda concerning civil immigration enforcement which the States claim violate two immigration laws. But upon closer examination, the actions of the Government and the claims by the States are strikingly complex. Congress did not design our Nation's immigration laws on a whim. Therefore, to place this case in its proper context and facilitate understanding of the function of Sections 1226(c) and 1231(a)(2), the Court begins by briefly detailing some of the history behind those statutes.[5]

---

[4] In this Memorandum Opinion and Order, the Court does not address the States' likelihood of success on claims that the Memoranda are unlawful because they violate: (1) the Agreements between Texas and Louisiana and the Department of Homeland Security ("DHS"); and (2) the Constitution's requirement that the President "take Care that the Laws be faithfully executed." (Dkt. No. 1 at ¶¶ 122–31). In withholding a ruling on these claims, the Court is mindful that to succeed on their Motion, the States need only demonstrate a substantial likelihood of success on "at least one" claim, which they have. *See Texas v. United States*, 86 F. Supp. 3d 591, 672 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*). Moreover, given the significance of the substantial interests at stake in this case, the Court finds it to be in the interest of justice to rule after all Parties have an opportunity to make a complete presentation on the merits of these claims. *See id.* at 677. Similarly, the Court defers ruling on the States' request for an injunction to compel agency action unlawfully withheld pursuant to Section 706(1) of the Administrative Procedure Act. *See* footnote 61; *see also* (Dkt. No. 1 at 28); (Dkt. No. 18 at 26).

[5] In outlining the extensive background and history involved in this case, the factual statements made herein (except where the Court is discussing a factual dispute) should be (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003968

A. History Of Sections 1226(C) And 1231(A)(2)

The United States has long welcomed and benefited from immigration.[6] The Nation has, however, borne costs due to illegal immigration and the criminal conduct of illegal aliens. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 380–81 (2006). Congress in the 1990s was not blind to those concerns. As a legislative report from 1995 mentions, "[a]lthough immigrants to the United States have been, and continue to be, predominantly hard working and law abiding, there appears to be a growing criminal class among immigrants, especially among those here illegally." S. Rep. No. 104-48, at 7 (1995). Indeed, Congress directly linked illegal immigration with crime. The same legislative report provides:

> The fact that many criminal aliens have entered the U.S. illegally helps explain why so many aliens are involved in crime[.] [T]heir illegal situation conveys an "outlaw" status, often leading them into the shadowy realms of criminal lifestyles. The point was made succinctly in Congressional testimony by a former Commissioner of the INS, "[t]hose entering the United States illegally have no legitimate sponsors and are prohibited from holding jobs. Thus, criminal conduct may be the only way to survive."

Id. at 5.

Yet throughout much of its history, the United States had neither the means nor the ability to curb illegal immigration or alien criminality. Indeed, "[f]or much of this

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considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions, except where the Court discusses the various competing legal theories and positions, should be taken as conclusions of law regardless of any label or lack thereof.

[6] *See generally* John F. Kennedy, *A Nation of Immigrants* (1958); Andrea Barton, *Sitting on Ellis Island: The Fate of Disparate Immigration Policies in the Wake of the Guantanamo Bay Cases*, 23 Notre Dame J.L. Ethics & Pub. Pol'y 233, 237 (2009).

AMERICAN OVERSIGHT

country's history there has been no comprehensive body of immigration law and no laws at all addressing criminal aliens." *Id.* at 10. Despite the enactment of the Immigration and Nationality Act in 1952—and numerous immigration bills signed into law in the subsequent decades—these issues were "dealt with . . . mostly as an afterthought." *Id.* at 12. Prior to the 1990s, "no major immigration legislation ha[d] focused exclusively on the problem of criminal aliens." *Id.* And although there were attempts to solve the problem of illegal immigration and alien criminality, change happened in a "piecemeal fashion." *Id.* It is unsurprising, therefore, that the time leading up to the enactment of Sections 1226(c) and 1231(a)(2) has been regarded by the Supreme Court as a time of "wholesale failure by [the Executive Branch] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714 (citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 698, 121 S.Ct. 2491, 2503, 150 L.Ed.2d 653 (2001). The Executive Branch's failures at that time led to costs and consequences borne by the states, the citizens of this country, and its legal immigrants. *See Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; S. Rep. No. 104-48, at 1–2 (1995).

Congress's observations led to significant statutory reform in the federal detention of criminal aliens. Following numerous reports about the high rate of abscondment and recidivism among criminal aliens and the corresponding costs and negative effects, "Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. Section 1226(c)(1) reads:

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003970

> The Attorney General *shall take into custody* any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d][7] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphases added) (footnote added). And to buttress this detention mandate, Congress in Subsection (2) provided detailed instructions on the narrow circumstances under which the Attorney General could release a detained illegal alien.

> The Attorney General *may* release an alien described in paragraph (1) *only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General 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. A decision relating to such release shall take place in accordance with a procedure

[7] The text of the statute says "sentence;" however, the Court notes it should probably be "sentenced."

AMERICAN OVERSIGHT

> that considers the severity of the offense committed by the alien.

Id. § 1226(c)(2) (emphases added).

Congress's efforts to protect the states, citizens, and legal immigrants from criminal illegal aliens through the INA during the 1990s were not confined to Section 1226(c). Through other statutes, too, "Congress explicitly expanded the group of aliens subject to mandatory detention." *Zadvydas*, 533 U.S. at 698, 121 S.Ct. at 2503 (citing Antiterrorism and Effective Death Penalty Act of 1996, § 439(c), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009–585, 3009–598 to 3009–599; 8 U.S.C. § 1226(c); and 8 U.S.C. § 1231(a)). That expansion is evident in 8 U.S.C. § 1231(a)(2), which outlines the Attorney General's discretion regarding the detention of illegal aliens who have been ordered removed:

> During the removal period, the Attorney General *shall detain* the alien. *Under no circumstance* during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphases added).

In view of the historical context and text of Sections 1226(c) and 1231(a)(2), Congress designed these two provisions to curtail the effects of illegal immigration and the concomitant concerns of alien criminality. But, as the Senate Judiciary Committee Report mentioned earlier admits, these statutory policies are futile if the "laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996).

AMERICAN OVERSIGHT

B. DETENTIONS IN PRACTICE

Previously, in *Texas v. United States*, the Court provided an in-depth overview of the immigration removal process. ____ F. Supp. 3d ____, ____, 2021 WL 2096669, at *4–9 (S.D. Tex. Feb. 23, 2021) (hereinafter "*Texas I*"). That discussion touched upon parts of the detention process for aliens subject to removal proceedings, *id.* at *5, and aliens subject to final orders of removal, *id.* at *8–9. Given the specific focus on detentions in this Motion for Preliminary Injunction, it is appropriate to more fully discuss the detention process for aliens subject to Sections 1226 and 1231.

To start, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, created a uniform procedure for deporting aliens or denying them entry into the United States. The detention and removal process under Section 240 of the Immigration and Nationality Act ("240 proceedings") commences when DHS files a Notice to Appear ("NTA") against an alien or noncitizen—who are designated as "respondents"—in immigration court. *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465 (2018); *see* 8 C.F.R. § 1003.14; Jennifer Williams, *The Potential Implications of the Supreme Court's Decision in* Pereira v. Sessions *on Prosecutions for Illegal Reentry Under 8 U.S.C. § 1326*, 67 DOJ J. Fed. L. & Prac. 141 (2019); *see also* (6:21-cv-3, Dkt. Nos. 82 at 12, 82-1 at 5, 83 at 14). Federal law then gives the Attorney General—and immigration judges by extension of DOJ's internal organizational structure—discretion on whether such an alien may continue to be detained during the proceedings or released on bond or conditional parole pursuant to Section 1226(a). 8 U.S.C. § 1226(a).

AMERICAN OVERSIGHT

For criminal aliens, however, the start of the process is a bit different. Such aliens are taken into custody by officers within the Executive Branch (*i.e.*, Immigration and Customs Enforcement ("ICE") agents) in generally three ways: an ICE arrest; in execution of detainers after a local police stop, *see* 8 C.F.R. § 287.7(a) (2011); or after completion of incarceration for a prior criminal conviction, *see* 8 C.F.R. § 287.5(c) (2016). *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 302 (2013). Of the three, immigration detainers are particularly important:

> The Executive branch uses immigration detainers to control the release of non-citizens from state prisons and local jails. When federal immigration officials learn that a state or local law enforcement agency has custody of a non-citizen targeted for immigration proceedings or investigation, they issue a detainer to give notice to state or local officials that the federal government intends to take custody of the non-citizen upon release. The form detainer notice issued by federal immigration officials directs the recipient that federal regulations require the recipient agency to detain the non-citizen for a brief period of time after the non-citizen would otherwise be released from custody.[8] Absent the ability to issue detainers, immigration enforcement officials would have to be present at the gates of the state or local detention facility to apprehend the non-citizen upon release.

---

[8] Federal regulations permit the temporary detention of certain incarcerated aliens at DHS's request for a period not to exceed 48 hours "in order to permit assumption of custody" of the detainee by DHS. 8 C.F.R. § 287.7(d). Note at least one state court determined that beyond the 48-hour mark, state authorities must release the incarcerated aliens "[i]f the federal government *fails to apply* federal law and take custody of [the criminal aliens] within the time limit set by federal regulations." *Ochoa v. Bass*, 2008 OK CR 11, ¶ 19, 181 P.3d 727, 733 (emphasis added).

AMERICAN OVERSIGHT

Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L. Rev. 164, 165 (2008) (footnote added) (citations omitted).[9]

In the past, ICE and DHS have been known to "screen" state prison and local jail populations for criminal aliens who may be subject to Section 1226(c). *Id.* at 177 (citing U.S. Immigration and Customs Enforcement, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (Mar. 28, 2008), not available online (Aug. 2, 2021)). This screening takes place, at least in some circumstances, without cooperation from state and local authorities. *See, e.g.*, *State v. Reyes-Armenta*, No. M2004-00419-CCA-R3-CD, 2004 WL 2804898, at *2 (Tenn. Crim. App. 2004) ("The codefendants were then taken to the Sumner County Jail for processing. The officers had made no attempt to contact federal immigration officials; however, Agent Robert Kinghorn, an immigration officer, happened to be at the Sumner County jail and issued detainers on the defendants."). Additionally, in the past, "DHS's practice appears to be to place a detainer as soon as DHS learns of a potentially deportable prisoner—in many cases before conviction, close in time to the alien's arrest." Lasch, *supra*, at 178.

Once the alien is in mandatory custody pursuant to Section 1226(c), an NTA may be issued, formally beginning the immigration removal proceedings. Mark Noferi,

---

[9] The importance of detainers aside, note that "[t]here are certainly other mechanisms available to assist in implementing the federal apprehension of criminal aliens." *Id.* at 175. For instance, written agreements between the Executive Branch and states and local governments pursuant to 8 U.S.C. § 1357(g) may permit state and local law enforcement "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)." 8 U.S.C. § 1357(g). In another example, the Executive Branch may also enter an "inter-governmental service agreement" with local and state jails to authorize such detention centers to house prisoners on behalf of DHS. Lasch, *supra*, at 175.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003975

Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 Mich. J. Race & L. 63, 83 (2012). Because certain criminal aliens are required to be detained, a Notice of Custody Determination ("Form I-286") may also be issued. *Id.* (citing 8 C.F.R. § 231.1(g)(1) (2011)). The Form I-286 explains an ICE officer's determination that an alien is subject to mandatory detention because the alien falls within certain categories of Section 1226(c). *Id.* For such aliens, "the NTA's removal charge will commonly be the [Form I-286] charge justifying mandatory detention." *Id.*

While in detention, the criminal alien is entitled to a "*Joseph* hearing." *Id.* at 63, 85–86; *see Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). The hearing is the detainee's only chance to challenge the mandatory nature of his or her detention. *Joseph*, 22 I. & N. Dec. at 800; Noferi, *supra*, at 85–86; Savaresse, *supra*, at 303. The point of the *Joseph* hearing is to determine whether the detainee challenging mandatory detention was "properly included" within a mandatory detention category; that is, the categories enumerated in Section 1226(c). *See Joseph*, 22 I. & N. Dec. at 800; Savaresse, *supra*, at 303. If the detainee prevails, he or she is entitled to a bond determination. *See Joseph*, 22 I. & N. Dec. at 808–09.

The detention process is similar for aliens with final orders of removal, *i.e.*, those who exhausted the removal proceedings and were found to be deportable. *See* 8 U.S.C. § 1231(a)(2). Criminal aliens who were initially detained under Section 1226(c) must remain in ICE custody as their removals are processed. *See* 8 U.S.C. §§ 1226(c)(2) and 1231(a)(2). As for the aliens with final orders of removal who are not currently in ICE

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003976

custody, ICE sends a "Bag-and-Baggage" letter requiring the aliens to report to an ICE facility for detention and deportation. *Qian Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007); *Bermudes-Cardenas v. Gonzales*, 184 F. App'x 406, 407 (5th Cir. 2006) (per curiam). An alien who fails to report is classified by ICE and the circuit courts as a "fugitive." *See, e.g.*, *Giri v. Keisler*, 507 F.3d 833, 834–36 (5th Cir. 2007). Once an alien is in custody, ICE takes the lead in coordinating their removal from the country. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *9.

C. THE JANUARY 20 MEMORANDUM

More than two decades after Congress changed the way this country approached the issues of illegal immigration and alien criminality, the current Administration set forth its views advocating a different approach from its predecessor. *See* Revision of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021) ("[The current] Administration will *reset* the policies and practices for enforcing civil immigration laws to align enforcement with [certain] values and priorities." (emphasis added)).

Once the current Administration assumed power on January 20, 2021, it wasted no time issuing its first memorandum on civil immigration enforcement (the "January 20 Memorandum"). (Dkt. No. 1-1). The January 20 Memorandum, signed by Acting DHS Secretary David Pekoske, announced changes to the enforcement of the Nation's immigration laws. (Dkt. No. 1-1). The January 20 Memorandum begins by acknowledging the current issues the federal government is encountering in enforcing immigration laws, noting the United States "faces significant operational challenges at

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003977

the southwest border as it is confronting the most serious global public health crisis in a century." (*Id.* at 2). The January 20 Memorandum goes on to say, "in light of those unique circumstances," DHS must substantially increase "resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security." (*Id.*) In Section A, the January 20 Memorandum calls for a "Department-wide review of policies and practices concerning immigration enforcement[.]" (*Id.* at 3). In Section B, the January 20 Memorandum articulates "interim enforcement priorities [that] shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the" Department-wide review. (*Id.* at 3–4). Pending completion of the Department-wide review, the January 20 Memorandum lists three DHS enforcement priorities:

> 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

AMERICAN OVERSIGHT

> at the time of conviction, and are determined to pose a threat to public safety.

(*Id.* at 3). The January 20 Memorandum then qualifies its prioritization scheme by stating, "[w]hile resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." (*Id.* at 4).

In Section C, the January 20 Memorandum orders a temporary pause on removals of noncitizens, with some exceptions.[10] (*Id.* at 4–5). Specifically, the January 20 Memorandum directs "an immediate pause on removals of any noncitizen with a final order of removal . . . for 100 days[.]" (*Id.* at 4). The January 20 Memorandum justifies this pause by pointing to DHS's "limited resources," which it claims "must be prioritized to . . . provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently" and

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[10] The January 20 Memorandum excludes from the 100-day pause any alien with a final removal order who:

> 1) According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
> 2) Was not physically present in the United States before November 1, 2020; or
> 3) Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver and has been given a meaningful opportunity to access counsel prior to signing the waiver; or
> 4) For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

(Dkt. No. 1-1 at 4–5) (footnote omitted).

AMERICAN OVERSIGHT

to "comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact." (*Id.*). Further, the January 20 Memorandum states, the pause is necessary for DHS to "ensure that [its] removal resources are directed to [its] highest enforcement priorities." (*Id.*).

This Court partially enjoined the January 20 Memorandum on January 26 with a temporary restraining order, *Texas v. United States*, ____ F. Supp. 3d ____, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021), and again on February 23 with a preliminary injunction, *Texas I*, ____ F. Supp. 3d ____, 2021 WL 2096669. Specifically, this Court enjoined Section C of the January 20 Memorandum, which paused removals of aliens with a final order of removal for 100 days. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52. In doing so, this Court explicitly left intact Section B of the January 20 Memorandum, which enumerates DHS's "enforcement priorities" going forward. (*Id.*). Section B is a subject of this litigation. (Dkt. No. 1-1 at 3–4).

D. THE FEBRUARY 18 MEMORANDUM

On February 18, 2021, five days before the preliminary injunction was signed in *Texas I*, ICE Acting Director Tae D. Johnson issued the February 18 Memorandum to all ICE employees. (Dkt. No. 1-2). The February 18 Memorandum became "effective[] immediately" and controls to the extent it conflicts with the January 20 Memorandum. (*Id.* at 2). Designed to implement Section B of the January 20 Memorandum,[11] the February 18 Memorandum broadly delineates six "revisions":

[11] The January 20 Memorandum provides that "the Acting Director of ICE shall issue operational guidance on the implementation of these priorities." (Dkt. No. 1-1 at 4).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003980

> 1) authorization to apprehend presumed priority noncitizens in at-large enforcement actions without advance approval;
>
> 2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities;
>
> 3) authorization to apprehend without prior approval other presumed priority noncitizens who are encountered during enforcement operations;
>
> 4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended;
>
> 5) the further delegation of approval authority; and
>
> 6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

(*Id.* at 2–3).

Relevant to this case, the February 18 Memorandum lists three "criteria defining cases that are presumed to be priorities." (*Id.* at 5). The first priority category is national security.

> A noncitizen is *presumed* to be a national security enforcement and removal priority if: 1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities; 2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities; or 3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

(*Id.*) (emphasis in original). The second priority category is border security.

> A noncitizen is *presumed* to be a border security enforcement and removal priority if: 1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020; or 2) he or she

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003981

> was not physically present in the United States before November 1, 2020.

(*Id.*) (emphasis in original). And the final priority category is public safety.

> A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and: 1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA; or 2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

(*Id.* at 5–6) (emphasis in original).

In addition to the three enforcement priorities, the February 18 Memorandum explains, "[o]fficers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases"—*i.e.*, the three enforcement priorities—"beyond what existing policy requires and what a supervisor instructs." (*Id.* at 6). By contrast, preapproval is required for enforcement or removal actions that do not fall under the three enforcement priorities. (*Id.* at 7). But there are certain exceptions. The February 18 Memorandum, for example, posits that there are circumstances when "the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action." (*Id.*). But this is "generally . . . limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003982

E. PROCEDURAL BACKGROUND

The States filed this case on April 6, 2021. (Dkt. No. 1). In its six-count Complaint, the States allege the January 20 and February 18 Memoranda are unlawful because they violate:

1) the Administrative Procedure Act's ("APA") proscription of actions that are "not in accordance with law" and "in excess of . . . authority" by transgressing a statutory duty of DHS to detain certain individuals pursuant to 8 U.S.C. § 1226(c) (Count I) and 8 U.S.C. 1231(a)(2) (Count II);[12]

2) the APA's proscription of actions that are "arbitrary [and] capricious" (Count III);[13]

3) the APA's requirement that agency rules be subject to notice and comment (Count IV);[14]

4) the Agreement between the States and DHS (Count V);[15] and

5) the Constitution's requirement that the President "take Care that the Laws be faithfully executed" (Count VI).

(Dkt. No. 1 at ¶¶ 94–131).

On April 27, 2021, the States filed a Motion for Preliminary Injunction moving to enjoin the implementation and enforcement of the January 20 and February 18

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[12] 5 U.S.C. § 706(2)(A), (C).

[13] 5 U.S.C. § 706(2)(A).

[14] 5 U.S.C. § 553.

[15] As this Court noted in *Texas I*, DHS, "U.S. Customs and Border Protection . . ., U.S. Immigration and Customs Enforcement . . ., and U.S. Citizenship and Immigration Services . . . entered into a Memorandum of Understanding Between Texas and DHS concerning certain aspects of the nation's immigration laws." ___ F. Supp. 3d at ____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). "The Agreement was finalized on January 8, 2021—just 12 twelve days before the transition from the Trump Administration to the Biden Administration." *Texas I*, ___ F. Supp. 3d at____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). DHS and the Louisiana Department of Justice entered into a nearly identical agreement, which was also finalized on January 8, 2021. (Dkt. No. 1-4).

AMERICAN OVERSIGHT

Memoranda. (Dkt. No. 18 at 43). The Government filed a Response in opposition, (Dkt. No. 42), to which the States filed a Reply. (Dkt. No. 51). Several amicus briefs have also been filed in support of and in opposition to the Motion. (Dkt. No. 25); (Dkt. No. 48); (Dkt. No. 49). The Motion is now ripe for review.

II. JURISDICTION AND JUDICIAL REVIEW

Before addressing the merits, this Court must consider the threshold issues of whether the States have standing to bring this action and whether the APA allows this Court to review the Memoranda challenged by the States. The States contend they have standing, and their claims are reviewable. (Dkt. No. 18 at 35–40). The Government disagrees. (Dkt. No. 48 at 22–36). Based on the following, the Court finds the States have standing and their claims are reviewable.

A. STANDING

Article III of the Constitution confines judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2. "For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, ____ U.S. ____, ____, 139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019). A plaintiff has standing to sue only where it satisfactorily shows it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 856, ____, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990)); *see also Barber v. Bryant*, 860 F.3d 345, 352 (5th

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003984

Cir. 2017). In short, injury, traceability, and redressability comprise the "irreducible constitutional minimum" of standing. *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136).

Under certain circumstances, states like Texas and Louisiana are not "normal litigants." *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). Where a state alleges a defendant violated a congressionally accorded procedural right which affected the state's "quasi-sovereign" interests, that state is afforded "special solicitude" in its quest to establish standing. *Id.* at 520–21, 127 S.Ct. at 1454–55; *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015) , *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*) (hereinafter "*Texas DAPA*"). Specifically, a state armed with special solicitude can more easily satisfy the traceability and redressability elements of the traditional standing inquiry. *Massachusetts*, 549 U.S. at 520–21, 127 S.Ct. at 1454–55; *Texas DAPA*, 809 F.3d at 151–55.

Here, the States assert they have standing under the traditional inquiry *and* because they are owed special solicitude. (Dkt. No. 18 at 35–37). The Government counters that the States fail all three prongs of the traditional inquiry, and they are not entitled to special solicitude because they do not assert a proper quasi-sovereign interest. (Dkt. No. 42 at 22–25 & n.5). Based on the following, the Court finds the States have satisfied the traditional inquiry and, regardless, are owed special solicitude which would satisfy any doubts.

AMERICAN OVERSIGHT

1. **Injury in Fact**

The States' first task is to establish an injury in fact. A plaintiff satisfies that burden where it shows it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136). An alleged injury is sufficiently concrete if it is "*de facto*," meaning it "actually exist[s]" and is not merely "abstract." *Id.* (alteration added) (citations omitted). An alleged injury is sufficiently particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (alteration added) (quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. at 2136 n.1). And lastly, an alleged injury is sufficiently actual or imminent, respectively, if the plaintiff suffers "continuing, present adverse effects" or demonstrates he "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending." *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (emphases in original) (citations omitted).

The States assert the Memoranda will injure two basic interests: their financial interests and their interest as *parens patriae* in protecting their citizens from criminal aliens. (Dkt. No. 35–37). As it pertains to their financial interests, the States claim the Memoranda will require them to spend more on detention facilities and several public benefits and services. (*Id.* at 35–36). Regarding the States' interest as *parens patriae*, the States allege the Memoranda will result in an increase in crime from aliens within their borders, thus harming their citizenries' physical and economic well-being. (*Id.* at 37).

AMERICAN OVERSIGHT

Case 2:21-cv-00067-Document 78 Filed on 08/19/21 in TXSD Page 23 of 26

The Government does not seriously refute the Memoranda will result in "a drop" in immigration enforcement actions. (Dkt. No. 42 at 23). Nor could it. For example, Texas has put forth undisputed evidence 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. (Dkt. No. 19-3 at 5). That's 68 more rescinded detainers than during the same period the year prior. (*Id.* at 3, 8) (showing no detainers were dropped from January 20, 2020, to March 20, 2020). Of note, the list includes 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 the sexual assault of a child. (*Id.* at 6–7). And at least six had received a final order of removal. (*Id.* at 5). Importantly, current ICE officials "attribute" the Government's sharp decline in maintaining detainers "to the new 'enforcement priorities' established by the [M]emoranda during the Biden Administration."[16] (Dkt. No. 46 at ¶ 17).

Rather than challenge the suffocating effect of the Memoranda on federal detentions of criminal aliens, the Government counters that any drop in detentions is of

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[16] This statement comes directly from the Chief of Staff of the Texas Department of Criminal Justice. (Dkt. No. 46 at 2). It is unclear whether the "ICE officials" quoted by the Chief of Staff made this statement in a capacity excluding the statement from the rule against hearsay. *See* Fed. R. Evid. 801(d)(2). But even if hearsay, this Court may rely on the statement at the preliminary injunction phase. *See Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."). The Government has made no showing that this testimony is otherwise unreliable, and the Court finds none itself. Rather, the sworn affidavit from the Chief of Staff under penalty of perjury possesses sufficient indicia of reliability as to the statement of the ICE officials. The Court therefore accepts as fact, at the preliminary injunction phase, the testimony of the Chief of Staff regarding the statement of current ICE officials.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003987

no real consequence to the States. It argues, even if the Memoranda cause detentions to decline, the States' theories of injury rely on a "speculative chain of events involving independent actions by third parties." (Dkt. No. 42 at 23). Specifically, the Government asserts the States would incur increased financial expenses and exposure to crime only if two conditions are satisfied: (1) the aliens who would have otherwise been detained commit crimes or choose to use public benefits and services; *and* (2) those aliens do so at a higher rate than the noncitizens who *are* removed as a result of the Memoranda. (*Id.* at 23–24).

The Government's concern over the causal chain of events involving third-party action is noteworthy but out-of-turn. These concerns pertain to the "fairly traceable" prong of the traditional standing inquiry. *See Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565–66 (finding "traceability . . . satisfied" where the plaintiffs' theory "relies . . . on the predictable effect of Government action on the decisions of third parties"); *Texas DAPA*, 809 F.3d at 156–60 (finding a plaintiff–state's financial injury was "fairly traceable" to the independent conduct of third-party aliens); *see also California v. Texas*, ____ U.S. ____, ____, 141 S.Ct. 2104, 2116–17 (2021) (finding "an individual's decision to enroll [in] Medicaid" was not "fairly traceable" to the Affordable Care Act's "minimum essential coverage provision" (alteration added)). Therefore, although the Government's third-party causation concerns will need to be addressed, the Court reserves its analysis on those issues for discussion of the traceability of the States' alleged injuries. For now, the Court inquires whether the States have presented a cognizable injury to their financial interests or interests as *parens patriae*. *See also Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003988

(explaining "imminence" is shown where a plaintiff "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending" (emphases in original) (citations omitted)); *cf. Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565 (sidestepping the reliance of the plaintiff-states' "future" injuries upon independent decisions of third-party aliens to underreport in a census and holding the injuries were sufficiently "concrete and imminent" because the plaintiff–states demonstrated, "*if* noncitizen households are undercounted by as little as 2%[,] . . . they will lose out on federal funds that are distributed on the basis of state population" (emphasis added)). They have.

a. Financial Injuries

Between the States, Texas marshals the lion's share of state-specific evidence concerning injury. *Compare* (Dkt. Nos. 19-5–19-9) *with* (Dkt. No. 19-12). The Court therefore focuses its attention on Texas's evidence. *See Texas DAPA*, 809 F.3d at 155 (same). Texas's alleged financial injury affects three categories of its public fisc: Texas's detention system, public education services, and healthcare-related costs. (Dkt. No. 18 at 35–36). Texas asserts that in these three categories it will incur unanticipated costs due to the "rushed implementation" of the Memoranda which "deprived [it] of the ability to adjust[] [its] policies in light of the federal shift." (*Id.* at 41).

To begin, Texas has alleged injury to a legally protected interest. *See Spokeo,* 578 U.S. at ____, 136 S.Ct. at 1548. Texas complains it will incur additional costs to its public fisc because of an unlawful and sudden shift in federal immigration policy. (Dkt. No. 18 at 35). Theories of injury to state or local financial interests predicated on the actions of

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003989

the federal government are not novel. *See, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430–31, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393 (1998) (finding sufficient for standing purposes a local government's claim to suffering injury to its "borrowing power, financial strength, and fiscal planning"); *Texas DAPA*, 809 F.3d at 152–53 (finding sufficient for standing purposes several states' claims to suffering injury to their public fiscs); *see also Sch. Dist. of City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261–62 (6th Cir. 2009). And such financial harm is particularly acute in the context of federal immigration enforcement, where states have "an interest in mitigating the potentially harsh economic effects of *sudden shifts* in population." *Plyler v. Doe*, 457 U.S. 202, 228, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786 (1982) (emphasis added); *see id.* at n.23 (explaining, because the Constitution deprives states of any "direct interest in controlling entry into this country, . . . unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service"); *Texas DAPA*, 809 F.3d at 152–54; *see also Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012) (acknowledging states "bear[] many of the consequences of unlawful immigration"); *DHS v. Regents of the U. of Cal.*, ____ U.S. ____, ____, 140 S.Ct. 1891, 1913, 207 L.Ed.2d 353 (2020) (finding a sudden shift in the government's immigration policy was arbitrary and capricious in part because the government "failed to address whether there was legitimate reliance" on the former immigration policy (quotation omitted)). In sum, the financial injuries incurred by states from "sudden shifts" in their population due to federal immigration policies are not nebulous. *Plyler*, 457 U.S. at 228, 102 S.Ct. at 2400. Rather, they are among the "serious and well recognized" vintage of legally protected

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003990

interests. *Massachusetts*, 549 U.S. at 521, 127 S.Ct. at 1455. By requesting equitable relief from the impact of the Memoranda on its public fisc, then, Texas appropriately seeks judicial shelter.

The remaining inquiries as to Texas's alleged financial injury concerns whether it is sufficiently concrete, particularized, and actual or imminent. *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. The Government does not contest that Texas's alleged injury is particularized to Texas, and the Court finds that it is. Texas can therefore establish an injury in fact for its financial injury if it is both concrete and actual or imminent.

Texas asserts a financial injury in the form of added costs to its detention system. Texas states the Memoranda will lead to an unanticipated rise in criminal activity from aliens the federal government would otherwise detain. (Dkt. No. 18 at 15–16, 35–36). On average, Texas spends $62.34 per day per inmate in its detention facilities. (Dkt. No. 19-6 at 3–4). In 2018, Texas detained 8,951 criminal aliens for a total of 2,439,110 days, costing $152,054,117.[17] (*Id.*). If even one alien not detained due to the Memoranda recidivates, Texas's costs "will increase" in accordance with its current cost per inmate. (*Id.* at 4); *cf. Dep't. of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565.

The Court finds Texas's claimed injury from unanticipated detention costs is sufficiently concrete and imminent. The harm is concrete because Texas incurs real financial costs in detaining criminal aliens. And the harm is imminent because Texas

[17] As the Court discusses *infra*, the federal government reimbursed Texas for a miniscule fraction of its costs for detaining criminal aliens as part of a statutorily mandated program that seeks to help states with the burden of incarcerating criminal aliens. *See* 8 U.S.C. § 1231(a)(1)(A).

AMERICAN OVERSIGHT

currently operates a detention system holding criminal aliens and plans to continue doing so in the future.[18]

b. *Parens Patriae* Injury

In addition to its financial injury, the States assert they have been injured in their interests as *parens patriae*. (Dkt. No. 18 at 37). The Government counters that the States are precluded from bringing a *parens patriae* action against the federal government. (Dkt. No. 42 at 24 & n.5). Based on the following, the Court concludes the States properly lay claim to a *parens patriae* injury.

"*Parens patriae* means literally 'parent of the country.'" *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (quoting Black's Law Dictionary 1003 (5th ed. 1979)). The concept derives from the English constitutional system. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972). As that system developed, the Crown retained certain "duties and powers" referred to as the "royal prerogative." *Id.* (citation omitted). For example, as the "father of the country," the King served as the guardian of persons with legal disabilities. *Id.* (internal quotations omitted). When the United States achieved independence, "the prerogatives of the crown devolved upon the people of the States." *Wheeler v. Smith*, 50 U.S. (9 How.) 55, 78, 13 L.Ed. 44 (1850). That is, "[t]he State, as a sovereign," became "the *parens patriae*." *Id.* Like the King before them, the states were

[18] Because the States have put forth sufficient evidence to demonstrate a concrete and imminent injury regarding Texas's detention costs and *parens patriae*, *see infra* II.A.1., the Court need not address the States' alleged financial injuries arising from unanticipated education and healthcare-related expenses.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003992

now responsible for acting "in the interests of humanity" and "for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 808, 34 L.Ed. 478 (1890).

Once vested in the states, the scope of a *parens patriae* action under American law "greatly expanded." *Hawaii*, 405 U.S. at 257, 92 S.Ct. at 889. The first such expansion is noteworthy. Coincidentally, in a previous dispute between the States in this case, Louisiana sought through a *parens patriae* action to enjoin Texas from continuing a trade embargo that was allegedly injuring Louisiana's economy. *Louisiana v. Texas*, 176 U.S. 1, 3–4, 11–12, 20 S.Ct. 251, 251–52, 254, 44 L.Ed. 347 (1900). Texas's lead health official had cinched the spigot on all commerce flowing between the city of New Orleans and the State of Texas "under the guise of a quarantine against yellow fever." *Id.* at 11, 20 S.Ct. at 254. A standing issue arose because Louisiana had simultaneously invoked the Supreme Court's original jurisdiction, which required a "controversy arising directly between" the states as sovereigns, *and* asserted an interest as *parens patriae*, which had traditionally been a tool for a state to vindicate "the grievances of particular individuals" within its borders. *Id.* at 16, 20 S.Ct. at 256. To reconcile this seeming conflict, the Court determined Louisiana had properly stated an interest as *parens patriae* in protecting "her citizens at large" from economic harm due to Texas's quarantine regulations. *Id.* at 19, 20 S.Ct. at 257. This interest, reasoned the Court, stemmed in part from the fact that Louisiana, as a state, held no right under the Constitution to regulate "the freedom of interstate commerce." *Id.* Although the Supreme Court ultimately held Louisiana lacked standing for other reasons, *id.* at 22–23, 20 S.Ct. at 258–59, the case is considered the first

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003993

to expand the notion of *parens patriae* to a state's interest in protecting its citizens' interests broadly. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266.

Perhaps unsurprisingly, the concept of a *parens patriae* action to vindicate the rights of a state's citizens-at-large proved popular. *See id.* at 603, 102 S.Ct. at 3266–67 (listing cases brought by various states during the early 20th century). And not long after *Louisiana v. Texas*, Justice Holmes referred to a state's interests in such broader matters as "quasi-sovereign" interests. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907). The term stuck. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374, 44 S.Ct. 138, 139, 68 L.Ed. 342 (1923); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447, 450, 65 S.Ct. 716, 721, 722, 89 L.Ed. 1051 (1945). And before long, the doctrine evolved to the point that the Supreme Court determined quasi-sovereign interests to be not simply a branch of traditional *parens patriae* actions, but the *sine qua non* of *parens patriae* actions. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266. ("[T]o have [*parens patriae*] standing, the State *must* express a quasi-sovereign interest[.]" (alteration and emphasis added)).

But lending this workable term to the abstract concept of a state's interest in its citizenry did not resolve all questions regarding *parens patriae* standing. Namely, the referent "quasi-sovereign interest," without more, proved useless in settling whether a state's injury is sufficiently "concrete" for purposes of Article III standing. *Id.* After all, a quasi-sovereign interest itself is nothing more than a "judicial construct" that does "not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. at 3265. On its surface, the term clearly was crafted to help distinguish from a state's "sovereign interests, proprietary interests, or private interests." *Id.* at 602, 102 S.Ct. at 3266. And an inch

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003994

deeper, the term represented "a set of interests that the State has in the well-being of its populace." *Id.* But those broad contours alone, absent further granularity, "risk[ed] being too vague to survive the standing requirements" of the Constitution. *Id.*

Recognizing this concreteness issue, the Supreme Court in *Alfred L. Snapp & Son* took it upon itself to hammer out, as best it could, the notion of a quasi-sovereign interest. 458 U.S. 592, 102 S.Ct. 3260. While at once conceding that "the articulation of such interests is a matter for case-by-case development," the Supreme Court nevertheless provided "two general categories" into which characteristics of a true quasi-sovereign interest may fall.

"First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. at 3269. Regarding the first category, the Supreme Court further elaborated, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the state standing to sue as *parens patriae* is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* And regarding the latter, the Supreme Court explained, "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents." *Id.*

Building on this rubric, the Fifth Circuit has concluded that a state's claim to a "quasi-sovereign" interest for standing purposes is sufficient when the state seeks to "protect[] its citizens from criminal activity." *Castillo v. Cameron County*, 238 F.3d 339, 351

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003995

(5th Cir. 2001) (citing *Snapp*, 458 U.S. at 602, 102 S.Ct. at 3260). In *Castillo*, Texas sought to overturn a federal district court's injunction which permitted a local County Sheriff to refuse to incarcerate alleged parole violators to reduce the county's jail population. 238 F.3d at 343–47. To prove standing in that circumstance, Texas was required to show, among other things, it had a "personal stake" in the outcome. *Id.* at 350–51. The panel held that Texas satisfied this showing in part by alleging a valid quasi-sovereign interest in protecting its citizens from criminal activity. *Id.* at 351. As a result of the injunction, the panel explained, "parole violators who should be incarcerated remain[ed] free, potentially increasing the level of criminal activity." *Id.* Although fully aware that "the concept of quasi-sovereign standing 'risks being too vague to survive the standing requirements of Article III,'" the panel found that Texas's interest in protecting its citizens from increased criminal activity "[fell] within the category of 'a quasi-sovereign interest in the health and well–being—both physical and economic—of its residents in general.'" *Id.* (quoting *Snapp*, 458 U.S. at 602, 102 S.Ct. 3260).

Bearing these principles in mind, the Court now turns to the States' basis for *parens patriae* standing in this case. The States assert a quasi-sovereign interest in protecting their citizens' physical and economic well-being "from crime caused by [the Government's] failure to detain criminal aliens." (Dkt. No. 18 at 37). As it pertains to "criminal activity" in general, *Castillo* resolves that the States here possess a quasi-sovereign interest in protecting their citizens. 238 F.3d at 351.

As it pertains to the criminal activity of "aliens" specifically, the States' interests are perhaps stronger than the circumstances presented in *Castillo*. Whereas in *Castillo* the

AMERICAN OVERSIGHT

State of Texas sought to protect its citizens from criminal activity in an area of law over which the State retained extensive authority—the procedure for detaining alleged parole violators—here the States retain *no* authority over the detention of criminal aliens upon their release from state prison and during the pendency of their removal proceedings. That is, the injury to the States' quasi-sovereign interest in protecting their citizens from criminal aliens is especially severe here because the States' hands are tied, in effect, when it comes to federal immigration policy. *See* U.S. Const. art. I, § 8, cl. 4 (conferring upon Congress the Power "[t]o establish an uniform Rule of Naturalization"); *Arizona*, 567 U.S. at 394–95, 132 S.Ct. at 2498 (holding that a state law "authorizing state officers to decide whether an alien should be detained for being removable . . . violates the principle that the removal process is entrusted to the discretion of the Federal Government" (citations omitted)).

By seeking relief for an injury to their populace from which they have no constitutional mode of recourse, the States align themselves with the rationale employed by the Supreme Court to support the first expansion of *parens patriae* standing in *Louisiana v. Texas*. Just as Louisiana once sought "vindication of the freedom of interstate commerce" that was "not committed" to it by the Constitution, here the States seek protection from an effect of a federal immigration policy that the States possess no constitutional authority to change.[19] *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Snapp*,

[19] The fact that an expansion of *parens patriae* to citizens-at-large in *Louisiana v. Texas* was determined in a case involving the Supreme Court's original jurisdiction does not restrict the scope of quasi-sovereign interests in non-original jurisdiction cases. If anything, the opposite is (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003997

458 U.S. at 608, 102 S.Ct. at 3269. Accordingly, the Court holds that the States possess a quasi-sovereign interest in protecting their citizens-at-large from the criminal activity of aliens subject to mandatory detention under federal law.

The Government contends that the States nevertheless are barred from bringing a *parens patriae* action "against the federal government." (Dkt. No. 42 at 24). For this proposition the Government relies exclusively upon *Massachusetts v. Mellon*, where the Supreme Court denied *parens patriae* standing to a state suing the federal government to protect its citizens from the "operation of" a federal statute called the Maternity Act. 262 U.S. 447, 479, 485–86, 43 S.Ct. 597, 598, 600, 67 L.Ed. 1078 (1923). A critical feature of the Supreme Court's rationale was that the state had not identified any "rights of the state falling within the scope of the judicial power," such as "quasi sovereign rights." *Id.* at 485, 43 S.Ct. at 600. These twin aspects of *Mellon*—the challenge to the "operation of federal statutes" and the state's lack of an identifiable "right"— were later acknowledged by the Supreme Court as the defining characteristics of its bar on *parens patriae* actions *vis-à-vis* the federal government. *See Massachusetts*, 549 U.S. at 520 n.17, 127 S.Ct. at 1455 n.17; *Georgia*, 324 U.S. at 447, 65 S.Ct. at 721 (holding that Georgia could bring a *parens patriae* action to protect a quasi-sovereign interest because, unlike *Mellon*, it did not seek "to protect her citizens from the *operation of* federal statutes" and it possessed "rights . . . based on federal [anti-trust] laws" (emphasis added)). And a long train of federal courts

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true. *See Snapp*, 458 U.S. at 603 n.12, 102 S.Ct. at 3267 n.12; *id.* at 611–12, 102 S.Ct. at 3270–71 (Brennan, J., concurring) (explaining on constitutional grounds that the Court might be more "restrictive" as to the types of interests a state can assert in a *parens patriae* action when the Court's original jurisdiction is invoked as compared to typical federal suits).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-003998

have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a *parens patriae* action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662, 696–98 (S.D. Tex. 2018); *See Texas v. United States*, 86 F. Supp. 3d 591, 625–28 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*); *New York v. Sebelius*, No. 1:07-cv-1003, 2009 WL 1834599, at *12–13 (N.D.N.Y. June 22, 2009); *Puerto Rico Pub. Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *City of New York v. Heckler*, 578 F. Supp. 1109, 1122–25 (E.D.N.Y. 1984); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984).

The *parens patriae* injury set forth by the States safely navigates this well-trodden distinction from the *Mellon* rule. The States do not challenge the operation of any federal statute. Rather, they primarily challenge the Executive Branch's putative refusal to enforce certain immigration statutes which, they claim, should benefit their citizenries. (Dkt. No. 1 at 21–24). The States allege that the Executive Branch's policy of non-enforcement infringes upon rights they derive from the APA. (*Id.* at 21–27). Specifically, the States claim that the federal government's policy creating a categorical refusal to enforce certain immigration statutes is an unlawfully withheld agency action, contrary to law, arbitrary and capricious, procedurally defunct, and constitutionally injurious. By asserting these federal statutory rights, the States have not presented this Court with "abstract questions of political power." *Cf. Mellon*, 262 U.S. at 485, 43 S.Ct. at 600. Rather,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-003999

the States have demonstrated concrete injuries to their quasi-sovereign interests as *parens patriae*. *See Castillo*, 238 F.3d at 351; *see also Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269; *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Texas*, 328 F. Supp. 3d at 697–98 (finding the state had "demonstrated a concrete injury to its quasi-sovereign interest in the economic well-being of its citizens" in a *parens patriae* action against the federal government (quotation omitted)). The Court therefore concludes that the States have demonstrated a cognizable *parens patriae* injury.

2. Traceability

The States must next establish a "fairly traceable link" between their injuries and the Government's allegedly unlawful action. They can establish this link with "no more than *de facto* causality." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). That is to say, a federal plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S.Ct. 1154, 1164, 137 L.Ed.2d 281 (1997); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734–35, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008).

Both States' injuries depend on the future behavior of criminal aliens whom the Government would otherwise detain. Regarding Texas's detention costs injury, the States argue the Memoranda will cause a significant number of criminal aliens who otherwise would have been detained by the federal government to be detained again or longer in Texas. (Dkt. No. 18 at 16, 18, 35–37). Regarding the States' *parens patriae* injury, the States urge that the Memoranda will lead to a significant number of criminal aliens

AMERICAN OVERSIGHT

who would otherwise have been detained by the federal government causing harm—both physical and economic—to their respective citizenries. (*Id.* at 37). Thus, at their core, both States' injuries depend upon criminal aliens behaving unlawfully in the future.

The Government contends that whether the aliens who would have otherwise been taken into custody will commit crimes is speculative. (Dkt. No. 42 at 23). The Government further contends that, even if the States can make this showing, they must also prove that those aliens would commit crimes at a higher rate than the aliens who *are* removed because of the Memoranda. (*Id.*).

Regarding the Government's first concern, the Supreme Court has traditionally denied standing wherever the traceable link between the government's action and the plaintiff's injury depends in part on the future behavior of third parties. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S.Ct. 1138, 1150, 185 L.Ed.2d 264 (2013) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). This tradition is especially firm where, as here with the States' asserted injuries, it is alleged that the third parties' future behavior will be unlawful. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666–67, 75 L.Ed.2d 675 (1983).

That said, the Supreme Court embraces standing theories dependent on third parties' future behavior under certain circumstances. In *Department of Commerce*, for instance, the Supreme Court traced a governmental action to aliens' future unlawful behavior where evidence established a likelihood that aliens have "historically" behaved in a certain manner. ____ U.S. at ____, 139 S.Ct. at 2566. This type of evidence, the

AMERICAN OVERSIGHT

Supreme Court concluded, demonstrated that traceability was not "mere speculation," but rather, the product of a "predictable effect of Government action on the decisions of third parties." *Id.* (citations omitted). Similarly, in *Davis v. Federal Election Commission*, the Supreme Court traced a governmental action to the future behavior of the plaintiff's political opponent where evidence showed that "most candidates" had behaved in a certain manner and there was "no indication" the opponent would do otherwise. 554 U.S. at 734–35, 128 S.Ct. at 2769; *see also Texas DAPA*, 809 F.3d at 156 (finding a traceable link between DAPA and aliens' likelihood of obtaining driver's licenses where driving was a "practical necessity" for residents of the state). From these cases, it becomes apparent that an injury may be traced through third-party behavior to governmental action where the plaintiff demonstrates individuals similarly situated to the third party have a propensity to engage in the relevant behavior.

Considering this principle, the link between the States' alleged harm and the Memoranda is virtually unassailable. As mentioned, the undisputed evidence demonstrates that the Memoranda are *already* causing a dramatic increase in the volume of criminal aliens released into the public. The States further present evidence suggesting that criminal aliens, as a group, have a strong propensity to recidivate. (Dkt. No. 18 at 15–16). Indeed, the States submit evidence from a Texas Sheriff's Office showing that a group of 209 recently held criminal alien inmates with detainers had a recidivism rate of 73.68%. (Dkt. No. 19-5 at 3). The States also submit a 2018 study from the United States Department of Justice's Bureau of Justice Statistics showing that state offenders generally recidivate at 44% within the first year following release, 68% within the first three, 79%

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004002

within the first six, and 83% within the first nine. (Dkt. No. 19-20 at 1). And these weren't one-time recidivists. The same study shows, during the nine-year period following release, there were on average five arrests per released *prisoner*. (*Id.*).

This foregoing evidence confirms what the Supreme Court and Congress have long acknowledged: "deportable criminal aliens who remain[] in the United States often commit[] more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)); *see also Zadvydas*, 533 U.S. at 713–14, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (warning of the "risk to the community posed by the mandatory release" of criminal aliens when accounting for "statistical studies showing high recidivism rates for released aliens").

These facts and precedents should come as no surprise to the Government. Congress and the Executive have long provided financial aid to states to ameliorate the strain criminal aliens place on state detention facilities. Through the State Criminal Alien Assistance Program ("SCAAP"), the federal government partially reimburses states for costs associated with detaining criminal aliens.[20] (Dkt. No. 19-2 at 2–4). For example, in 2018 the federal government through SCAAP reimbursed Texas $14,657,739 of the total $152,054,117 Texas spent on detaining criminal aliens. (*Id.* at 4). Although amounting to less than 10% of Texas's actual costs in 2018, SCAAP payments demonstrate that the

[20] Notably, the statutory basis for SCAAP resides near one of the detention statutes at issue in this case, 8 U.S.C. § 1231(i).

AMERICAN OVERSIGHT

federal government has long acknowledged that states like Texas incur financial harm as a direct result of the unlawful behavior of criminal aliens.

In sum, the States present evidence of criminal alien and state felon recidivism through a Texas Sheriff and the DOJ's own dataset, Supreme Court precedent citing the congressional record making similar findings as to criminal aliens, and the existence of the SCAAP program. Considering this substantial evidence, the Court is not persuaded that the link between the States' injuries and criminal aliens being released is "speculative" as the Government suggests. The Court finds that criminal aliens "historically" recidivate. *See Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566.

Next, the Government asserts that the risk of criminal aliens committing further crimes is insufficient for the States to trace their injuries to the Memoranda. (Dkt. No. 42 at 23). Rather, the Government hypothesizes that "it is possible" the Memoranda's reprioritization "will result in a net reduction in crimes." (*Id.*). This argument fails in three respects.

First, evidence already in the record demonstrates that the Government is not just refusing to detain its newly deprioritized categories of criminal aliens, but even the "prioritized" variety. For instance, in Texas alone, some of the 68 individuals whose detainers were dropped were serving time for an "aggravated felony," a supposedly prioritized category. *Compare* (Dkt. No. 19-3 at 6–7) *with* 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" under the INA).

Second, the Government provides no support for its contention that its enforcement of the prioritized categories of criminal aliens will exceed any decline in

AMERICAN OVERSIGHT

enforcement of the deprioritized categories. The Government's subjective belief cannot overcome the States' evidence demonstrating to the contrary.

Finally, even if the Government *could* demonstrate that increased enforcement in the prioritized categories might displace a drop in the total number of detained aliens resulting from the deprioritized categories, this "offset" would be irrelevant as a matter of law. The "standing analysis is not an accounting exercise." *Texas DAPA*, 809 F.3d at 156 (internal quotation omitted). Absent a "tight[] nexus" between the alleged "benefits" and the "costs" of the Memoranda, there can be no "offset." *Id.* Here, other than what it noted in the Memoranda, the Government makes no showing that the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories. And the evidence put forward by the States regarding a drop in enforcement actions—even for prioritized aliens—makes that "possibility" unlikely. Accordingly, there is no connection between the results of enforcement of prioritized categories and the results of enforcement of deprioritized categories.

The Court further notes that the number of aliens who would otherwise be detained in the entire United States is relevant to estimating the impact of the Memoranda on the States in this case. The Fifth Circuit made clear in *Texas DAPA* that injury to a state can flow from the fact that aliens are "free to move among states." 809 F.3d at 188. Indeed, the States proffer evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Given the Fifth Circuit's

AMERICAN OVERSIGHT

acknowledgement of this interstate migration principle and the data provided by the States, the prospect that criminal illegal aliens falling within the deprioritized categories of the Memoranda who are not detained elsewhere in the Nation could move to the States' territories—thereby amplifying their injuries—is not mere "conjecture," as the Government posits. *See* (Dkt. No. 42 at 61).

Considering the foregoing, the Court holds that the States have established a traceable link between their injuries and the challenged Memoranda. The Memoranda are already leading to an increased volume of criminal aliens released into Texas who otherwise should have been detained by the federal government. Criminal aliens and state offenders have a demonstrable propensity to recidivate. The Memoranda will therefore cause a traceable injury to the States' financial and *parens patriae* interests.

3. <u>Redressability</u>

The States must next demonstrate that their requested relief would remedy their harm. The "redressability" element of the standing to sue doctrine requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020) (cleaned up). The States' request for relief does that.

The States request two forms of injunctive relief. First, they ask this Court to *restrain* the Government from "enforcing and implementing the policies described" in Section B of the January 20 Memorandum and the February 18 Memorandum. (Dkt. No. 18-1 at 2). This Court will refer to this requested relief as the "negative injunction." Second, the States ask this Court to *order* the Government to comply with "the mandatory

AMERICAN OVERSIGHT

Case 2:21-cv-00067-Document 178 Filed on 08/19/21 in TXSD Page 43 of 71

duty" to "take into custody" and "detain" aliens covered by 8 U.S.C. §§ 1226(c)(1) and 1231(a)(2), respectively, and to "refrain from releasing" aliens covered by Section 1226(c)(1) except as permitted by Section 1226(c)(2). (*Id.*). The Court will refer to this requested relief as the "positive injunction." The positive injunction relates directly to the States' Count I claim that the Government is "unlawfully withholding and unreasonably delaying agency action" pursuant to 5 U.S.C. § 706(1). (Dkt. No. 1 at 23). The States further seek to implement both the negative and positive injunctions nationwide. (Dkt. No. 18-1 at 2).

Assuming, as the Court must for purposes of standing, that the States are "correct on the merits of [their] claims," either form of requested relief is substantially likely to remedy the States' alleged injuries. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Regarding the requested positive injunction, it is perhaps self-evident that an order compelling the federal government to take criminal aliens into custody and detain them pursuant to the relevant statutes would relieve the States from harm they anticipate from the criminal behavior of criminal aliens. Requiring an agency action, the withholding of which is causing injury, will logically alleviate that injury. Notably, the Government offers no clear argument to the contrary regarding the benefit of a positive injunction. (Dkt. No. 42 at 25).

But even if the Court were to grant only the requested negative injunction, then, too, the States are substantially likely to obtain reprieve. Namely, the federal government would be *required* to act in conformance with the standards set by Congress in Sections 1226(c) and 1231(a)(2) as interpreted by this Court. The Government does not quibble

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004007

Case 2:21-cv-00067 Document 78 Filed on 08/19/21 in TXSD Page 44 of 202

with the notion that, under Congress's standards, the States' injuries would be redressed. Rather, the Government argues that, if the Memoranda are enjoined, the States are unable to show that "the resulting *prioritization scheme*" will "result in a decrease in crime levels" within the States' boundaries. (Dkt. No. 42 at 25) (emphasis added). The Government's argument misses the mark for two reasons.

First, this argument suggests the Memoranda were issued in a vacuum in which no prior policy concerning the detention of criminal aliens ever existed. Of course, such a suggestion is demonstrably false: the Government's own affidavits demonstrate that the United States has "had policies guiding such exercise since as early as 1909." (Dkt. No. 42-6 at 6); (Dkt. No. 42-5 at 8).

Second, the Court's concern over redressability in an APA case such as this cuts not to the executive-level policy which would be applied in the absence of the faulty one, but rather, whether *Congress*'s express standards—both for the immigration laws challenged and the procedural standards allegedly discarded—if followed, would provide the States recourse. *See Texas DAPA*, 809 F.3d at 161. By nullifying the constraints flowing from the Memoranda's "prioritization," this Court would require that agency to return to or pursue a specific standard for exercising its discretion within the bounds set by Congress. The States have supplied evidence demonstrating that in times past, such an exercise of discretion led to significantly fewer criminal aliens who are not in custody and roaming their streets. (Dkt. No. 19-3 at 5). The Government's inability to refute this evidence is telling. It suggests that conformance with the strictures set by Congress in Sections 1226(c) or 1231(a)(2) as practiced prior to the issuance of the Memoranda would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004008

result in a reduction of the volume of criminal aliens moving freely within the interior of the States.

Accordingly, the Court finds that, regardless of which form it takes, the injunctions sought by the States would redress their injuries flowing from the Memoranda. The States have standing under the traditional inquiry.

4. Special Solicitude

Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. The Supreme Court in *Massachusetts v. EPA* determined that states are owed special solicitude wherever they assert a congressionally bestowed procedural right and the governmental action at issue affects the state's quasi-sovereign interests. 549 U.S. at 519–20, 127 S.Ct. at 1454–55. The Fifth Circuit has acknowledged that the holding in *Massachusetts* applies to procedural claims under the APA. *Texas DAPA*, 809 F.3d at 152–55. Specifically, the Fifth Circuit in *Texas DAPA* granted the state special solicitude where it sought judicial review of an immigration policy memorandum which imposed "direct, substantial pressure" on a state's "lawmaking authority"—that is, pressure to change its laws subsidizing driver's licenses for aliens. *Id.*

The States are likewise owed special solicitude here. The States seek judicial review of immigration policy memoranda which they allege constitute final agency action, and they assert that the resulting policies cause injury to Texas's public fisc because its budget for detention facilities "has been set months or years in advance." (Dkt. No. 18 at 41). Additionally, and as discussed above, the States have shown they

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004009

possess a quasi-sovereign interest in protecting their citizenries from the unlawful activity of criminal aliens. The Government's sole argument in opposition is that special solicitude still requires an injury in fact. (Dkt. No. 42 at 24–25 n.7). But this argument falls short because, as detailed in this Memorandum Opinion and Order, *see supra* II.A.1., the States have demonstrated an injury in fact. Accordingly, the States have satisfied their burden to demonstrate they are entitled to special solicitude in the standing inquiry.

In *Massachusetts*, a state armed with special solicitude was permitted to establish causation between the EPA's decision not to regulate certain greenhouse gas emissions and the state's interest in protecting its physical territory. 549 U.S. at 523–24, 127 S.Ct. at 1456–57. As detailed above, the links between the States' injuries and the Memoranda here are not perceptibly frailer than in *Massachusetts* and likely are firmer. *See also Lujan*, 504 U.S. at 572 n.7, 112 S.Ct. at 2142 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). The States have standing under the special solicitude inquiry. Accordingly, the Court finds it has jurisdiction to consider the States' claims.[21]

[21] In sum, having concluded that the States have standing, the Court must exercise jurisdiction. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) (noting that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014) (resolving doctrinal tension that had developed with a federal court's "virtually unflagging" obligation to "hear and decide cases within its jurisdiction" (internal quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004010

Case 2:21-cv-00618 Document: 00515990757 Page: 75 Date Filed: 08/23/2021

B. JUDICIAL REVIEW

The Court must next determine whether the States' claims are reviewable before turning to the merits of the Motion. *Lexmark*, 572 U.S. at 128, 134 S.Ct. at 1387–88. In so doing, the Court narrows the focus to the States' APA claims. The APA imposes four general requirements that must be satisfied before a federal court can review agency action. *See Bennett*, 520 U.S. 154, 117 S.Ct. 1154. To start, no statute may bar judicial review. *Id.* at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(1). Next, the new guidance outlined in the February 18 Memorandum must constitute a "final agency action." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 704. Third, the new guidance must not be "committed to agency discretion by law." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(2). Finally, the States must show that their injuries are within the "zone of interests" to be protected by the statutes allegedly violated by the Government. *Bennett*, 520 U.S. at 163, 117 S.Ct. at 1161; 5 U.S.C. § 702. The Court finds that the States have met each of these requirements.

1. Statutory Bars to Judicial Review

Under the APA, an action may not proceed when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). With respect to immigration, Congress enacted "many provisions . . . aimed at protecting the Executive's discretion from the courts[.]" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S.Ct. 936, 945, 142 L.Ed.2d 940 (1999). Banking on this, the Government contends that Sections 1252, 1231(h), and 1226(e) protect the Executive Branch's discretion from the States' claims before this Court. (Dkt. No. 42 at 30–35). The Court will address each in turn.

AMERICAN OVERSIGHT

First, the Government makes the same arguments it articulated in *Texas I* that 8 U.S.C. § 1252(a)(5) and (b)(9) bar judicial review of the States' APA claims. (*Id.* at 30–31); *see also* (6:21-cv-3, Dkt. No. 83 at 27).[22] The States disagree arguing that the provisions are irrelevant to this case because they apply "only with respect to review of an order of removal under subsection (a)(1)." (Dkt. No. 51 at 27–28) (quotations omitted). As in *Texas I*, the Court agrees with the States and incorporates by reference its decision on the issue in that case. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42; *see also Nielsen v. Preap*, ____ U.S. ____, ____, 139 S.Ct. 954, 962, 203 L.Ed.2d 333 (2019) (holding that Section 1252(b)(9) does not preclude judicial review of respondents' challenge to the Government's detention authority under Section 1226 because respondents "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal as opposed to the decision to deny them bond hearings; and they are not even challenging any part of the process by which their removability will be determined" (quotations omitted)); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("[W]hile [Sections 1252(a)(5) and 1252(b)(9)] limit *how immigrants* can

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[22] Section 1252(a)(5) provides in relevant part: "Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." 8 U.S.C. § 1252(a)(5).

Section 1252(b)(9) states in part: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

AMERICAN OVERSIGHT

challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel *judicial review over final orders of removal to the courts of appeals*."(emphases added)).

Next, the Government, again repeating its stance in *Texas I*, argues that any of the States' claims brought under Section 1231 are precluded from judicial review by Subsection (h). (Dkt. No. 42 at 34); *see also* (6:21-cv-3, Dkt. No. 83 at 30–32). Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). In this case, the Government rehashes its prior argument in *Texas I* that the meaning of "party" in Section 1231(h) includes the States. This time around, it argues that because Black's Law Dictionary defines the word "party" as "one by or against whom a lawsuit is brought," the Court was in error when it concluded that "party" in that section narrowly means "alien in a removal proceeding." (*Id.* at 34–35); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. For their part, the States unsurprisingly agree that the Court got it right the first time around and succinctly agrees with the Court's disposition. (Dkt. No. 51 at 28–29). The Court agrees with the States.

Although the Government is correct in arguing that "party" may have a broad dictionary definition, statutory construction is more complex. On the surface, the plain meaning of "party" in Section 1231(h)—even when accounting for the dictionary definition—could refer to (1) any party *to the removal proceedings* or (2) *any* party to *any* proceeding. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24. This potential

AMERICAN OVERSIGHT

for multiple meanings of "party" in Section 1231(h) does not necessarily render the text ambiguous; if "all but one of the meanings" of the word *party* in Section 1231(h) can be "ordinarily eliminated by context," that remaining meaning is correct.[23] *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 1996–97, 124 L.Ed.2d 44 (1993) (superseded by statute on other grounds). The well-established process for interpreting a text with *potential* ambiguity focuses on "text, context, structure, and history." *See Texas v. EPA*, 983 F.3d 826, 836 (5th Cir. 2020). "Statutory language has meaning only in context." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415, 125 S.Ct. 2444, 2449, 162 L.Ed.2d 390 (2005)). While a dictionary can illuminate the "core meanings of a term," "the meanings of common words (which typically have multiple definitions) must be determined in the context in which they appear." *Texas*, 983 F.3d at 837 n.2 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 418–19 (2012)). In short, the Court in *Texas I* conducted an in-depth analysis of the term "party," the statute, and the history of the statutory scheme and, having done so, the Court determined that "party" in Section 1231(h) means "alien in a removal proceeding." *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. The Government has offered nothing to convince the Court that its analysis and conclusion in *Texas I* were in error.

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[23] The Court in *Texas I* held that Section 1231(h) was unambiguous. ___ F. Supp. 3d at ____, 2021 WL 2096669, at *26 & n.4. Hence, the Court did not find *Chevron* deference applied to the Government's preferred interpretation of Section 1231(h). *Id.* The Court adopts that reasoning by reference here. The Court additionally notes that the Government, like in *Texas I*, fails to invoke any claim to *Chevron* deference with respect to Section 1231(h) in its Response to this Motion.

AMERICAN OVERSIGHT

Thus, the Court adopts its prior reasoning and conclusion in *Texas I* with respect to Section 1231(h).

Lastly, the Government contends that Section 1226(e) bars the States' claims as they relate to Section 1226(c). (Dkt. No. 42 at 32–33). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). The Government insists that determinations under Section 1226(c) are discretionary because the federal government "may detain a noncitizen under § 1226—under either subsection (a) or subsection (c)—only 'pending a decision' on removal." (Dkt. No. 42 at 32). According to the Government, "[d]etention authority is thus contingent on the Secretary's separate, predicate, and discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear." (*Id.*) (citations omitted).

Voicing their disagreement, the States allege that Subsection (e) is irrelevant to the action since it applies only to discretionary decisions to detain *individual* aliens and not to lawsuits on the Government's detention authority. (Dkt. No. 18 at 39); (Dkt. No. 51 at 28). And because Section 1226(c) imposes a mandatory duty to detain, as the States argue, it follows that Section 1226(e) does not apply to Subsection (c). (*Id.*); *see infra* II.B.3.a. The Court agrees with the States.

AMERICAN OVERSIGHT

The Supreme Court has clearly stated that Subsection (e)'s limitation "applies only to 'discretionary' decisions about the 'application' of § 1226 to *particular cases*." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added). Section 1226(e), therefore, "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*, ____ U.S. ____, ____, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (quoting *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714)). Indeed, "Section 1226(e) . . . deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions." *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). So, for instance, Subsection (e) poses no hurdle for a respondent who challenges the statutory framework that permits his detention without bail under Section 1226. *See Demore*, 538 U.S. at 517, 123 S.Ct. at 1714. Section 1226(e) does not preclude challenges to the Government's alleged authority to detain certain aliens without a bond hearing under Sections 1225(b), 1226(a), and 1226(c). *Jennings*, ____ U.S. at ____, 138 S.Ct. at 839, 841. It also does not bar habeas corpus petitions. *See Parra*, 172 F.3d at 957. Further, Subsection (e) does not prevent plaintiffs from questioning whether the Government has the power under Section 1226(c) to detain certain aliens despite failing to detain the aliens *immediately after* they were released as required by Section 1226(c). *Preap*, ____ U.S. at ____, 139 S.Ct. at 961–62; *see also infra* II.B.4. Thus, Section 1226(e) does not prohibit parties from "disput[ing] the *extent of the statutory authority* that the Government claims." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004016

Here, the States' claims against the Government clearly "dispute the extent of the statutory authority that the Government claims." *See id.* In their Complaint, the States allege the Government does not have any discretion under Section 1226(c) to determine whether certain aliens must be detained when released from custody. *See* (Dkt. No. 1 at ¶¶ 35, 37–38, 94–101); *see also* (Dkt. No. 18 at 39). In effect, "the general extent of the Government's authority under § 1226(c) is precisely the issue here." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962. Thus, "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*, ____ U.S. at ____, 138 S.Ct. at 841.

Accordingly, the Court concludes Sections 1252(a)(5) and (b)(9), 1231(h), and 1226(e) do not preclude the States' claims. There are no statutory bars to reviewing these claims.

2. Final Agency Action

The Court next considers whether the enforcement priorities set forth in the January 20 and February 18 Memoranda constitute "final agency action" subject to judicial review. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). "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 Def.*, ____ U.S. ____, ____, 138 S.Ct. 617, 626, 199 L.Ed.2d 501 (2018) (citing 5 U.S.C. § 704) (internal quotations omitted). The States and the Government agree on the standard used to determine whether an agency action is

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004017

"final." *See* (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26). That standard requires two conditions to be satisfied. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 1129, ____, 136 S.Ct. 1807, 1813, 195 L.Ed.2d 77 (2016). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168). The Parties disagree whether the Memoranda constitute final agency action. (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26–28). The Court finds that they do for the following reasons.

a. <u>The Consummation of the Agency's Decision-Making Process</u>

The first condition that must be satisfied for a court to find that an agency's action is final is that the action constitutes "the consummation of the agency's decisionmaking process." *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. A consummation of this decision-making process is present when the action is "definitive [in] nature" rather than "advisory in nature." *Id.* The Court finds the Memoranda easily satisfy this condition.

As an initial matter, the text of the February 18 Memorandum indicates the Memoranda are the consummation of DHS's decision-making process. It states, "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added). Moreover, the February 18 Memorandum states, "[i]t applies to *all* U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning." (*Id.*) (emphasis added). The immediacy and

AMERICAN OVERSIGHT

definite nature of the application of this guidance to *all* enforcement actions and custody decisions made by *all* ICE Directorates and Program Offices strongly suggest the agency's decision is final. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813.

The Government attempts to overcome these indicia of final agency action by arguing "the Secretary retains the discretion to change or abandon these policies at any time[.]" (Dkt. No. 42 at 27). This argument stems from the February 18 Memorandum, which states, "[t]his interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines," which will occur "only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices." (Dkt. No. 19-2 at 2). The Government's argument is unpersuasive. The mere fact that an agency *says* an action is not final because it maintains "discretion" to alter a policy is insufficient to *render* an action nonfinal. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." (citation omitted)); *Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

Here, the Government's insinuation that agency action is not final simply because the agency says so, would produce the absurd result of precluding judicial review of *any*

AMERICAN OVERSIGHT

policy that the agency says is not final. Indeed, if such a rule were followed, then an agency could avoid judicial review of its action in perpetuity simply by labeling its action as "interim" or "temporary" and stating that the agency maintains the ability to repeal or revise it in the future. In fact, this case demonstrates how an agency could potentially tie the judiciary's hands if the agency's action is not final simply because the agency says it is not.

In this case, the February 18 Memorandum took effect immediately upon issuance. (Dkt. No. 19-2 at 2). The Memorandum states it would "remain in effect until Secretary Mayorkas issues new enforcement guidelines." (*Id.*). It also states Secretary Mayorkas "anticipate[d] issuing these guidelines in less than 90 days," meaning the new guidance would be issued before May 19, 2021. (*Id.*). But that did not happen. *See* (Dkt. No. 63 at 3–4). In fact, in a separate challenge to the February 18 Memorandum, the Government represented to the district court that it "currently expect[s] that the Secretary will issue new immigration priorities in the beginning of July." *Arizona v. Dep't of Homeland Sec.*, No. 2:21-cv-00186-SRB, 2021 WL 2787930 (D. Ariz. June 7, 2021), Dkt. No. 85 at 2. Once again, the new guidance was not released. *See* (Dkt. No. 63 at 3–4). The Government now projects "the Secretary will issue new immigration enforcement priorities by the end of August or the beginning of September." (Dkt. No. 63 at 3–4). Notably, the Government "caution[s] that this is *only* [*its*] *current expectation*." (*Id.* at 4) (emphasis added). In other words, the Government's expectation could once again change, and the issuance of the new guidance could be delayed even longer. Thus, a purely subjective definition of nonfinality would be awfully convenient for the Government—but that is not what the

AMERICAN OVERSIGHT

law provides. Rather, because the agency-wide application of this guidance has an immediate and definite nature, it objectively demonstrates the agency's decision is indeed final. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Court therefore finds that the Memoranda satisfy the first condition.

b. Rights, Obligations, and Legal Consequences

The second condition that must be satisfied for a court to find that an agency's action is final is that the challenged action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Government argues the Memoranda do not satisfy this condition because the Memoranda do not change DHS's legal obligation to enforce the law in the manner prescribed in Sections 1226(c) and 1231(a)(2). (Dkt. No. 42 at 26–28). The Government also argues the Memoranda do not "change any person's legal status, confer any legal benefits, or have any 'legal consequences.'" (*Id.* at 27). Stated differently, the Government contends the Memoranda do not affect the rights or obligations of the States, aliens, or any other person or entity. In support, the Government points to the February 18 Memorandum, which states that the Memorandum does not "create any right or benefit, substantive or procedural, enforceable at law." (*Id.* at 27) (citing (Dkt. No. 19-2 at 8)). But once again, what the Memoranda say and do are different. The Court finds the Memoranda satisfy the second condition.

First, the Government's assertion that the Memoranda do not alter DHS's legal obligations to detain certain aliens under Sections 1226(c) and 1231(a)(2) is demonstrably false. In deciphering the meaning of Sections 1226(c) and 1231(a)(2) below, *see infra*

AMERICAN OVERSIGHT

Case 2:21-cv-00067 Document 115 Filed on 08/19/21 in TXSD Page 86 of 286

II.B.3.a., the Court goes to great lengths to discuss what obligations those statutory provisions create for DHS. In sum, Section 1226(c) obligates DHS to detain *all* aliens who fall within the ambit of that provision *when they are "released" from state custody*. Section 1231(a)(2) requires DHS to detain *all* aliens with final orders of removal "*during the removal period*."

The Memoranda require something quite different. Specifically, the February 18 Memorandum effectively substitutes a prioritization scheme in place of the enforcement mandates set forth in these statutory provisions. This new scheme creates two categories of aliens who are required to be detained: priorities and nonpriorities. *See* (Dkt. No. 19-2 at 4–7). It also sets forth a requirement that ICE agents obtain preapproval to detain aliens who are deemed nonpriorities. (*Id.* at 7). The plain meaning of Sections 1226(c) and 1231(a)(2) allows for neither this specific prioritization scheme nor its preapproval process; they simply require DHS to detain *all* aliens described therein at a certain time or for a specific duration. Because the Memoranda *require* DHS to enforce the law in a different way than what Sections 1226(c) and 1231(a)(2) prescribe, the Memoranda constitute a change in DHS's legal obligations. Such a change weighs in favor of classifying the Memoranda as final agency action. *See Texas*, 86 F. Supp. 3d at 648–49 (finding that DAPA is a final agency action, in part, because "[a]s evidenced by the mandatory language throughout the DAPA Memorandum requiring USCIS and ICE to take certain actions, the Secretary's Directive clearly establishes the obligations of the DHS and assigns specific duties to offices within the agency").

AMERICAN OVERSIGHT

Case 2:21-cv-00067 Document 00515990757 Page 87 Date Filed: 08/23/2021

Next, the Government contends the Memoranda do not alter the rights or obligations of the States or aliens in the country. The Court disagrees. Based on the record before the Court, the Memoranda affect Texas's legal obligation to provide Emergency Medicaid to certain noncitizens. "Emergency Medicaid is a *federally required* program *jointly funded* by the federal government and the *states*." (Dkt. No. 19-7 at ¶ 7) (emphases added). Illegal aliens are eligible to participate in this program. *See* (*Id.*); 8 U.S.C. § 1611(b)(1)(A). An alien in Texas who is eligible for Emergency Medicaid and presently in state custody can benefit from the program after being released.[24] Texas is therefore legally obligated to bear part of the cost of Emergency Medicaid for aliens who qualify for the program and are not detained by ICE after being released from state custody.

But as should be clear by now, not all aliens released from state incarceration are returned to society. And that is because of Sections 1226(c) and 1231(a)(2). Again, pursuant to Section 1226(c), DHS is *required* to detain *all* aliens who have committed certain serious offenses *as soon as* they are released from state custody. And per Section 1231(a)(2), DHS is *required* to detain certain aliens during their removal period. Instead, because of the Memoranda, DHS is no longer detaining all of these aliens as soon as they are released from state custody or during their removal periods. Texas will therefore have a legal obligation to share the cost of providing Emergency Medicaid to aliens who

[24] Indeed, even the Executive Branch in a website has stated that incarcerated individuals may apply for Medicaid coverage in their respective states and thereafter be eligible for benefits after release from custody. *See* HealthCare.gov, *Health coverage for incarcerated people*, https://www.healthcare.gov/incarcerated-people/.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004023

qualify for the program and, under the Memoranda, are not detained by ICE after being released from state custody.[25]

As for the rights of aliens, another district court has already concluded the Memoranda affect the rights of certain aliens presently detained. *See Hussein S.M. v. Garland*, No. CV 21-348 (JRT/TNL), 2021 WL 1986125, at *3 (D. Minn. May 18, 2021). As this Court noted in *Texas I*, "an [alien] who has been detained for six months may be entitled to release if 'it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" ____ F. Supp. 3d at ____, 2021 WL 2096669, at *31 (quoting *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505). In *Hussein S.M.*, a detained alien with a final of order of removal filed a petition for a writ of habeas corpus to secure his release from detention. 2021 WL 1986125, at *1. The district court granted the petition, relying on the civil immigration enforcement priorities set forth in the

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[25] The Court is also concerned that the Memoranda affect the States' legal obligation to provide a public-school education to certain noncitizens following their release from juvenile detention. For example, Texas is required by both federal and state law to provide noncitizen children with a public-school education. *See generally Plyler*, 457 U.S. 202, 102 S.Ct. 2382 (holding that a Texas statute that withheld state funds for educating children who were not "legally admitted" was unconstitutional); *see also LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005) ("In . . . *Plyler*, the [Supreme] Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens."); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) ("[T]he State's public education expenditures for the children of undocumented aliens are required by the equal protection clause[.]" (citing *Plyler*, 457 U.S. 202, 102 S.Ct. 2382)). This obligation would necessarily include juveniles released from the custody of the Texas Juvenile Justice Department ("TJJD") who are not detained by ICE because of the Memoranda. *See* (Dkt. No. 19-9 at ¶ 7) ("As Chapter 25, Texas Education Code, requires a child to attend school and as *Plyler* . . . prohibits denying undocumented children of illegal immigrants the right to attend public school, to the extent ICE does not take custody of non-citizen juveniles set to be released from TJJD custody, it is my understanding that those non-citizen juveniles who have not already received their General Educational Development or high school diploma attend Texas public schools after being released."). The Court is interested in further briefing on this issue at the next stage of this litigation.

AMERICAN OVERSIGHT

January 20 Memorandum and later reaffirmed in the February 18 Memorandum. *Id.* at *3. Because the alien in *Hussein S.M.* did not fall within one of the priority groups, the district court found "his removal is *unlikely to be imminent* despite ongoing removal enforcement." *Id.* (emphasis added). In short, *Hussein S.M.* demonstrates the Memoranda directly affect an alien's right to be free from prolonged detention. The Court therefore concludes the Memoranda affect the rights of and have significant legal consequences for detained aliens with final orders of removal.

In sum, the Court finds the Memoranda are the consummation of DHS's decision-making process and determine certain rights and legal obligations. Therefore, the Court concludes the Memoranda constitute final agency action under Section 704 of the APA.[26]

3. Committed to Agency Discretion by Law

In determining whether an agency action is reviewable, the Court must also determine whether the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Accordingly, the Court now inquires whether the implementation of the new guidelines found in the Memoranda is "committed" to the Government's discretion by law.

The APA embodies a "basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). But this is "just" a

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[26] A district court in Florida concluded the February 18 Memorandum is unreviewable under the APA because it did not constitute final agency action. *Florida. v. United States*, No. 8:21-CV-541-CEH-SPF, 2021 WL 1985058, at *9 (M.D. Fla. May 18, 2021). The Court respectfully disagrees with this conclusion for the reasons set forth herein.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004025

presumption. *Lincoln*, 508 U.S. at 190, 113 S.Ct. at 2030. "'[R]eview is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* at 191, 113 S.Ct. at 2031 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985)). Where there is no meaningful standard to apply, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Lincoln*, 508 U.S. at 191, 113 S.Ct. at 2031 (quoting *Heckler*, 470 U.S. at 830, 105 S.Ct. at 1655).

One category of administrative decisions that courts "traditionally have regarded as 'committed to agency discretion'" is relevant to this discussion. *Id.* (citation omitted). Namely, "an agency's decision not to institute enforcement proceedings." *Id.* (citing *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655–56). Non-enforcement decisions, however, are only "presumptively unreviewable." *Heckler*, 470 U.S. at 832–33, 105 S.Ct. at 1656. The Supreme Court has outlined a narrow but clear roadmap to overcoming that presumption and a second, less–traveled path. As for the first: "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* As for the second: it may be "justifiably . . . found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4, 105 S.Ct. at 1656 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Although the Supreme Court has not (yet) found this latter type of "abdication," it has nevertheless instructed that any such inquiry should focus on "the statute

AMERICAN OVERSIGHT

conferring authority on the agency," which "might indicate that such decisions were not 'committed to agency discretion.'" *Heckler*, 470 U.S. at 833 n.4, 105 S.Ct. at 1656 n.4; *see also Texas DAPA*, 809 F.3d at 166–67.

In this case, the Government argues the States' claims are unreviewable because the new guidelines contained in the February 18 Memorandum are committed to agency discretion by law. More precisely, the Government argues: (1) the substantive statutes in question, Sections 1226(c) and 1231(a)(2), do not set out the specific mandatory duties the States assert, that is, the duty to detain certain aliens subject to those two sections; (2) even if these statutes establish mandatory duties, the new guidelines "simply establish[] enforcement priorities" since they do "not direct ICE officials to cease detaining any particular noncitizen subject to either § 1226(c) or § 1231(a)(2)"; and (3) assuming the first two arguments fail, the Executive Branch may, in effect, dispense with a congressional mandate because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President." (Dkt. No. 42 at 28–30). Opposing the Government's suppositions, the States contend that, although the Government wields tremendous discretion in this area of immigration law, Sections 1226(c) and 1231(a)(2) limit this discretion by mandating the detention of certain aliens when they are released or during the removal period. (Dkt. No. 51 at 29–30). The Court now turns to each of these arguments.

a. Whether "Shall" Means "Must"

The Government first argues that "shall" in Sections 1226(c) and 1231(a)(2) does not impose any mandatory duties or guidelines for the Government to follow. The Court

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004027

disagrees. Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable under the INA "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

Recent Supreme Court precedent establishes "shall" means "must" in these sections. In *Johnson v. Guzman Chavez*, the Supreme Court noted "detention is mandatory" during an alien's removal period, as prescribed by Section 1231(a)(2). ____ U.S. ____, ____, 141 S.Ct. 2271, 2281 (2021) (citing 8 U.S.C. § 1231(a)(2)). And under Section 1226(c), "detention is mandatory and release is permitted in very limited circumstances" "[f]or certain criminal aliens and aliens who have connections to terrorism." *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)). In light of *Guzman Chavez*, it seems there is no dispute that Sections 1226(c) and 1231(a)(2) are mandatory.

This is not surprising. *Guzman Chavez*'s holding follows the well-established principle that Sections 1226(c) and 1231(a)(2) mandate the detention of certain aliens at specific points in time. *See Preap*, ____ U.S. at ____, 139 S.Ct. at 959 (finding under Section 1226(c) certain criminal aliens "*must* be arrested when 'they are released' from custody on criminal charges and . . . *must* be detained without a bond hearing until the question of their removal is resolved" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 835 ("§ 1226(c) makes clear that detention of aliens within its

AMERICAN OVERSIGHT

scope *must* continue 'pending a decision' on removal" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Zadvydas*, 533 U.S. at 683, 121 S.Ct. at 2495 ("After entry of a final removal order and during the 90-day removal period, however, aliens *must* be held in custody." (citing 8 U.S.C. § 1231(a)(2)) (emphasis in original)); *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716 (noting Section 1226 "*requir[ed]* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability" (emphasis added)); *Hosh v. Lucero*, 680 F.3d 375, 377, 381 (4th Cir. 2012) ("Section 1226(c) *requires* the mandatory federal detention, without the possibility of bond, of certain deportable criminal aliens '*when*' those aliens are released from other custody." (emphases added)); *Rodney v. Mukasey*, 340 F. App'x 761, 764 & n.3 (3d Cir. 2009) (per curiam) (interpreting "shall" in Section 1231(a)(2) to mean the Attorney General "*must*" detain the alien for a certain period (emphasis added)); *Khotesouvan v. Morones*, 386 F.3d 1298, 1300 (9th Cir. 2004) (observing that, in *Demore*, the Supreme Court "approved the *mandatory* detention of a criminal alien during removal proceedings under 8 U.S.C. § 1226(c) even in the absence of an individualized finding that the alien was unlikely to appear for his removal hearing if released on bond" (emphasis added)); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 & n.4 (9th Cir. 2008) (noting that detention under Section 1231(a)(2) is *mandatory*); *Nyonton v. Brackett*, No. 18-CV-481-PB, 2019 WL 1082203, at *2 (D.N.H. Mar. 7, 2019) (holding Section 1231(a)(2) is "crystal clear" in mandating the detention of aliens subject to Section 1231, especially with respect to individuals "who have been found inadmissible because of a controlled substance violation"); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 235 (S.D.N.Y. 2010) (explaining that, while Section 1226(a) provides ICE

AMERICAN OVERSIGHT

with the discretion to detain any alien pending a decision in removal proceedings, "[a]liens who have been convicted of certain enumerated offenses, however, including drug crimes . . . *are subject to mandatory detention*" pursuant to Sections 1226(c)(1)(B), 1227(a)(2)(B), and INA § 126(c) (emphasis added)).

Accordingly, the Court concludes, following *Guzman Chavez* and the foregoing overwhelming precedent, the word "shall" means "must" in Sections 1226(c) and 1231(a)(2). Consequently, the Government is required to detain certain criminal aliens and aliens with final orders of removal at certain points in time to comply with those statutes.

Despite the Supreme Court's clear interpretation of Sections 1226(c) and 1231(a)(2), the Government nevertheless argues that *Guzman Chavez* and, by extension, all other related court rulings are irrelevant here. The Government contends *Guzman Chavez* "did not address the Department of Homeland Security's discretion whether to detain individuals covered by 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a)(2)." (Dkt. No. 67 at 1). "Rather," according to the Government, *Guzman Chavez* "addressed under which authority certain individuals were detained and whether such individuals were entitled to bond hearings." (*Id.*). In short, the Government argues the Court should disregard *Guzman Chavez*'s statements on Sections 1226(c) and 1231(a)(2)—and the numerous court holdings that precede *Guzman Chavez*—because those were not central to the case's holding and thus were dicta that need not be followed. The Court disagrees.

Guzman Chavez's treatment of Sections 1226 and 1231 were central to its holding. The case's key question was whether certain aliens could be released on bond while

AMERICAN OVERSIGHT

petitioning for relief from removal. That question was necessarily answered by analyses of both sections—analyses that included looking at the mandatory nature of Sections 1226(c) and 1231(a)(2)'s detention provisions. The respondents in *Guzman Chavez*—aliens who were detained following their unlawful reentrance into the United States after previously being removed—sought release on bond while they were pursuing relief from removal. *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280. The respondents argued that Section 1226, which generally conferred discretion to the Government to detain aliens, provided them an avenue to be released on bond. *Id.* at ____, 141 S.Ct. at 2283–84. However, the Government in that action contended that Section 1231, which mandates detention of aliens with orders of removal, applied to the respondents, effectively requiring their detention to be *without* bond. *Id.*; *see also* Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897), 2020 WL 4938065. The Supreme Court was thus required to determine which INA provision applied to the respondents. This task necessitated a finding as to whether, and in what circumstances, detention was mandatory under the relevant statutes. *See Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280–82.

Guzman Chavez ultimately held Section 1231 applies to the respondents since they had effectively been ordered removed through the reinstatement of their previous orders of removal. *See id.* at ____, 141 S.Ct. at 2287–91. In reaching this conclusion, the Supreme Court compared Section 1226, which, again, applies to the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States," *id.* at ____, 141 S.Ct. at 2281, with Section 1231, which applies to an alien ordered removed, *id.*

AMERICAN OVERSIGHT

In the Supreme Court's discussion of Section 1226, it noted "DHS," pursuant to that provision, "*may* arrest and detain the alien," pending that alien's removal decision. *Id.* Such an alien "may generally apply for release on bond or conditional parole." *Id.* Nevertheless, the Supreme Court probed further, stating "there is one exception" to this general rule: for certain criminal aliens, "*detention is mandatory*" under Section 1226(c). *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)) (emphasis added). Like Section 1226(c)'s exception, the Supreme Court stated Section 1231's detention is "mandatory" precisely because of Section 1231(a)(2). *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2281 (citing 8 U.S.C. § 1231(a)(2)). Thus, *Guzman Chavez*'s interpretation of Sections 1226(c) and 1231(a)(2) as mandating detention was essential to the case's holding.

Tellingly, the Government itself admitted during briefing in *Guzman Chavez* that Section 1226(c) imposed a mandatory duty to detain certain criminal aliens.[27] The Government explained, although "Section 1226(a) makes detention discretionary," "a separate provision, Section 1226(c), *makes an exception* to that general rule, providing that the government 'shall' take into custody and not release certain criminal aliens." Brief for Petitioner, 2020 WL 4938065, at *5 (No. 19-897) (emphasis added). The Government also argued in its reply brief that the Supreme Court's "intervention" in *Guzman Chavez* would "determine[] whether Section 1226(c)—which provides for the *mandatory* detention of certain criminal aliens—applies to aliens who have reinstated orders of

[27] As another Texas court said of a similar change in litigation position, "[b]ut that was then, and this is now." *Texas v. United States*, 340 F. Supp. 3d 579, 611 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded*, 945 F.3d 355 (5th Cir. 2019), *rev'd and remanded sub nom. California v. Texas*, 141 S.Ct. 2104 (2021).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004032

removal and are in withholding-only proceedings." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 3124376, at *7 (emphasis added). Likewise, with respect to Section 1231(a)(2), the Government stated it had "long read" the statute "to *require* the detention of terrorist and *criminal* aliens." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 7249055, at *17 & footnote (emphases added). Thus, in conjunction with *Guzman Chavez*, the Court takes the Government at its word and finds "shall" means "must" in Sections 1226(c) and 1231(a)(2) with respect to the detention of certain criminal aliens.

Second, even if the clear principles delineated in *Guzman Chavez*, *Preap*, *Zadvydas*, and the like are dicta, they are persuasive, nonetheless. As the Fifth Circuit has noted, "[i]t is well established in this circuit that, although we are 'not bound by dicta, even of [this court,] [d]icta of the Supreme Court are, of course, another matter.'" *Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152, 154 n.3 (5th Cir. 2018) (quoting *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015)).[28] Thus, the Court follows the Fifth Circuit

[28] Likewise, the Eleventh Circuit concluded, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (collecting cases with similar findings) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)). Indeed, "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold," so this Court cannot "blandly shrug them off because they were not a holding." *See United States v. Montero-Camargo*, 208 F.3d 1122, n.17 (9th Cir. 2000) (en banc) (citations omitted). Other circuits agree. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (considering that dicta "must be given considerable weight and cannot be ignored in the resolution of [a] close question"); *Oyebanji v. Gonzales*, 418 F.3d 260, (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004033

and its sister circuits and defers to *Guzman Chavez*, *Preap*, *Zadvydas*, and other related Supreme Court precedent even if the statements on Sections 1226(c) and 1231(a)(2) in those cases were dicta, as the Government contends. The Court is not free to treat Supreme Court dicta as cavalierly as the Government suggests. Accordingly, the Court applies the caselaw discussed above and holds that the "shall" found in Sections 1226(c) and 1231(a)(2) means "must," imposing on the Government a duty to detain certain criminal aliens and those with final orders of removal when released and during the removal period, respectively.

Arguments about dicta aside, the Court's own statutory interpretation of Sections 1226(c) and 1231(a)(2) also leads to the conclusion that "shall" means "must" in those sections. *See* Scalia & Garner, *supra*, at 53 ("*Every* application of a text to particular circumstances entails interpretation." (emphasis added)).

264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's 'considered dicta.'" (quoting *McCoy*, 950 F.2d at 19)); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[A]s we and our sister circuits have frequently noted, . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (internal quotation marks omitted) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003))); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (noting that lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" (citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996))); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that lower courts "should respect considered Supreme Court dicta"); *McDonough v. Anoka County*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts . . . are not 'free to limit Supreme Court opinions precisely to the facts of each case.' Instead, federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings[.]'" (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993))); *Bangor Hydro–Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-particularly when expressed so unequivocally.").

AMERICAN OVERSIGHT

"The task of statutory interpretation begins and, if possible, ends with the language of the statute." *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013). "When the language is plain, [the court] 'must enforce the statute's plain meaning, unless absurd.'" *Id.* (quoting *In re Nowlin*, 576 F.3d 258, 261–62 (5th Cir. 2009)); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))). "A statute is ambiguous if it is susceptible of more than one accepted meaning." *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003). Thus, as before, regarding interpreting Section 1231(h), the Court must initially determine whether "all but one of the meanings" of the word "shall" in Sections 1226(c) and 1231(a)(2) is "ordinarily eliminated by context." *Deal*, 508 U.S. at 132–33, 113 S.Ct. at 1996–97.

For this analysis, the Court applies "the traditional means of statutory interpretation, which include the text itself, its history, and its purpose." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) (citation omitted). Put differently, the Court must initially "look first to the word's ordinary meaning," *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 131 S.Ct. 1885, 1891, 179 L.Ed.2d 825 (2011),

AMERICAN OVERSIGHT

since "[s]tatutory language has meaning only in context." *Graham Cnty.*, 545 U.S. at 415, 125 S.Ct. at 2449 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 382, 160 L.Ed.2d 271 (2004)). Only "when traditional methods of statutory construction fail to reveal a provision's meaning" may the Court "conclude that it is ambiguous." *Perry*, 102 F.3d at 147.

"[T]he word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, ____ U.S. ____, ____, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020); *see also* Scalia & Garner, *supra*, at 112 ("When drafters use *shall* and *may* correctly, the traditional rule holds—beautifully."). The Supreme Court has nonetheless cautioned, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co. v. Hecht*, 95 U.S. 168, 170, 24 L.Ed. 423 (1877).

This need for legislative intent to demonstrate "shall" should be construed as "must" against the government is present in Supreme Court jurisprudence. In *Texas I*, this Court identified *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), a Supreme Court case upon which the Government relies, (6:21-cv-3, Dkt. No. 82 at 19); (6:21-cv-3, Dkt. No. 83 at 25–26, 34); (6:21-cv-16, Dkt. No. 42 at 36–38), as an apt example of the need for legislative intent to determine that "shall" connotes a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *33. In *Castle Rock*, the respondent claimed her due process rights were violated because a police department refused to enforce restraining orders despite language printed on the orders themselves stating that an "officer shall arrest" a restrained person where probable cause of a

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004036

violation was evident. 545 U.S. at 754, 759, 125 S.Ct. at 2802, 2805. The Supreme Court, however, found "the presence of seemingly mandatory legislative commands" like "shall" could not automatically impose a "true mandate" against the police. *Id.* at 760–61, 125 S.Ct. at 2805–06. What was needed—and lacking in *Castle Rock*—was "some stronger indication" from the legislature. *Id.* at 761, 125 S.Ct. at 2806. Such an "indication" was not present because the "shall" used in the restraining orders was "not perceptibly more mandatory than" other state statutes using the word "shall" where the police force was traditionally accorded discretion. *Id.*; *see also Chicago v. Morales*, 527 U.S. 41, 61–62 n.32, 119 S.Ct. 1849, 1861 n.32, 144 L.Ed.2d 67 (1999) (noting that interpreting "shall" as mandatory in the context of police action "flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances").

With the foregoing in mind, this Court in *Texas I* previously explained how a "stronger indication" from Congress may be gleaned. In *Richbourg Motor Co. v. United States* and *Escoe v. Zerbst*, the Supreme Court noted one "indication" sufficient to conclude that the word "shall" in a statute imposes an obligation upon the Government is present when the statute's manifest purpose is to protect the public or private interests of innocent third parties. *See Richbourg Motor Co. v. United States*, 281 U.S. 528, 533–34, 50 S.Ct., 385, 387–88, 74 L.Ed. 1016 (1930); *Escoe v. Zerbst*, 295 U.S. 490, 494, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34. The Court finds it appropriate to reiterate its explanations of these cases here.

AMERICAN OVERSIGHT

In *Richbourg Motor Co.*, the Supreme Court expressly found reason to avoid the rule in *Hecht* where a statute provided that an officer "shall" take possession of a vehicle used in the act of transporting liquor. 281 U.S. at 533–34, 50 S.Ct. at 387–88. After noting that the statute in question was "in form mandatory throughout," the Court explained it "detail[ed] . . . successive steps to be taken, which, if followed, [led] unavoidably to forfeiture under that section . . . , *with the important consequence of protecting the interests of innocent third persons*." *Id.* (emphasis added). These qualities of the relevant text, the Supreme Court explained, "suggests a definite purpose to make the protection effective" by imposing a mandatory duty. *Id.*

Five years after *Richbourg Motor Co.*, the Supreme Court in *Escoe* concluded that any doubt regarding the mandatory nature of a statutory "shall" is "dispelled when we pass from the words alone *to a view of ends and aims*." 295 U.S. at 492–93, 55 S.Ct. at 819–20 (emphasis added). In *Escoe*, the relevant statute appeared to require a trial court to bring a probationer to court to revoke his probation. *Id.* The Supreme Court determined, because it was "[c]lear[] [that] the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation," the presentment of the probationer was "necessary, or so the Congress must have thought, to protect the individual against malice or oppression." *Id.* at 493, 55 S.Ct. at 820. Thus, *Escoe* concluded the "shall" in the relevant statute was "mandatory in meaning as well as mandatory in form." *Id.* at 494, 55 S.Ct. at 820. Leaving no doubt, the Supreme Court stated, "[s]tatutes are not [optional] when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect." *Id.*; *see also Ralpho*

AMERICAN OVERSIGHT

v. Bell, 569 F.2d 607, 627–28 & n.149 (D.C. Cir. 1977) (applying *Escoe* to "prefer a construction" of mandatory language in a statute guiding governmental officials' discharge of duties "that bestows the benefits of the Act on those for whom it was chiefly intended").

Given the caselaw, the key in this case is whether Sections 1226(c) and 1231(a)(2) demonstrate a purpose to protect public or private interests. If so, the word "shall," as used in both sections, would connote a requirement against the Government in the manner envisioned by *Richbourg Motor Co.* and *Escoe*. Based on the following, the Court finds that the statutes do indeed demonstrate such a purpose.

The Supreme Court in *Demore* clearly explains that the purpose of Section 1226(c) was to protect third-party interests: that of the states, citizens, and legal immigrants of this country. Essentially, Section 1226(c) was enacted "against a backdrop of wholesale failure by the INS [ICE's predecessor] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. "INS' near-total inability to remove deportable criminal aliens imposed" overpopulation in federal and state prisons, caused monetary costs, took away immigration opportunities that could have been provided to others, and increased crime in the Nation's communities. *Id.* at 518–20, 123 S.Ct. at 1714–15. Crucially, "Congress also had before it 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, 123 S.Ct. at 1715. Before Section 1226, "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal

AMERICAN OVERSIGHT

proceedings when those aliens were determined not to present an excessive flight risk or threat to society." *Id.* (citing 8 U.S.C. § 1252(a) (1982 ed.)). Thus, to alleviate these issues, Congress "enacted 8 U.S.C. § 1226, *requiring* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521, 123 S.Ct. at 1716 (emphasis added). Given *Demore*'s findings, the purpose of Section 1226 is to protect the public and private interests of third parties, namely, the states, the citizens, and legal immigrants of the United States.

Considering the context and purpose of Section 1226, it is no wonder why Subsection (c) "subtract[s]," from the discretion given to the Government in Section 1226(a). *See Preap*, ____ U.S. at ____, 139 S.Ct. at 966. In fact, it does more than that. Subsection (c) also subtracts from the general "broad discretion" that the Attorney General originally had prior to the enactment of Section 1226. *See Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. "Shall" in Section 1226(c), therefore, must be construed to mean "must."

Like Section 1226(c), Section 1231(a)(2) was enacted to protect public and private interests of the states and the people of the United States. As the Supreme Court noted in *Zadvydas*, "protecting the community from dangerous aliens" is a "statutory purpose" of that section. 533 U.S. at 697, 121 S.Ct. at 2502. What's more, Section 1231 "is part of a statute that has as its basic purpose effectuating an alien's removal," a purpose related to the community's protection. *Id.* Coupled with *Demore*'s detailed explanation of the burdens criminal aliens impose on both the country and its people when the Government fails to deport them, 538 U.S. at 518–20, 123 S.Ct. at 1714–15, it is evident that Section 1231(a)(2)'s purpose was to similarly protect the states, the citizens, and legal immigrants'

AMERICAN OVERSIGHT

interests against the harmful effects the Government's failure to remove certain aliens would bring about.

Additionally, numerous federal courts—including this Court—have recognized *other* parts of Section 1231 use "shall" as a mandatory command. *See Shuaibu v. Gonzales*, 425 F.3d 1142, 1144 (8th Cir. 2005) (interpreting the "shall" in Section 1231(b)(1)(C) to mean the Attorney General "must" attempt to remove the alien to certain countries); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (interpreting "shall" in Section 1231(a)(3) to mean all aliens ordered released "must" comply with supervision requirements); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *32–37 (analyzing Section 1231(a)(1)(A) and holding the "shall" in that provision imposes a mandate on the Government to deport aliens with final orders of removal within 90 days). These interpretations of "shall" as mandatory in other parts of Section 1231 are yet further indication the "shall" in Section 1231(a)(2) bears the same meaning, because "a word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra*, at 170; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Thus, for all these reasons, the "shall" in Section 1231(a)(2) necessarily means must.

The Government does not disagree that Congress enacted Sections 1226(c) and 1231(a)(2) to protect public or private interests. Rather, the Government demurs that a statutory purpose of protecting third parties, as held in *Richbourg Motor Co.* and *Escoe*,

AMERICAN OVERSIGHT

is not a "stronger indication," per *Castle Rock*, to make "shall" mandatory against any governmental actor. (Dkt. No. 42 at 36–38); *see Richbourg*, 281 U.S. at 533–34, 50 S.Ct., at 387–88; *Escoe*, 295 U.S. at 493–94, 55 S.Ct. at 820; *Castle Rock*, 545 U.S. at 761, 125 S.Ct. at 2806. In making this argument, the Government reasons that the "protection of a third party" rationale *cannot* serve as a stronger indication because, it claims, the very "statute [in *Castle Rock*] concerned enforcement of restraining orders entered to benefit a 'protected person.'" (*Id.* at 37–38) (emphasis omitted) (quoting *Castle Rock*, 545 U.S. at 758–59, 125 S.Ct. at 2804–05). In doing so, however, the Government ignores the Supreme Court's holdings in *Richbourg Motor Co.* and *Escoe*. *See* (*Id.* at 36–39). In short, the Government implies that *Castle Rock* overruled *Richbourg Motor Co.* and *Escoe sub silentio*. That argument fails.

As an initial matter, this Court cannot ignore *Richbourg Motor Co.* and *Escoe* where the Supreme Court or the Fifth Circuit has not expressly instructed it to do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Lopez v. City of Hous.*, Civil Action No. H-09-0420, 2009 WL 1456487, at *15 (S.D. Tex. May 22, 2009) (Lake, J.) ("[I]t is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals." (quoting *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004042

920, 925 (S.D. Tex. 1997) (Jack, J.))). The Court did not disregard those cases in *Texas I*, nor will it disregard them here.[29]

But even if the Court could ignore *Richbourg Motor Co.* and *Escoe*, *Castle Rock* is easily distinguishable from this case. The state statute ostensibly mandating the police to enforce restraining orders in *Castle Rock* was drafted upon a background of "[a] well established tradition of police discretion" that "ha[d] long coexisted with apparently mandatory arrest statutes." *Castle Rock*, 545 U.S. at 760, 125 S.Ct. at 2805–06 (citing 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980)). A similar tradition is not present with respect to Sections 1226(c) and 1231(a)(2). As explained above, it was precisely the federal government's "wholesale failure" "to deal

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[29] The Court also notes that its decision in *Texas I* did not rely entirely on the protection of "public or private interests" rationale explained in *Richbourg Motor Co.* and *Escoe* to support its finding of a "stronger indication" that the "shall" in 8 U.S.C. § 1231(a)(1)(A) connoted a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34–35. Instead, the Court performed a full statutory interpretation of the word "shall" in Section 1231(a)(1)(A) and relied on numerous precedents in the Fifth Circuit and sister circuits demonstrating the mandatory nature of that word. *Id.* at *33–38 (noting the Court had examined "the text, context, statutory history, and precedent demonstrating that 'shall' means *must* in section 1231(a)(1)(A)" (emphasis in original)). In contrast to that comprehensive analysis, the Government's current lone attack on the Court's prior synthesis of the rules from *Hecht*, *Castle Rock*, *Richbourg Motor Co.*, and *Escoe* is lacking. Nevertheless, despite the in-depth analysis the Court undertook in *Texas I*, a district court in Arizona arrived at a different conclusion, holding that "shall" does not mean "must" in 8 U.S.C. § 1231(a)(1)(A). *Arizona*, 2021 WL 2787930, at *9–10. That court's rationale was that the legislative intent required for Section 1231(a)(1)(A) to be mandatory—per *Castle Rock*—was not present. *Id.* The court based its holding on (a) the statutory scheme which apparently contemplated removals of aliens outside the 90-day period, (b) the Government's broad discretion to remove aliens at any stage of the removal process, and (c) some legislative history showing that the 90-day period contemplated in the section was intended to be "merely" a "target" date "rather than a statutory mandate." *Id.* Therefore, according to the *Arizona* court, "shall" did not mean "must" in Section 1231(a)(1)(A). *Id.* Like the Government in this case, the district court neither cited to nor discussed *Richbourg Motor Co.* and *Escoe*. This Court respectfully disagrees with the court in *Arizona* and the Government, having thoroughly probed the statutory text, the purpose of the statutes, and legislative history of Sections 1231(a)(1)(A) in *Texas I*, and Sections 1226(c) and 1231(a)(2) in this Memorandum Opinion and Order.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004043

with increasing rates of criminal activity by aliens" that prompted Congress to *limit* the Executive's discretion in such matters by enacting Section 1226. *See Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. Such specific legislative intent, backed by Supreme Court acknowledgment, was not present in the statute interpreted in *Castle Rock*. *Cf.* 545 U.S. at 760–61, 125 S.Ct. at 2805–06.

Furthermore, the Government's contention that Sections 1226(c) and 1231(a)(2) do not confer a mandatory duty against the Government goes against an analysis of the statutes' text within the whole statutory scheme. The Supreme Court has noted that "[t]he word 'may' customarily connotes discretion" and that such a "connotation is particularly apt where . . . 'may' is used in contraposition to the word 'shall.'" *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (citing *Haig v. Agee*, 453 U.S. 280, 294 n.26, 101 S.Ct. 2766, 2775 n.24, 69 L.Ed.2d 640 (1981)). That principle proved crucial in *Jama*, where the Supreme Court held that because Section 1231(b)(2) of the INA states that the Attorney General "shall remove" an alien to a designated country, it would be inappropriate to read as mandatory another provision explaining that the Attorney General "may" disregard the designation if certain circumstances arise. *Id.* This principle applies to this case as well.

Section 1231(a)(2) states that the Attorney General "shall" detain certain aliens "during the removal period," which is defined to be a period of 90 days when an alien is ordered removed. 8 U.S.C. § 1231(a)(1)–(2). Before Section 1231(a)(2), Subsection (a)(1)(C) provides that the removal period "shall" be extended beyond 90 days if certain circumstances arise, and the alien "may" remain in detention during that extended

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004044

period. *Id.* § 1231(a)(1)(C). Again, it would be absurd if Section 1231(a)(2)—with its use of "shall"—is read to provide merely discretionary authority to the Government to detain people during the removal period when Section 1231(a)(1)(C)—using "may"—clearly provides discretion to the Government to detain people *after* the initial 90-day removal period.

Likewise, Section 1226(c) clearly juxtaposes "may" and "shall" so that there is no ambiguity as to whether the "shall" used in 1226(c)(1) imposes a mandatory duty. Subsection (c)(1) states that the Attorney General "shall" detain certain aliens "when the alien is released." 8 U.S.C. § 1226(c)(1). Just right after that, Subsection (c)(2) notes that the Attorney General "may" release aliens described in Subsection (c)(1) "only if" certain circumstances are present. *Id.* § 1226(c)(2). As such, for Subsection (c)(2) to have any meaning, Subsection (c)(1) must be read as a mandate: the Attorney General *must* detain aliens when released and such aliens *may* be released *only if* certain situations call for it. If Subsection (c)(1) is not interpreted in this way, then Subsection (c)(2)—the release provision—loses its significance. It would be superfluous for Congress to state how certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place. This analysis of the two statutes within the overall scheme indeed tracks how the Supreme Court and other federal courts have construed Sections 1226(c) and 1231(a)(2), as described more fully above.

AMERICAN OVERSIGHT

b. Whether "Prioritization" Contravenes Congressional Mandates

Having concluded that "shall" means "must" in Sections 1226(c) and 1231(a)(2), the Court turns to the Government's second argument in support of its assertion that the new guidelines in the February 18 Memorandum are committed to agency discretion by law. That is, regardless of the relevant sections' mandatory nature, the new guidelines "simply establish[] enforcement priorities" because they do "not direct ICE officials to cease detaining any particular noncitizen." (Dkt. No. 42 at 28–29). Put differently, the Government argues that the guidelines do not *actually* stop detentions and, instead, merely prioritize who gets detained first. As a result, the Government concludes that the guidelines do not contravene the statutes. *See* (*Id.*). Thus, in essence, the Government argues that it has discretion to determine the *timing* of when certain aliens should be detained—if not the discretion to determine *who* gets detained. This argument fails as well.

Although the Government describes the February 18 Memorandum as only a reprioritization of immigration enforcement priorities, a review of the Memorandum itself establishes that it is more than that. *See Texas DAPA*, 809 F.3d at 171–72 ("Although the DAPA Memo facially purports to confer discretion, the district court determined that nothing about DAPA genuinely leaves the agency and its employees free to exercise discretion." (cleaned up)). The new guidelines violate the statutory commands of Sections 1226(c) and 1231(a)(2) which are: to detain certain aliens "when the alien is released," per Section 1226(c), or "during the removal period," per Section 1231(a)(2).

AMERICAN OVERSIGHT

The Government opines that the February 18 Memorandum "directs 'officers and agents . . . to exercise their discretion thoughtfully' after consideration 'of all relevant facts and circumstances'" concerning the arrest, detention, or removal of criminal illegal aliens. (Dkt. No. 42 at 29) (alteration in original) (citing Dkt. No. 42-2 at 4). That statement demonstrates that the new guidelines wade into areas that are not committed to agency discretion. *See* (*Id.*). Because "shall" means "must" in Section 1226(c), the Executive Branch is required to detain criminal aliens who have committed "*any* offense covered in section 1182(a)(2)," "*any* offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)," or *any* alien who "is deportable under section 1227(a)(2)(A)(i)," "inadmissible under section 1182(a)(3)(B)," or "deportable under section 1227(a)(4)(B)." 8 U.S.C. § 1226(c)(1)(A)–(D) (emphases added). This leaves no room for the Executive's agent to "thoughtfully" exercise discretion. *See* (Dkt. No. 42 at 29). And crucially, to protect the public, Congress mandated that *any* alien falling under any of these categories must be detained "when the alien is released" from state custody. *Id.* Likewise, Section 1231(a)(2) requires both the detention of aliens who possess orders of removal *and* aliens who have been found "inadmissible under section 1182(a)(2)," "1182(a)(3)(B)," or "deportable under section 1227(a)(2) or 1227(a)(4)(B)."[30] *Id.* § 1231(a)(2). And, like Section 1226(c),

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[30] In *Texas I*, the Government argued that Section 1231(a)(1)(A)'s use of the word "shall" could not have meant "must" because at least one other "shall" in Section 1231 is not mandatory (at least according to the Government). *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35. That other "shall" is apparently in Section 1231(a)(2) which reads, as stated earlier: "During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under [certain circumstances]." *Id.* The Government contended that reading "shall" as mandatory in the first sentence of Section 1231(a)(2) would make the second sentence (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004047

Congress in Section 1231(a)(2) mandated the timing of such detention: the aliens must be detained "during the removal period." *Id.*

Because of the clear mandates set forth in Sections 1226(c) and 1231(a)(2), determining whether and when an alien should be detained is not a decision committed to agency discretion. And by prioritizing the detention of some aliens over others, the Government has effectively conferred upon itself discretion as to the timing of detention—discretion it does not have. Put differently, the Government has assumed a discretionary power that Congress has explicitly foreclosed. Such a maneuver is impermissible. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446 ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." (alteration in

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superfluous. *Id.*; *see also* (6:21-cv-3, Dkt. No. 82 at 21); (6:21-cv-3, Dkt. No. 83 at 34). The Court found the argument unpersuasive, finding that there was a distinction between the two clauses. *Id.* As the Court held, the first clause of Section 1231(a)(2) mandates the act of detaining. *Id.* (citing *Rodney*, 340 F. App'x at 764). The second clause, on the other hand, prohibits the release of certain individuals. *Id.* Thus, the Attorney General may in some circumstances "release" those whom he has "detain[ed]." *See* 8 U.S.C. § 1231(a)(2). Section 1231 itself prescribes the conditions through which an alien—who is presumably presently detained—may pursue a "stay" and a "release." *Id.* § 1231(c)(2)(A), (C). In fact, it could easily be said that the prohibition on releasing certain aliens demonstrates that Congress assumed *all* aliens would be detained—because they "shall" be. Thus, the Court concluded in *Texas I* that the Government's "textual" argument failed. In this case, the Government briefly restates its argument from *Texas I* in an attempt to persuade the Court to change its disposition. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35; *see also* (Dkt. No. 42 at 39). The Court remains unpersuaded and adopts its prior conclusions from *Texas I* as discussed in this footnote.

AMERICAN OVERSIGHT

original) (citation omitted) (citing U.S. Const. art. II, § 3)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 956, 151 L.Ed.2d 908 (2002) (finding that an agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

"Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets." *Preap*, ____ U.S. at ____ n.6, 139 S.Ct. at 969 n.6 (emphasis in original). In this case, Section 1226(c)'s "when . . . released" language "clarifies when the duty to arrest is triggered: upon release from criminal custody." *Id.* at ____, 139 S.Ct. at 969. And as a logical extension of that reasoning, Section 1231(a)(2)'s "during the removal period" language also clarifies when a duty to arrest is triggered: when the alien is provided with a final order of removal.[31] *See* 8 U.S.C. § 1231(a)(1)–(2). In sum, Congress has clearly specified when the *duty* to detain is *triggered*: when the alien is released as provided by Section 1226(c) and during the removal period for Section 1231(a)(2). *When* that duty to detain is triggered is not left for the agency to decide. Thus, choosing to detain certain aliens "when . . . released," *see* Section 1226(c), or "during the removal period," *see* Section 1231(a)(2), over others who are mandated to be detained at those specific points in time is not left to agency discretion. Indeed, it is a violation of the clear letter of the law. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446.

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[31] For criminal aliens in state custody, the 90-day period does not start until they are released from state confinement. *See* 8 U.S.C. § 1231(a)(1)(B)(iii).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004049

c. Whether the Executive may "Dispense" with Laws

Finally, the Government argues that the Memoranda are committed to agency discretion because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President" and that such "discretion" is "greatly magnified" in the immigration law context. (Dkt. No. 42 at 29–30) (citing *Reno*, 525 U.S. at 490, 119 S.Ct. at 946). As this Court stated in *Texas I*, "whatever 'inherent authority' the Executive may have in the area of immigration, that authority—along with the executive Power—does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws." ____ F. Supp. 3d at ____, 2021 WL 2096669, at *36. The Government's suggestion that the Executive's discretion is so significant that it may, in effect, dispense with laws has significant implications for the separation-of-powers system enshrined in the Constitution. The subject is therefore worth addressing, albeit briefly, at this early stage in the litigation. However grand the Executive's discretion might be in enforcing immigration laws, the Constitution does not empower the Executive to set forth a policy that, in effect, dispenses with a congressional immigration mandate.[32]

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[32] This proposition does not include circumstances in which the President is asked to enforce a law that is unconstitutional or, more specifically, a law that usurps Executive authority. *See* Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 621–22 (1994). After all, the Constitution commands that, "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, *and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.'" U.S. Const. art. II, § 1, cl. 8 (emphasis added). The Government, however, does not assert that Sections 1226(c) or 1231(a)(2) are unconstitutional. *See* (Dkt. No. 42).

AMERICAN OVERSIGHT

Concern over the Executive's power to dispense with laws dates back to before the founding of this Nation. The Framers of the Constitution were well aware of how the English Crown had abused the dispensing power a century prior to the ratification of the Constitution. *See* Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 118 (2020) (concluding that the Framers addressed the royal "prerogatives of suspending or dispensing with the laws" in the Take Care Clause "[g]iven that the Committee [of Detail] explicitly dealt with virtually every one of the royal prerogatives, and especially the notorious prerogatives that had animated the overthrow of Charles I and James II"); Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell & Samuel L. Bray, *The Constitution of the United States* 317 (Robert C. Clark et al. eds., 2d ed. 2013) (opining that the President's duty to "'take care that the laws be faithfully executed' . . . means that the president is not permitted to dispense with or suspend statutes the way King James II did before the Glorious Revolution of 1688"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 797–98 & n.95, 804–09 (2013) (detailing how the "suspending power" was abused by English Monarchs, such as James II, and how that history influenced Americans in limiting "[t]he executive Power"); *see also* Randy Barnett & Evan Bernick, *The Letter & The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 20–21 (2018) (contending the Founding Fathers constructed the new American government as a fiduciary of We the People, "bound by fiduciary duties to *honor the law*, . . . *remain loyal to the public interest*, . . . and *account for violations of these duties*." (emphasis added) (citations and quotations omitted)). As a

AMERICAN OVERSIGHT

prime example, King James II dispensed with the Test Acts,[33] which effectively barred Catholics from holding government or military office, "to create an enlarged standing army under the control of Catholic officers . . . and . . . put Catholic peers in key positions in the Privy Council and the government" because he did "[n]ot trust[] Protestant militias and gentry to protect him from rebellion[.]" McConnell, *supra*, at 116; *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 691 (2014) ("King James enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters."); Delahunty & Yoo, *supra*, at 805–06 ("James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics."). This decision angered many Englishmen[34] and played a significant role in igniting the Glorious Revolution, which resulted in William III and Mary II replacing James II on the throne. Delahunty & Yoo, *supra*, at 807. Although no longer on

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[33] Specifically, the First Test Act, enacted in 1673, "was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation and receive the Anglican sacrament. Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily." Delahunty & Yoo, *supra*, at 805–06. The Second Test Act, enacted in 1678, "made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy." *Id.* at 806.

[34] This ire towards James II's use of the dispensing power is best captured in the English Bill of Rights, which says:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;
>
> By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament[.]

The Bill of Rights, 1 W. & M., c. 1 (1689).

AMERICAN OVERSIGHT

the throne, James II had already left his mark on the future powers of the Crown. Indeed, the English Bill of Rights of 1689 barred William III and Mary II and all future monarchs from suspending or dispensing with laws.[35]

By 1776, Americans had developed a similar sentiment about the dispensing power as had the English in 1689. *See* Price, *supra*, at 692. Notably, one of the grievances against King George III articulated in the Declaration of Independence[36] was that he "often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing him to halt their execution." Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy Rabkin as Amici Curiae Supporting Respondents at 5–6, *United States v. Texas*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (mem) (per curiam) (citing Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 224–27, 256–68 (1934)). This "allowed the king not only to dispense with the implementation of statutes, but also to force changes to their content—an essentially legislative power." *Id.* at 5–6; *see also* Declaration of Independence ¶¶ 3–4.

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[35] Specifically, the English Bill of Rights of 1689 provides: "[T]he pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal" and that "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal." The Bill of Rights, 1 W. & M., c. 2 (1689).

[36] These grievances are as follows:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good; He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Declaration of Independence ¶¶ 3–4.

AMERICAN OVERSIGHT

Prior to the United States Constitution's ratification, states were aware of this sentiment and crafted state constitutions of their own that barred the Executive from exercising the suspending or dispensing power. *See* Price, *supra*, at 692 ("Drawing from this English model, several states during the American revolutionary period adopted constitutions including prohibitions on executive suspension of laws."); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights In 1787 and 1791: What Individual Rights Are Really Deeply Rooted In American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534–35 (2012) (explaining that, at the time of the founding, "state constitutions . . . had constitutional clauses restricting the power to suspend or dispense with laws to the legislature"); *cf.* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425–26 (1999) (noting that, "[i]n the 1760s and 1770s, during the crisis that eventually tore apart the British empire, the American colonists had this long English heritage of popular rights to draw upon," including the English Bill of Rights, which "declared illegal certain actions of the crown, including its dispensing with laws"). By 1787, six states—Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia—had state constitutions containing provisions barring the Executive from exercising the suspending or dispensing power. *See* Del. Const. of 1776 Decl. of Rights, § 7 ("That no power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature."); Md. Const. of 1776 Decl. of Rights, § VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); Mass. Const. of 1780 pt. 1, art. XX ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the

AMERICAN OVERSIGHT

legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."); N.H. Const. of 1784 pt. 1, art. XXIX ("The power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for."); N.C. Const. of 1776 Decl. of Rights, § V ("That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised."); Va. Const. of 1776 Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."); *see also* Calabresi, Agudo & Dore, *supra,* at 1534. This number soon grew to eight after Pennsylvania added a provision prohibiting the Executive from suspending or dispensing with laws to its constitution in 1790, and Vermont, which already had such a provision in its constitution, became a state in 1791.[37] *See* Pa. Const. of 1790 art. IX, § 12 ("That no power of suspending laws shall be exercised, unless by the legislature, or its authority."); Vt. Const. of 1786 Decl. of Rights, § XVII ("The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by

[37] Not all states ratified constitutions at the time of the founding. Indeed, "two states, Connecticut and Rhode Island, retained their Colonial Charters issued by King Charles II and did not try to write new state constitutions or declarations of rights" at this time. Calabresi, Agudo, & Dore, *supra*, at 1543; *see also Narragansett Indian Tribe of R.I. v. State,* 667 A.2d 280, 280 (R.I. 1995) ("Rhode Island's first constitution was adopted in 1842 . . . ."); *Moore v. Ganim*, 660 A.2d 742, 772 (Conn. 1995) (Peters, C.J., concurring) ("Of the thirteen original states, Connecticut was the second to last to adopt a written state constitution, failing to do so until 1818.").

AMERICAN OVERSIGHT

authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for."); *see also* Calabresi, Agudo & Dore, *supra,* at 1535.

Although the Constitution does not contain a provision of its own explicitly prohibiting the Executive from dispensing with laws,[38] it in no way sanctions such action by the Executive for at least two reasons. First, the Constitution separates power among three branches, vesting executive power *exclusively* in the President and legislative power *exclusively* in Congress. *See* U.S. Const. art. I, § 1; U.S. Const. art. II, § 1; U.S. Const. art. III, § 1; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 130 S.Ct. 3138, 3146, 177 L.Ed.2d 706 (2010) ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" (quoting *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983))); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949) ("When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical

[38] In fact, "[a]t the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority." *See* Price, *supra*, at 693. The First Congress did, however, have an opportunity to bar the President from possessing such power in the Bill of Rights but failed to do so, "despite proposals from several state ratifying conventions that the Constitution be amended to include such a provision." *Id.* at 694. But "any negative inference from Congress's failure to act on these proposals seems weak." *Id.* Instead, "[i]t seems more likely that James Madison and other members of the First Congress failed to include an antisuspension provision in the Bill of Rights precisely because they thought the Constitution already made it clear enough that the President lacked such powers." *Id.*

AMERICAN OVERSIGHT

manner."). Dispensing of laws is, in effect, a *legislative* power. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13, 9 L.Ed. 1181 (1838); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (stating that the President does not have the dispensing power, in part, because only Congress has "dominion" over the laws—*i.e.*, the legislative power); *see also* Del. Const. of 1776 Decl. of Rights, § 7; Md. Const. of 1776 Decl. of Rights, § VII; Mass. Const. of 1780 pt. 1, art. XX; N.H. Const. of 1784 pt. 1, art. XXIX; N.C. Const. of 1776 Decl. of Rights, § V; Va. Const. of 1776 Bill of Rights, § 7; Pa. Const. of 1790 art. IX, § 12; Vt. Const. of 1786 Decl. of Rights, § XVII. As such, the Executive does not possess this power. *See Kendall*, 37 U.S. (12 Pet.) at 612–13 (stating that giving the President the dispensing power "would be clothing the President with a power entirely to *control the legislation of congress*, and paralyze the administration of justice" (emphasis added)); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids[.]"); *cf. Clinton*, 524 U.S. at 438, 118 S.Ct. at 2103 ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Second, the dispensing power conflicts with the Executive's *duty* to *faithfully* execute the laws. *See* U.S. Const. art. II, § 3. In vesting the executive power in the

AMERICAN OVERSIGHT

President,[39] the Constitution requires the President to channel that power to perform certain duties and prescribes how he or she is to carry out those duties.[40] *See id.* One of those duties, contained in the Take Care Clause, is that "he *shall take Care*[41] that the Laws be *faithfully*[42] executed[43] . . . ."[44] *Id.* (emphasis added) (footnotes added); *see Morrison v. Olson*, 487 U.S. 654, 689–90, 108 S.Ct. 2597, 2618, 101 L.Ed.2d 569 (1988) ("The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere

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[39] "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

[40] "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3.

[41] "*Care*: Regard; charge; heed in order to protection and preservation." Samuel Johnson, *A Dictionary of the English Language* (1755).
https://johnsonsdictionaryonline.com/1755/care_ns.

"*Care*: Charge or oversight, implying concern for safety and prosperity." Noah Webster, *American Dictionary of the English Language* (1828).
http://webstersdictionary1828.com/Dictionary/care.

[42] "*Faithfully*: Without failure of performance; honestly; exactly." Johnson, *supra.*
https://johnsonsdictionaryonline.com/1755/faithfully_adv.

"*Faithfully*: With strict adherence to allegiance and duty." Webster, *supra.*
http://webstersdictionary1828.com/Dictionary/faithfully.

[43] "*Execute*: To put in act; to do what is planned or determined." Johnson, *supra.*
https://johnsonsdictionaryonline.com/1755/execute_va.

"*Execute*: To carry into effect; as, to execute law or justice." Webster, *supra.*
http://webstersdictionary1828.com/Dictionary/execute.

[44] As stated above, the Court, at this time, declines to weigh in on the merits of the States' separate claim that the Memoranda violate the Take Care Clause. *See* footnote 4. However, the Court is interested in further briefing on this claim at the next stage of this litigation. In addition to any issues the Parties would like to bring to the Court's attention, the Parties should focus part of their briefing on whether the States can bring a Take Care Clause claim independent of or in conjunction with their APA claims.

AMERICAN OVERSIGHT

with the President's exercise of the 'executive power' and his *constitutionally appointed duty* to 'take care that the laws be faithfully executed' under Article II." (emphasis added) (footnote omitted)); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863, 102 S.Ct. 3440, 3444, 73 L.Ed.2d 1193 (1982) ("The Constitution imposes on the President the *duty* to 'take Care that the Laws be faithfully executed." (emphasis added) (quoting U.S. Const. art. II, § 3)); *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926) ("Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his *duty expressly declared* in the third section of the article to 'take care that the laws be faithfully executed.'" (emphasis added)); *see also Seila L. LLC v. Consumer Fin. Prot. Bureau*, ____ U.S. ____, ____, 140 S.Ct. 2183, 2228, 207 L.Ed.2d 494 (2020) (Kagan, J., concurring in part) ("To begin with, the provision—'he shall take Care that the Laws be faithfully executed'—speaks of *duty*, not power." (emphasis added) (quoting U.S. Const. art. II, § 3)); Letter from George Washington to Alexander Hamilton[45] (Sept. 7, 1792) (on file with the National Archives) ("It is my *duty* to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it; nor can the Government longer remain a passive spectator of the contempt with which they are treated." (emphasis added)); Letter from John Adams to Roger Sherman[46] (July 18, 1789) *reprinted in* 6 *The Works of John Adams, Second President of The United States* 427, 429–30 (Charles

[45] https://founders.archives.gov/documents/Washington/05-11-02-0040.

[46] https:// https://founders.archives.gov/documents/Adams/99-02-02-0682.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004059

Francis Adams ed., 1851) (stating that it is the President's "*duty* to take Care that the Laws be faithfully executed" (emphasis added)); Saikrishna B. Prakash, *Faithless Execution*, 133 Harv. L. Rev. F. 94, 97 (2020) ("The *duty* to see the laws faithfully executed implies that the President has the power—the executive power—to see the laws faithfully executed." (emphasis added)); Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014) ("To be sure, the President has the *duty* to take care that the laws be faithfully executed." (emphasis added)).

Given this duty to take care that the laws are faithfully executed, the Constitution's system of separation-of-powers, and the treatment of the dispensing power in American history and tradition, the Court is hard pressed, at this early stage of the litigation, to see how the Government can suggest that the Constitution confers upon the Executive the "discretion" to ignore clear congressional commands contained in Sections 1226(c) and 1231(a)(2). *See Kendall*, 37 U.S. (12 Pet.) at 612–13 ("It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a *dispensing power*, which has no countenance for its support in any part of the constitution . . . . To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and

AMERICAN OVERSIGHT

entirely inadmissible." (emphasis added)); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (stating that, because the President has the "high duty . . . to 'take care that the laws be faithfully executed,'" he must enforce a law in accordance with congressional commands where Congress has "prescribed . . . the manner in which [the] law shall be carried into execution"); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, *nor dispense with its execution*, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government." (emphasis added)); *see also Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435, 110 S.Ct. 2465, 2477, 110 L.Ed.2d 387 (1990) (White, J., concurring) ("The Executive Branch *does not have the dispensing power* on its own[.]" (emphasis added) (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 505, 35 S.Ct. 309, 325, 59 L.Ed. 673 (1915) (Day, J., dissenting) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); McConnell, *supra*, at 119 ("The Dispensing Power must not be confused with the exercise of prosecutorial discretion. The executive decision not to prosecute a particular person or class of persons for actions in violation of the law does not give them the legal right to violate the law."); Paulsen, Calabresi, McConnell & Bray, *supra*, at 317; Joseph Story, *Commentaries on the Constitution of the United States* 316 (Quid Pro Brooks 2013) (1833) ("[T]he duty imposed upon [the President] to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will 'preserve,

AMERICAN OVERSIGHT

protect, and defend the constitution.' The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people."); Kavanaugh, *supra*, at 1911 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws *regulating the executive branch*." (emphasis added)); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 620 (1994) (noting that the "Committee of Detail [may have] added the requirement that the President 'take care' that the laws be 'faithfully' executed" out of a "desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it"); Delahunty & Yoo, *supra*, at 797–98 & n.95, 804–09; Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873–74 (1994) ("The duty to execute the laws faithfully means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection." (footnotes omitted)); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 18 n.80 (1993) (quoting William Rawle, *A View of the*

AMERICAN OVERSIGHT

Constitution of the United States of America 148–49 (2d ed. 1829), for the proposition that the Take Care Clause "declares what is [the President's] *duty*" and that "[h]e is *bound* to enforce" the laws (first alteration in original) (emphases added)); William P. Marshall & Saikrishna B. Prakash, *Common Interpretation: Article II, Section 3*, National Constitution Center[47] ("At a minimum, the [Take Care] Clause means that the President may neither breach federal law *nor order his or her subordinates to do so*, for defiance cannot be considered faithful execution. *The Constitution also incorporates the English bars on dispensing or suspending the law*, with some supposing that the Clause itself prohibits both." (emphases added)).

Instead, the Executive—and thus, the Attorney General or the Secretary of DHS—must exercise any discretion accorded to it by statute in the manner which Congress has prescribed. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Vigil*, 508 U.S. at 193, 113 S.Ct. at 2032 ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."); *Heckler*, 470 U.S. at 832–34, 105 S.Ct. at 1656–57; *see also Regents*, ____ U.S. at ____, 140 S.Ct. at 1926 (Thomas, J., concurring in part) ("It is axiomatic that an administrative agency's power . . . is limited to the authority granted by Congress." (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988))).

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[47] https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/348?aff_id=1000.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004063

Accordingly, the Executive Branch, including its agencies, may not dispense with a clear congressional mandate under the guise of exercising "discretion."

d. The Memoranda are not Committed to Agency Discretion

In sum, the Court finds that Sections 1226(c) and 1231(a)(2) impose mandatory detention at specific points in time for certain aliens. The Executive Branch may neither alter these statutory obligations through reprioritization nor dispense with them. Accordingly, the Court concludes that the detention of certain aliens subject to Sections 1226(c) and 1231(a)(2) is not committed to agency discretion.

4. Zone of Interests

The States must next show that their injuries are within the "zones of interest" the two laws were intended to protect. Congress has placed limits on *how* the Executive may be sued for violating the law and *who* can do it. Congress, through the APA, has provided a cause of action for those seeking redress against the federal government for violating other federal laws. *See* 5 U.S.C. §§ 702, 706. But Congress has limited the availability of an APA cause of action to those who allege an injury that is "arguably" within the "zone of interests" to be protected or regulated by the relevant statutes. *Collins v. Mnuchin*, 938 F.3d 553, 573–74 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, ____ U.S. ____, 141 S.Ct. 1761 (2021); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (hereinafter "*Match-E*") (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)).

AMERICAN OVERSIGHT

The zone of interests test is not "especially demanding" in the APA context. *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389). Indeed, the Supreme Court has "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389 (quoting *Match-E*, 567 U.S. at 225, 132 S.Ct. at 2210). The zone of interests 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 authorized that plaintiff to sue." *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389).

Importantly, the relevant statute in whose zone of interests the plaintiff's injury must reside "is to be determined not by reference to the overall purpose of the Act in question," but rather, "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–76, 117 S.Ct. at 1167. In other words, a court must review those "substantive provisions" of law that the plaintiff relies on for "the gravamen" of its complaint. *Id.*

In this case, the States essentially bring three APA claims asserting that the Government violated federal law: (1) the Memoranda are contrary to Sections 1226(c) and 1231(a)(2) of the INA, (Dkt. No. 1 at ¶¶ 94–107); (2) the policy set forth in the Memoranda is arbitrary and capricious, (*id.* at ¶¶ 108–17); and (3) the Government was required but failed to follow notice and comment procedures in issuing the Memoranda, (*id.* at ¶¶ 118–121).

AMERICAN OVERSIGHT

As in *Texas I,* the Government solely—and narrowly—maintains that "the States do not come within the relevant zone-of-interests" because "no entity can enforce § 1231" because Subsection (h) bars any party from enforcing Section 1231 against the Government.[48] (Dkt. No. 42 at 35–36); *see* (6:21-cv-3, Dkt. No. 83 at 30–32); *Texas I,* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *22–23. For their part, the States briefly address the Government's suppositions, arguing they "fit within the zone of interests both because [the Government is] wrong about Section 1231(h) and for the reasons this Court has already explained" in *Texas I*. (Dkt. No. 51 at 29) (citing *Texas I,* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–29). The Court agrees with the States.

For starters, the Government cannot refute the States' position that their injuries are within the zones of interests of Sections 1226(c) and 1231(a)(2), particularly in light of this Court's discussions of *Demore* and *Zadvydas* concerning the development and purpose of Sections 1226 and 1231. *See supra* I.A, II.B.1 & II.B.3. This discussion makes clear that Sections 1226(c) and 1231(a)(2)—and indeed the INA itself, *see Texas DAPA*, 809 F.3d at 163 & n.80—were enacted to protect and benefit the states, the citizens of this country, and the legal immigrants of the United States. *See supra* I.A, II.B.1 & II.B.3. As such, the injuries the States suffer due to the Memoranda, *see supra* II.A.1–4, fall within the relevant statutes' zones of interests. *See Texas DAPA*, 809 F.3d at 163 (finding that

[48] In so doing, the Government essentially foregoes any zone-of-interest challenge on the States' other APA claims, that is, those based on Section 1226(c) and those which are arguably not based on any of the statutes in question (*i.e.*, the arbitrary and capricious and notice and comment claims).

AMERICAN OVERSIGHT

Texas satisfies the zone-of-interest test as a result of the same injuries that give Texas Article III standing).

The Government, indeed, does not dispute that the States' injuries fall within Sections 1226(c) and 1231(a)(2)'s zones of interests. Rather, the Government focuses its attention on Section 1231(h), in essence arguing that because Subsection (h) bars parties from enforcing Section 1231, any injury stemming from violations of the section does not fall within the statute's zone of interests. *See* (Dkt. No. 42 at 35–36). But, as explained earlier, Section 1231(h) does not bar the States' claims. *See supra* II.B.1; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42. Thus, the Government's lone contention fails. The Court finds that the States' injuries fall within the zones of interest of Sections 1226(c) and 1231(a)(2).

III. DISCUSSION OF PRELIMINARY INJUNCTION

Having determined the Court has jurisdiction over the action and nothing precludes judicial review under the APA, the Court now turns to the merits of the States' Motion for Preliminary Injunction.

A. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, ____ U.S. ____, ____, 138 S.Ct. 1942, 1943, 201 L.Ed.2d 398 (2018) (quotation omitted). Indeed, the decision to grant a preliminary injunction is "to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Thus, "[i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or

AMERICAN OVERSIGHT

withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008) (quotation omitted). And in determining whether injunctive relief is proper, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*

A preliminary injunction "issue[s] only where (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). As such, "[t]he party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated" in order for a preliminary injunction to be granted. *Id.*

Note, however, that "none of the four prerequisites has a fixed quantitative value." *Texas v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975). "Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id.* (citing *Siff v. State Democratic Exec. Comm.*, 500 F.2d 1307 (5th Cir. 1974)). For instance, "a preliminary injunction does *not* follow as a matter of course from a plaintiff's showing" of the first element, "a likelihood of success on the merits." *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1943–44 (emphasis added). Thus, federal courts must consider whether the movant has established the three other elements as well for a preliminary injunction to issue. *Id.* at ____, 138 S.Ct. at 1944.

AMERICAN OVERSIGHT

B. APPLICATION

1. Substantial Likelihood of Success on the Merits

a. Counts I & II: Contrary to Law

As described above, the Court determined that "shall" in Sections 1226(c) and 1231(a)(2) means "must." *See supra* II.B.3.a. This conclusion means that the Attorney General must detain certain aliens subject to those sections. The Court also found that both statutes mandate detention of certain aliens at specific points in time: for Section 1226(c), the Attorney General is required to detain certain aliens "when the alien is released from custody," while for Section 1231(a)(2), the Attorney General is obligated to detain certain aliens "during the removal period." The policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur. This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2). Thus, the States have demonstrated a substantial likelihood of success on Counts I & II.

b. Count III: Arbitrary and Capricious

The States argue that the Government's Memoranda establishing new guidelines and priorities for the detention of certain aliens are arbitrary and capricious because they "failed to consider important aspects of a problem." (Dkt. No. 18 at 28). Specifically, the States allege that the Memoranda: (1) "failed to consider the risks of recidivism among criminal aliens who are not detained;" (2) "ignore the effects non-detention will have on future removal efforts," especially on the costs that delays in deportation often produce

AMERICAN OVERSIGHT

and the rate of abscondment of released aliens; (3) "do not discuss the costs that [the new guidance] will impose on [the] States;" (4) "did not consider more limited policies that would have retained congressionally mandated detention of criminal aliens and those with final orders of removal;" and (5) "do[] not explain Defendants' choice[]"of prioritizing the detention of aliens who have aggravated felonies over others who have committed drug offenses and crimes of moral turpitude or those with final orders of removal. (*Id.* at 27–29). The Government disagrees with the States' contentions. Countering the States point-by-point, the Government argues that it "considered the relevant factors and reached a reasonable decision." (Dkt. No. 42 at 42–47). Reviewing these assertions, the Court finds the States have demonstrated a substantial likelihood of success in establishing that the policy set forth in the Memoranda is arbitrary and capricious as alleged in Count III.

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). With that in mind, federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 826, 139 L.Ed.2d 797 (1998) (internal quotation omitted). This necessarily means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be *logical and rational*." *Id.* (emphasis added). More specifically, "the 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*.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

AMERICAN OVERSIGHT

Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)) (emphasis added).

When final agency action is challenged as arbitrary and capricious, "[t]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989) (internal quotations omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. If a court finds that an administrative agency failed to engage in reasoned decision-making, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

"Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) (quoting *State Farm*, 463 U.S. at 50, 103 S.Ct. at 2870). As such, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its

AMERICAN OVERSIGHT

action was based." [49] *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). The administrative record need only "indicate[] the determinative reason for the final action taken," *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973), and courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974).

Finally, the Court is mindful that the arbitrary and capricious standard is "highly deferential." *Garner*, 767 F.2d at 116. Courts must "accord the agency's decision a presumption of regularity" and "are prohibited from substituting [the courts'] judgment for that of the agency." *Id.* (citation omitted). But "while the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *Id.* Based on

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[49] In a status conference with the Parties on July 2, 2021, the Court asked whether the Government intended to file the administrative record for review. The Government declined stating that it was unnecessary at this stage of the litigation. (July 2, 2021, Status Conference, 10:00–10:15 A.M.). For their part, the States did not oppose the Government's position, and, instead, told the Court that it could dispose of the pending Motion for Preliminary Injunction without the full administrative record in hand. *Id.* In effect, the Parties agreed that the full administrative record is not necessary for the Court to rule on the arbitrary and capricious claim at this time.

"A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2556 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). As such, the Court will limit its inquiry to the findings, conclusions, and explanations provided in the February 18 Memorandum for its review. In addition, because the Court is ruling on a motion for preliminary injunction, the Court merely needs to determine "if there is a substantial likelihood that" the States "will prevail on the merits" of their arbitrary and capricious claim. *Prichard*, 812 F.2d at 993. It follows, therefore, that the disposition of the arbitrary and capricious claim, at this stage, is not final. Indeed, for at least one other district court, the lack of an administrative record was not a barrier for that court to rule on an arbitrary and capricious claim at this stage. *See Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *23 & n.8, 28–29 (N.D. Tex. June 27, 2016).

AMERICAN OVERSIGHT

the following, the Memoranda fail to indicate that the Government engaged in reasoned decision-making, thereby rendering them arbitrary and capricious.

At their core, the Memoranda reprioritize certain classes of aliens for immigration enforcement action. In the February 18 Memorandum specifically, the Government states that it is establishing enforcement and removal guidelines with respect to immigration enforcement and removal priorities pursuant to the January 20 Memorandum.[50] *See* (Dkt. No. 19-2 at 5). As discussed above, if a criminal illegal alien falls under a category deemed to be a priority, no preapproval is required for an enforcement or removal action. On the other hand, if the criminal illegal alien does not fall under any of the categories, an enforcement or removal action "will require preapproval." (*Id.* at 7). The Memorandum states that "ICE operates in an environment of limited resources," and thus, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." (*Id.* at 3). In addition to "resource constraints," "several other factors," according to the Memorandum, "render ICE's mission particularly complex." These factors include "ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and relationships with, sovereign

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[50] To the extent the January 20 Memorandum's 100-day pause on removals and that Memorandum's corresponding administrative record are implicated in this action, the Court adopts its reasoning in *Texas I* and finds that the Government failed to engage in reasoned decision-making. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *38–42. Thus, the Court adopts and incorporates by reference its prior decision that the January 20 Memorandum's 100-day pause is arbitrary and capricious.

AMERICAN OVERSIGHT

nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal." (*Id.*). Given these considerations, the Memorandum states that the Government "must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission." (*Id.* at 4).

As described here, the February 18 Memorandum indeed enumerates quite a few factors that make the Government's "mission particularly complex" in this field. But the Memorandum itself does not directly state whether these factors were considered while the Government was actually formulating the guidance in question. Assuming they were considered and were the bases for the new guidance, *see Pitts*, 411 U.S. at 143, 93 S.Ct. at 1244, the February 18 Memorandum (along with its predecessor, the January 20 Memorandum) still does not demonstrate reasoned decision-making. The February 18 Memorandum does not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued. In short, both Memoranda fail to establish any rational connection or logical link between any of these factors and the new guidance. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866.

First, the February 18 Memorandum does not offer even a brief explanation of how "ongoing litigation in various fora" affected the Government's decision-making in promulgating the new guidance. It is simply a vague and conclusory statement. Did the Government mean to say that *Texas I* or other pending cases were considered when crafting the new guidance? If so, how did the disposition of *Texas I* or other cases affect the reprioritization? Those questions have yet to be answered.

AMERICAN OVERSIGHT

Second, the Government's stated responsibility and desire to ensure that eligible aliens may be afforded relief from removal is commendable but likewise lacks any rational connection with the new guidance. The new guidance reprioritizes the detention and deportation of criminal illegal aliens. But the February 18 Memorandum does not explain how or why prioritizing, for instance, the detention or deportation of "border security risks" (aliens who entered the country on or after November 1, 2020) over aliens who have drug offenses or crimes of moral turpitude would ensure that eligible noncitizens will obtain relief in their own removal proceedings. There does not seem to be any connection between reprioritizing the detention and removal of certain aliens to whether other aliens may be afforded legally authorized relief from deportation. The February 18 Memorandum does not shed light on this disconnect.

Third, although the Court acknowledges as a general matter that interactions and relationships with other sovereign nations "may place constraints" on the Government's ability to "execute final orders of removal," *see* (Dkt. No. 19-2 at 4), there is no rational link between any of these factual constraints to the reprioritization scheme the Government has chosen to pursue. For example, do these international relationships make it more inefficient to deport aliens with drug offenses over so-called "national security risks" or "border security risks"? If so, what are the facts that justify such conclusions? Those questions are also unanswered. Like the considerations described above, the Memorandum does not state any facts or findings with respect to why international relations apparently factored in the Government's decision-making.

AMERICAN OVERSIGHT

Lastly, the Government's written concern for the health and safety of ICE workers in the midst of the COVID-19 pandemic is not rationally relevant to the new guidance. Will COVID-19 infections among the ICE workforce be substantially reduced if the Government prioritizes the deportation of one category of criminal illegal aliens over another? How does reprioritization alleviate those health concerns, if any? On these points the February 18 Memorandum is, unfortunately, silent.

The Court further notes that, out of all these considerations, the cursory use of the COVID-19 pandemic to justify the new guidance comes across as implausible. Throughout the last year, institutions, including federal and state governments, have used the pandemic to rationalize policies found to be unlawful or unconstitutional. *See, e.g.*, *Chrysafis v. Marks*, ____ U.S. ____, 2021 WL 3560766 (U.S. Aug. 12, 2021) (enjoining the part of New York's COVID Emergency Eviction and Foreclosure Prevention Act that precluded landlords from contesting a tenant's self-certification of financial hardship on the grounds that "no man can be a judge in his own case" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955))); *Tandon v. Newsom*, ____ U.S. ____, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (enjoining California officials from enforcing occupancy limits on at-home religious exercise in response to COVID-19 when other policies treated comparable secular activities that did not pose a lesser risk of transmission more favorably); *Roman Cath. Diocese v. Cuomo*, ____ U.S. ____, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam) (enjoining the Governor of New York from enforcing occupancy limits on religious services in response to COVID-19 that would have violated the Free Exercise Clause of the First Amendment); *Capitol Hill Baptist Church v. Bowser*,

AMERICAN OVERSIGHT

496 F. Supp. 3d 284, 289 (D.D.C. 2020) (finding that the District's COVID-19-related prohibition of religious gatherings of more than 100 people, even those with appropriate precautions, substantially burdens the plaintiff's exercise of religion in violation of the Religious Freedom Restoration Act). And now the Government has added immigration to the mix.

The Government used the pandemic to reason that the January 20 Memorandum's 100-day pause on removals—the precursor to the February 18 Memorandum—was borne out of reasoned decision-making. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40. But, as the Court noted in *Texas I*, the U.S. Department of Health and Human Services Centers for Disease Control and Prevention ("CDC"), on October 13, 2020, authorized the CDC Director "to suspend the right to introduce persons into the United States" because of the COVID-19 pandemic. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40 & n.46 (citing CDC, *Order Suspending Introduction of Certain Persons Where a Communicable Disease Exists*, (Mar. 20, 2020), available at https://bit.ly/3736Lue (updated Oct. 2020)). The relevant CDC Order "applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to [certain] exceptions." *Id.* Considering the CDC Order, the Government's new guidance is puzzling. The new guidance effectively introduces and keeps more people—specifically, criminal illegal aliens—in the Nation's communities. But, per the CDC Order, the COVID-19 pandemic would likely justify a different course of action. Throughout this time, the Government

AMERICAN OVERSIGHT

has not introduced any further papers or discussed anything in the February 18 Memorandum that show it is following different health guidelines related to COVID-19 that speak to the safety of introducing aliens into the country and its communities. The February 18 Memorandum likewise does not grapple with or otherwise explain how the new guidelines are consistent with these CDC policies. Thus, like in *Texas I*, the Government's consideration of the COVID-19 pandemic not only is implausibly connected to the new guidance, it also "runs counter to the evidence before the agency." *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. In other words, the Government cannot use the pandemic as a blanket reason—devoid of explanation—to justify its choices, especially when these choices run afoul of another agency's published health directives.[51]

"[A]gency action must be based on *non-arbitrary*, *relevant* factors." *Judulang v. Holder*, 565 U.S. 42, 55, 132 S.Ct. 476, 485, 181 L.Ed.2d 449 (2011) (internal quotation omitted) (emphasis added). In this case, the factors apparently considered in the February 18 Memorandum and its predecessor, the January 20 Memorandum, are, after a thorough review, arbitrary and irrelevant to the new guidance. The link between the new guidance and the factors enumerated are so contradictory to the evidence and "implausible" that the States' challenge cannot be said to be differing policy preferences

[51] The Court acknowledges it could be argued that, considering the transmissibility of COVID-19, the Executive Branch has chosen to detain fewer aliens to minimize the spread of the virus in detention facilities where it could not ensure proper safety precautions. But it could also be argued (and the CDC Report the Court describes above strongly suggests) that allowing certain aliens—those who would be detained but for the Memoranda—to be released within communities during the pandemic would exacerbate COVID-19's community spread. Regardless, the Memoranda fail to logically link the Executive Branch's bare COVID-19 justifications to the new guidance such that the Court can conclude the Memoranda were borne of reasoned decision making.

AMERICAN OVERSIGHT

or views. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009) (explaining that when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account, [i]t would be arbitrary or capricious to ignore such matters," and "[i]n such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" (internal citation omitted)); *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'" (quoting *Chenery*, 332 U.S. at 196, 67 S.Ct. at 1577)); *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n*, 2 F.4th 421, 452 (5th Cir. 2021) (explaining that, when considering an agency's cost-benefit analysis in the scope of the arbitrary and capricious standard, the Court's "job 'is not to undertake [its] own economic study, but to determine whether the [agency] 'has established in the record a reasonable basis for its decision'" (quoting *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 251 (5th Cir. 1989))); *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) ("The agency must 'articulate a satisfactory explanation for its action including a

AMERICAN OVERSIGHT

rational connection between the facts found and the choice made.'" (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866)); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (noting the Court must "ensure that the agency examined the relevant data and articulated a satisfactory explanation for its action, and assess whether the agency's decision was based on a consideration of the relevant factors" (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (cleaned up)). Thus, the Court finds that the Government failed to engage in the reasoned decision-making required by law.

What's more, while the Government argues it actually did consider certain relevant factors in crafting the new guidelines (thus engaging in reasoned decision-making), the Court finds that the Government's briefs actually establish that it *did not* consider those factors. To begin with, "*[p]ost 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, 103 S.Ct. [at 2870]). Therefore, this Court finds it inappropriate to consider each of the Government's arguments in their briefing that were not included in the Memoranda. Even assuming they were relevant, however, the Government's in-brief explanations are meritless.

First, the Government states that it considered the prospect of recidivism when crafting the new guidance found in the February 18 Memorandum. (Dkt. No. 42 at 44). Specifically, the Government alleges that "DHS weighed the threat to public safety from criminal noncitizens reoffending in prioritizing certain noncitizens for removal." (*Id.*). In support, the Government cites to passages from the February 18 Memorandum that,

AMERICAN OVERSIGHT

according to the Government, (a) "focused on the degree of threat to public safety" the "different criminal noncitizens presented," which, apparently, is akin to considering the risk of recidivism; and (b) allowed immigration officers, in making "individualized determinations" for enforcement and removal, to "consider public interest factors, which include the risk of recidivism." *See* (*Id.* at 44). These points miss the mark entirely.

With respect to the first, the Government's decision to "focus[] on the degree of threat to public safety" establishes that the Government either did not consider the risk of recidivism or created a policy contrary to the evidence before it. In their claim, the States argue that, in choosing which policy to pursue, the Government did not consider the risks of recidivism of *all* criminal aliens. *See* (Dkt. No. 18 at 44). Indeed, the Supreme Court has stated that "*deportable* criminal aliens who remained in the United States"—notably *not* a certain subset or category of such aliens—"often committed more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (emphasis added); *see also Zadvydas*, 533 U.S. at 713–714, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (discussing rates of recidivism for released criminal aliens and their threat to public safety, noting the "high recidivism rates for released aliens"). Despite the Supreme Court's recognition of the risks deportable criminal aliens pose, the February 18 Memorandum requires prioritization of criminal aliens who *both* pose a threat to public safety *and* have had a prior aggravated felony conviction or criminal gang affiliation. *See* (Dkt. No. 19-2 at 5–6). The States correctly point out that by prioritizing certain aliens, the Memorandum "omit[s] aliens" who are solely "threats to public safety," in other words, potential recidivists. (Dkt. No. 51 at 14). Nothing in the February 18 Memorandum explains that

AMERICAN OVERSIGHT

criminal illegal aliens who are only "threats to public safety" are at a much lower risk of recidivism compared to criminal aliens who have had prior felonies or criminal gang convictions. Put differently, the new guidelines do not establish that the Government considered recidivism since the reprioritization leaves so many other "deprioritized" criminal illegal aliens free to recidivate—to harm the public. And crucially, the Government has not rebutted or clarified the well-established concept that *all* criminal illegal aliens or "deportable aliens pose high risks of recidivism." *See Demore*, 538 U.S. at 518, 123 S.Ct. at 1715. Instead, the February 18 Memorandum, without any support or evidence, implements new guidelines stemming from an idea that it is merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations—who have a much higher risk of recidivism. Such a *conclusion* is without any foundation in the record and shows that the Government either failed to consider recidivism as a factor in its decision-making or it explained its decision in a manner which contradicts the evidence before it. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867.

Moreover, it is irrelevant whether immigration officers have the capability, pursuant to the February 18 Memorandum, to "consider public interest factors" that "could" include the risk of recidivism. *See* (Dkt. No. 42 at 44). Arbitrary and capricious review calls for the Court to examine the rationality of agency decision-making and not the actual decision. *Garner*, 767 F.2d 104 at 116. Even if the new guidelines give some leeway to immigration officers to consider "public interest factors," this does not establish that the Government considered the risk of recidivism when crafting the new guidelines. As the Government frankly admits, the Memoranda "do not use the term

AMERICAN OVERSIGHT

'recidivism'" anywhere. (Dkt. No. 42 at 44). The February 18 Memorandum is, thus, devoid of any references to recidivism or other statements tending to show that the risk of recidivism that criminal illegal aliens pose was considered when drafting the new policy.

Second, the Government asserts that it has limited resources and must prioritize certain enforcement and removal actions under Section 1226(c). (*Id.* at 45). But, as the States point out, this contention "dodges the key issue" of whether the Government actually considered the effects of the new guidelines to costs of delaying deportations and the overall rate of abscondment of criminal illegal aliens. (Dkt. No. 51 at 15); (Dkt. No. 18 at 27–28). The costs of the non-detainment of criminal aliens are substantial. For instance, in the past, "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." *Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14. Even "[c]ourt ordered release" itself "cannot help but encourage dilatory and obstructive tactics by aliens." *Zadvydas*, 533 U.S. at 713, 121 S.Ct. 2491 (Kennedy, J., dissenting). "An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility." *Id.* And following this line, a Senate Report from 1995 noted that "[d]elays" in deportation "can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U.S. citizenship." S. Rep. No. 104–48, at 2 (1995). The costs from non-detainment rival the costs of abscondment. The same Senate Report found that "[o]ver 20 percent of nondetained criminal aliens fail to appear for

AMERICAN OVERSIGHT

deportation proceedings." *Id.* This Court, as well, found the rate of abscondment to be substantial even for aliens who have been "thoroughly vetted" in order for them to be placed in an "alternative to detention program." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *19. Even in light of these effects and costs, the February 18 Memorandum is silent on whether these were considered while crafting the new guidelines. The Court, therefore, finds that the Government failed to consider this relevant factor.

Third, the Government argues that, with regard to the additional costs the States will incur, "the States are wrong to argue that DHS was required to expressly evaluate the costs to each State," and, regardless, the Government "did consider how the Priority Framework would impact public safety . . . which should reduce the costs from crime to the States." (Dkt. No. 42 at 45–46). Rephrased, the Government argues that state costs and expenses are not relevant factors, but, nevertheless, the February 18 Memorandum indirectly considered them since it factored in the new guidelines' impact to public safety. The Government is incorrect on both issues.

State costs and expenses are, indeed, relevant factors. That was the case in *Texas I*, *see* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *41, and the Government takes issue with the Court's prior holding, *see* (Dkt. No. 42 at 46 & n.16). Thus, to be clear, a more descriptive analysis of the caselaw is in order.

As stated earlier, an "agency rule would be arbitrary and capricious" if the relevant agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. The Supreme Court has noted that immigration "ha[s] a discernable impact on traditional state concerns," owing to the fact that

AMERICAN OVERSIGHT

"unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Plyler*, 457 U.S. at 228, n.23, 102 S.Ct. at 2400, n.23 (citing *DeCanas v. Bica*, 424 U.S. 351, 354–56, 96 S.Ct. 933, 935–36, 47 L.Ed.2d 43 (1976)). Indeed, immigration policy is important to the states since they "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500. Obviously, as *Plyler* noted, some of those problematic consequences stem from a newly promulgated immigration policy's effect on the state's economy and its services; in other words, state costs and expenses. *See Texas DAPA*, 809 F.3d at 153 (holding that Texas had standing to challenge the federal government's DAPA policy in part because the policy "would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone" and "would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury"). In *Regents*, for instance, the Supreme Court held that the federal government's recission of its DACA policy was arbitrary and capricious in part because the government failed to consider the loss of state and local tax revenue stemming from the policy's rescission. ____ U.S. at ____, 140 S.Ct. at 1914. Along with a few other concerns, the Supreme Court characterized the loss of local and state tax revenue as "noteworthy," but "not necessarily dispositive." *Id.* Nevertheless, the Supreme Court found that the federal government needed to *consider* that factor—along with many others—and weigh them all together to ultimately decide whether to retain DACA or not. *Id.* As in this case, "[m]aking that difficult decision was the agency's job, but the agency failed to do it." *Id.*

AMERICAN OVERSIGHT

Further, the Supreme Court has indicated that, in the context of immigration policy, an agency's approach to decision-making "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55, 132 S.Ct. at 485. One broad purpose of immigration law and policy is to minimize the costs and expenses related to the presence of illegal aliens in the country. *See Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14 (noting that "prior to the enactment of 8 U.S.C. § 1226(c)," a vast majority of deportable criminal aliens were free during their deportation proceedings and many filed frivolous appeals to delay deportation); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. 1995) (noting 8 U.S.C. § 1252(i) (1986) was enacted "to ease financial burdens on federal, state and local prisons resulting from lengthy detention of aliens awaiting deportation"); *Giddings v. Chandler*, 979 F.2d 1104, 1109 (5th Cir. 1992) (noting that the main purpose of Section 1252(i) was to "reduc[e] prison overcrowding and cost to the government"); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990) (explaining that Section 1252(i) was enacted because there was a concern in Congress with prison overcrowding in "local and State jails"). While the Government is correct that immigration policy "affect[s] trade, investment, tourism, and diplomatic relations," among other things, *see* (Dkt. No. 42 at 46, n.16) and *Arizona*, 567 U.S. 387 at 395, 132 S.Ct. at 2498, that list of considerations is not exhaustive. Therefore, the Court finds the Government's argument that it need not consider the States' costs and expenses stemming from the new guidelines to be without merit.

Likewise, the Court finds that the Memoranda did not consider the States' costs and expenses even though, according to the Government, DHS considered the new

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004086

guidelines' impact to public safety. In fact, the Memoranda did not consider or failed to substantially consider the new guidelines' effects on public safety. Indeed, both Memoranda are devoid of explanation as to how or why prioritizing the detention or deportation of some criminal illegal aliens, while effectively delaying the detention or deportation of and releasing so many other criminal illegal aliens, positively impact public safety. Moreover, the Memoranda provide no indication that any relevant data or facts were considered in ultimately concluding that the public will be safer by releasing more criminal illegal aliens into communities from detention while fewer are detained or deported. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866 (explaining that an agency "must examine the relevant data" in order to explain its policy choices).

Additionally, even if the Government did consider public safety, the Memoranda—and the February 18 Memorandum most crucially—do not state or explain how that consideration connects with concerns regarding state costs and expenses. The Government in its brief argues that, by focusing its "limited resources" on enforcement actions against "the most significant threats to public safety," the Memoranda "should reduce the costs from crime to the States." (Dkt. No. 42 at 46). Leaving aside that the new guidelines practically provide for the non-detention of many criminal illegal aliens who are not within the ambit of any of the prioritized categories, the Government's assertion still fails. "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87, 63 S.Ct. at 459. And the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime.

AMERICAN OVERSIGHT

Next, the Government argues that, contrary to the States' allegations, DHS "need not 'consider all policy alternatives in reaching [its] decision.'" (Dkt. No. 42 at 46) (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2870). Instead, the Government states that "it need only 'consider the alternative[s] that are within the ambit of the existing [policy].'" (*Id.*) (quoting *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913). In this case, per the Government, "the States fail to identify a single policy alternative" that would be "within the ambit of existing policy," or would otherwise be "obvious," "significant and viable." (*Id.*) (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013)). The Court disagrees with the Government's contentions.

The States do propose that, instead of the prioritization scheme found in the February 18 Memorandum, the Government should have considered policies "that would have retained congressionally mandated detention of criminal aliens and aliens with final orders of removal." (Dkt. No. 18 at 28). The foregoing is simply asking that the Government follow the law.[52] Of course, such policies are "within the ambit of existing policy." After all, the February 18 Memorandum states that its reprioritization scheme "covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning," (Dkt. No. 19-2 at 2), and congressional statutes mandating the detention of aliens go to the explicit focus of the

[52] Not only that, the States' proposed limited policies are "obvious," "significant," and "viable" to this Court. *See Jones*, 716 F.3d at 215. It is incredibly obvious that a "reprioritization policy" that still effectuates and follows the law on detention and removals is more limited than the new guidelines. And surely, following laws should be significantly viable for the Executive Branch given it is *required* by the Constitution to enforce such laws. U.S. Const. art. II, §§ 1, 3.

AMERICAN OVERSIGHT

Memorandum. *See State Farm*, 463 U.S. at 51, 103 S.Ct. at 2871. But despite all this, the February 18 Memorandum never considered the limited policies the States proposed. It failed to discuss how a policy enabling the Government to detain all criminal illegal aliens subject to congressional mandates compares with the opted-for guidelines. It did not even state whether the new guidelines even considered *any* other policy. In short, the Government did not grapple with or provide any alternatives when it was required to do so. *See Regents*, ____ U.S. at ____, 140 S.Ct. at 1913 ("*State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis *must* consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856) (emphasis added)). "That omission alone" makes the new guidelines arbitrary and capricious. *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913.

Lastly, the States argue that the February 18 Memorandum failed to rationally explain why criminal illegal aliens who have committed aggravated felonies or who are affiliated with criminal gangs are prioritized over other criminal illegal aliens and aliens with final orders of removal. (Dkt. No. 18 at 29). The Government responds that the Memorandum "provides a clear, rational justification for prioritizing" such aliens. (Dkt. No. 42 at 43–44). As the Government writes, "the former category presumptively presents a more significant threat to public safety." (*Id.*). In mandating the detention of criminal aliens convicted of serious drug offenses, crimes of moral turpitude, and some other specified offenses, *see* 8 U.S.C. § 1226(c), as well as aliens with final orders of removal during the removal period, *see* 8 U.S.C. § 1231(a)(2), Congress did not differentiate among certain "types" or "categories" of deportable and detainable persons.

AMERICAN OVERSIGHT

These laws plainly mandate the detention of *all* the deportable criminal aliens subject to the relevant statutes. The new guidelines directly go against these congressional mandates, opting instead to prioritize certain criminal illegal aliens' detention and deportation over others because of an assertion that such aliens "presumptively present[] a more significant threat to public safety" than "one million noncitizens with final orders of removal," (Dkt. No. 42 at 44), and—necessarily—other criminal aliens with convictions for drug offenses or crimes of moral turpitude. But the February 18 Memorandum does not ground this otherwise unsupported assertion. It does not even explain or state how it considered, compared, and ultimately concluded that criminal illegal aliens of a certain category must be prioritized over others. Despite Sections 1226(c) and 1231(a)(2), nowhere in the February 18 Memorandum do the new guidelines even contemplate the prioritization of these "other" criminal illegal aliens. As the States correctly surmise, "[t]he very reason the February 18 Memorandum provides for prioritizing aggravated felonies also supports prioritizing drug offenses, crimes of moral turpitude, and final orders of removal." (Dkt. No. 18 at 29). Without more explanation grounded on relevant data and facts, it is unknown why the priorities were implemented in that way. The new guidance, therefore, indeed appears to be the product of arbitrary and capricious decision-making.

In sum, the Government's failure to rationally explain and connect the basis for the new guidance, along with the Government's failure to consider certain relevant factors and alternative policies, establish that there is a substantial likelihood that the reprioritization is an arbitrary and capricious policy. As the above discussion shows, the

AMERICAN OVERSIGHT

Government certainly did not engage in reasoned decision-making as required by the APA. The Court therefore finds that the States have established a substantial likelihood of success on this claim.

c. Count IV: Notice and Comment Rulemaking

The States' next claim is similar to one Texas raised in *Texas I*. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *42–47. In *Texas I*, this Court enjoined Section C of the January 20 Memorandum, in part, because Section C did not undergo notice and comment as required by the APA. *See id.* In this case, the States ask this Court to enjoin Section B of the January 20 Memorandum and the February 18 Memorandum for the same reason. The States argue that "[t]he January 20 and February 18 Memoranda are subject to notice and comment rulemaking because they are substantive or legislative rules." (Dkt. No. 18 at 30). The Government disagrees, raising nearly identical arguments to those it raised in *Texas I*. *See* (Dkt. No. 42 at 47). Namely, the Government contends that the Memoranda are exempt from the APA's notice and comment requirement as "general statement[s] of policy" or, alternatively, as "procedural rules." (*Id.*). For the following reasons, the Court disagrees with the Government's characterizations of the Memoranda and finds that the States have a substantial likelihood of success on the merits of their procedural APA claim.

AMERICAN OVERSIGHT

Rulemaking under 5 U.S.C. § 553

As in *Texas I*, no Party disputes that the Memoranda are rules of some kind and, therefore, that the rulemaking provisions of the APA apply.[53] *See* (Dkt. No. 18); (Dkt. No. 42); *see also* ___ F. Supp. 3d at ____, 2021 WL 2096669, at *42. Nor does any Party contend that the Memoranda underwent any notice and comment. (*Id.*). The question, then, is whether the Memoranda are the type of rules that *should* have undergone notice and comment but did not.

The Court begins with an overview of the APA's notice and comment requirement and the exceptions thereto. The APA requires rules to undergo notice and comment unless they are exempt. *See* 5 U.S.C. § 553.[54] Section 553 sets forth two such categories of exemptions to the notice and comment requirement, one of which is relevant to this case. *Id.* § 553(b). That category exempts "interpretative rules, *general statements of policy*, or *rules of* agency organization, *procedure*, or practice" from notice and comment. *Id.* § 553(b)(A) (emphases added). Thus, if an agency proposes a rule that is either a general

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[53] "'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4).

[54] Specifically, the APA requires that "[g]eneral notice of proposed rule making *shall* be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." *Id.* § 553(b) (emphasis added). And that notice *shall* contain "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The APA also requires an agency to "give interested persons an opportunity to participate in the rule making," *id.* § 553(c), and that the "publication or service of a substantive rule shall be made not less than 30 days." *Id.* § 553(d).

AMERICAN OVERSIGHT

statement of policy or a procedural rule, the agency is not required to conduct notice and comment on the proposed rule. *See id.*

The Fifth Circuit has made clear that exemptions to the notice and comment requirement "must be narrowly construed." *Texas DAPA,* 809 F.3d at 171. A narrow reading of the exemptions safeguards the vital interests notice and comment is intended to protect. *See Dep't of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984) ("Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." (quotations omitted)). Indeed, notice and comment ensures that those affected by a proposed rule have a voice in the rule-making process and assist the agency in crafting rules that better account for the costs and benefits of agency action. *See id.* at 1153. *But see id.* ("Inevitably, in determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension.").

In harmony with the Fifth Circuit's warning to narrowly construe exemptions to APA's procedural strictures, the Supreme Court has recognized that states like Louisiana and Texas offer important perspectives on illegal immigration issues. *See Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."); *see also Texas DAPA*, 809 F.3d at 163. States can assist an agency in crafting rules addressing important immigration issues. Mindful of the importance of notice and comment in this context, the Court now considers whether the reprioritization scheme contained within the Memoranda is

AMERICAN OVERSIGHT

exempt from the notice and comment requirement as either a general statement of policy or as a procedural rule.

General Statement of Policy

The Court first considers whether the Memoranda are general statements of policy. If so, notice and comment is not required. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see also* 5 U.S.C. § 553(b)(A). "In analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point is the agency's characterization of the rule." *Shalala,* at 596. As in *Texas I*, the Court would likely be convinced that the Memoranda are general statements of policy if it could rely on the Government's characterization of the Memoranda alone. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *43. Both the Government in its brief and the Memoranda themselves declare that the Memoranda are mere statements of policy. (Dkt. No. 42 at 47–49); (Dkt. No. 19-1); (Dkt. No. 19-2). Indeed, the January 20 Memorandum explicitly declares that it "should be considered Department-wide *guidance*[.]" (Dkt. No. 19-1 at 2) (emphasis added). The January 20 Memorandum also states that the "guidelines and priorities" contained therein "are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party[.]" (*Id.* at 5).

The February 18 Memorandum contains similar language. It begins by declaring that it "establishes interim *guidance*[.]" (Dkt. No. 19-2 at 2) (emphasis added). The February 18 Memorandum goes on to say that "[t]hese guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive

AMERICAN OVERSIGHT

or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 8).

But an agency's characterization of its rule is just that—its *own* characterization. Indeed, "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. 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." *Azar v. Allina Health Servs.*, ____ U.S. ____, ____, 139 S.Ct. 1804, 1812, 204 L.Ed.2d 139 (2019) (emphasis in original). The Fifth Circuit, too, cautions courts to be "mindful but suspicious of the agency's own characterization." *Texas DAPA*, 809 F.3d at 171 (quotation omitted). The Fifth Circuit therefore demands more of a district court than simply taking an agency at its word when determining whether the challenged rule is a general statement of policy or a substantive rule requiring notice and comment. *See Shalala*, 56 F.3d at 596 ("The label that the particular agency puts upon its given exercise of administrative power is not, for [this court's] purposes, conclusive; rather, it is what the agency does in fact.").

Specifically, the Fifth Circuit instructs district courts to also "evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (quotation omitted).[55] The Fifth

[55] The Fifth Circuit and the D.C. Circuit have emphasized that "unless a pronouncement acts prospectively, it is a binding norm. Thus . . . a statement of policy may not have a present effect[.]" *Shalala*, 56 F.3d at 595; *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987).
(continue)

AMERICAN OVERSIGHT

Circuit has acknowledged that "[t]here is some overlap in the analysis of those prongs because if a statement denies the decisionmaker discretion in the area of its coverage . . . then the statement is binding and creates rights or obligations." *Id.* (cleaned up). Moreover, these "criteria" are merely intended to guide a court in "fathom[ing] the interpretative/legislative distinction." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). In other words, "[t]hese 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*, 328 F. Supp. at 730 (citing *Am. Bus Ass'n v. United States*, 627 F.2d 525, 530 (D.C. Cir. 1980)).[56] The Court now weighs these criteria to determine whether the Memoranda are general statements of policy or substantive rules requiring notice and comment.

The Court first considers whether the Memoranda impose any rights or obligations. *See Texas DAPA*, 809 F.3d at 171. In doing so, the Court is mindful that "a substantive rule—or a legislative-type rule, is one that affects individual rights and

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Here, the February 18 Memorandum states that "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added).

The Fifth Circuit cautions, however, that the "binding effect, *not the timing*, . . . is the essence of criterion one." *Shalala*, 56 F.3d at 595 (emphasis added). Thus, the "[m]ere pronouncements of what the agency intends, whether for the present or for the future, which do not have a binding effect, are properly classified as interpretative rules." *Cmty. Nutrition Inst.*, 818 F.2d at 946 n.4. This caveat is of no consequence here because the Court finds that the Memoranda have a binding effect due to their effect on the rights and obligations described.

[56] In describing the criteria for determining whether a rule is a general statement of policy or a substantive rule requiring notice and comment, the Fifth Circuit has relied on the D.C. Circuit. *See Shalala*, 56 F.3d at 595 nn.15–16 (citing *Cmty. Nutrition Inst.*, 818 F.2d at 943, and *Am. Bus Ass'n*, 627 F.2d at 529).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004096

obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979) (citation and quotation omitted) (cleaned up). "This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'" *Id.* (citation omitted).

At the outset, it is worth noting that the Court has extensively described how the Memoranda affect rights and obligations in its analysis on whether the Memoranda constitute final agency action. *See supra* II.B.2. As a review, the Memoranda affect rights and obligations in at least three ways. First, the February 18 Memorandum commands that DHS abdicate its obligations under Sections 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. *Compare* §§ 1226(c) and 1231(a)(2) *with* (Dkt. No. 19-2 at 4–7).

Second, the Memoranda also create financial obligations for Texas that would not have existed but for the Memoranda. Based on the record, Texas will be required *by law* to bear some of the cost of providing Emergency Medicaid to eligible aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2). *See supra* II.B.2.b. The legal obligation to provide these aliens with these services would not exist if deprioritized aliens were taken into federal custody at the time of their release from state custody as mandated by Section 1226(c), or if they were detained during the removal period, as required by Section 1231(a)(2).

Finally, as described above, the Memoranda affect the rights of some aliens already in detention. *See supra* II.B.2.b. As another court has already found, the Memoranda make a nonpriority alien's removal "unlikely to be imminent." *See Hussein S.M.*, 2021

AMERICAN OVERSIGHT

WL 1986125, at *3. This status, in turn, entitles certain aliens to release from detention. *See id.*; *see also Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. That is an effect on rights.

For these reasons, the Court finds that the Memoranda affect the rights and obligations of those within the Memoranda's regulatory sphere—DHS, the states, and certain aliens. This consideration weighs against finding that the Memoranda are general statements of policy.

Next, the Court considers whether the Memoranda give the agency and its decisionmakers sufficient discretion to be considered a general statement of policy. They do not.

"General statements of policy" are those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197, 113 S.Ct. at 2034 (quotations omitted). The Fifth Circuit has described the inquiry for determining whether a rule gives an agency and its decisionmakers sufficient discretion to be classified as a general statement of policy:

> The key inquiry . . . is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Shalala, 56 F.3d at 596–97 (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, 466 U.S. 927, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984)). Applying

AMERICAN OVERSIGHT

this inquiry to the Memoranda, the Court is of the opinion that the amount of discretion they afford is insufficient for them to be classified as general statements of policy.

The core feature of the Memoranda is their prioritization of immigration enforcement actions for some classes of aliens to the exclusion of others. The Memoranda state explicitly that "[e]nforcement and removal actions [against aliens who fall within] the [priority groups] described . . . are *presumed* to be a justified allocation of ICE's limited resources." *See, e.g.*, (Dkt. No. 19-2 at 4–6) (alterations added) (emphasis added). And although the February 18 Memorandum purports to say that actions against nonprioritized aliens "may also be justified" and that "the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen," an agent's discretion in this regard appears so constrained as to be illusory. (*Id.* at 4). Specifically, the February 18 Memorandum stipulates that "[*a*]*ny* civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases *will require* preapproval from the [Field Office Director (FOD)] or [Special Agent in Charge (SAC)]." (*Id.* at 7) (emphasis added). The preapproval constraint *greatly* constricts the normal discretion ICE agents enjoy while exercising their statutory and regulatory duties on behalf of the agency. *See* (Dkt. No. 19-4 at ¶ 29) ("This policy requires field agents to obtain special permission before engaging in routine enforcement."); *cf.* 8 U.S.C. § 1357; 8 C.F.R. § 287.5. Put differently, agents now need the approval of a FOD or SAC to conduct otherwise routine enforcement operations. (Dkt. No. 19-2 at 7); (Dkt. No. 19-4 at ¶ 29).

AMERICAN OVERSIGHT

Moreover, the Memorandum details a mandatory process for receiving such preapproval. Indeed, "[i]n deciding to undertake an enforcement action or removal, the agent or officer *must* consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors." (Dkt. No. 19-2 at 7) (emphasis added). "In requesting . . . preapproval, the officer or agent *must* raise a written justification *through the chain of command*, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place." (*Id.*) (emphases added). In other words, 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. *See* (*Id.*); (Dkt. No. 19-4 at ¶ 29).

If this cumbersome preapproval requirement and process were not enough in general to limit the agents' usual discretion, the February 18 Memorandum goes even further by expressly describing two specific scenarios in which an agent's decision-making power is greatly reduced. First, the February 18 Memorandum states that "[t]he approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other [nonprioritized] noncitizens encountered

AMERICAN OVERSIGHT

during an operation."[57] (Dkt. No. 19-2 at 7). Simply put, the February 18 Memorandum flatly denies agents the ability to exercise discretion over non-preapproved, nonprioritized aliens "during an operation." Second, the February 18 Memorandum limits agency discretion in detaining and conducting other enforcement actions against nonpriority aliens where exigent circumstances exist. *See* (Dkt. No. 19-2 at 7). To be sure, the Memorandum allows for detention of, and other enforcement actions against, nonpriority aliens without preapproval when obtaining such preapproval would be "impracticable." (*Id.*). And while the Memorandum acknowledges that "it is impossible to preconceive all such circumstances" in which obtaining preapproval may be impracticable, it nevertheless states that circumstances where obtaining preapproval is impracticable "generally will be *limited* to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*) (emphasis added). Yet, even in these circumstances, the February 18 Memorandum requires approval, albeit after the enforcement action is conducted. (*Id.*). Specifically, the agent is *required*, within 24 hours of the enforcement action having been conducted, to "explain the exigency, where and when the enforcement activity took place, and whether the

[57] Specifically, the February 18 Memorandum states: "The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above." (Dkt. No. 19-2 at 7). In such circumstances, "[a]n approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above." (*Id.*).

AMERICAN OVERSIGHT

noncitizen is currently detained." (*Id.* at 7 n.7).[58] Once again, in a situation in which the agent's discretion is likely at its zenith—where exigent circumstances exist—the February 18 Memorandum severely restricts the agent's ability to exercise it.

In light of these policies, it is perhaps no surprise that the States provide evidence suggesting that ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance. *See* (Dkt. No. 19-4 at ¶ 36). Specifically, a former Acting Director of ICE with more than 32 years of service in the agency testified that, "[a]s 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." (*Id.* at ¶ 29). Also unsurprisingly, there is evidence in the record tending to show that these "categorical rules" in the February 18 Memorandum are already hampering enforcement actions and will continue to deter agents and officers from exercising their discretion in determining whether to conduct enforcement actions in the future. *See* (Dkt. No. 19-3 at 3–8); (Dkt. No. 46 at ¶ 17); *cf. Texas DAPA*, 809 F.3d at 173 (assessing how DAPA has been applied in practice in determining whether it conferred sufficient discretion to be considered a general policy statement).

In addition to limiting the discretion of individual ICE agents and officers, the Memoranda also restrict the discretion of entire ICE field offices. *See* (Dkt. No. 19-2 at 6); (Dkt. No. 42-2 at 6). Specifically, the February 18 Memorandum states that "ICE will

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[58] And "when the location of a proposed or completed enforcement action is a courthouse, . . . or a sensitive location, . . . that should be explicitly highlighted in the request." (*Id.* at 7 n.7) (citations omitted).

AMERICAN OVERSIGHT

require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases." (*Id.*). In other words, the Memoranda not only require individual agents and officers to receive preapproval before conducting enforcement actions against aliens falling outside the three priority groups; they also appear to bind *the field offices themselves* to the preapproval process delineated in the February 18 Memorandum.

For these reasons, the Court finds that the amount of discretion that the February 18 Memorandum confers to the agency and its decisionmakers in conducting routine enforcement actions weighs against classifying the Memorandum as a general statement of policy. Weighing this factor along with the rights and obligations affected, the Court concludes that the Memoranda do not constitute a general statement of policy.

Procedural Rule

Even if the February 18 Memorandum is not a general statement of policy, it may nevertheless be exempt from notice and comment if it is a rule "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also Texas DAPA*, 809 F.3d at 176. The Government does not assert that the February 18 Memorandum is a rule of DHS organization or practice; rather, the Government contends that it is one of agency procedure. (Dkt. No. 42 at 47–50). The Fifth Circuit employs two tests to determine whether a rule is one of agency procedure. *See Texas DAPA*, 809 F.3d at 176–77; *see also Texas*, 328 F. Supp. 3d at 728. Here, both tests yield the same conclusion: the Memoranda do not constitute a procedural rule that is exempt from the APA's notice and comment requirement.

AMERICAN OVERSIGHT

The first test used by the Fifth Circuit to determine whether a rule is procedural is the "substantial impact test." *See Texas DAPA*, 809 F.3d at 176. This test "is the primary means by which [the court] look[s] beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *Id.* (citing *Kast Metals*, 744 F.2d at 1153). "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Texas DAPA*, 809 F.3d at 176 (quoting *Kast Metals Corp.*, 744 F.2d at 1153).

In making this determination, the question is not "whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir.), *modified on reh'g*, 36 F.3d 89 (5th Cir. 1994), for text, *see* No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994). This distinction makes good sense, as "the notice and comment provisions 'were designed to assure fairness and mature consideration of rules of general application,'" *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969)), and to "afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.'" *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)).

In determining whether the rule will have a "substantial impact" on those regulated, the Court may consider whether the rule creates legal or financial obligations for the plaintiff and whether the rule restricts the discretion of agency officials. *See Texas DAPA*, 809 F.3d at 176 (concluding DAPA "undoubtedly [satisfies the substantial impact]

AMERICAN OVERSIGHT

test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes"); *Phillips Petroleum Co.*, 22 F.3d at 620 (concluding the rule at issue was not procedural because, in part, "[t]he rule narrowly restrict[ed] the discretion of MMS officials in determining the value of NGLP's" and "[i]t foreclose[d] other valuation methods by prescribing binding valuation criteria"); *see also Texas*, 328 F. Supp. 3d at 728 (concluding DACA is not a procedural rule, having found it "undoubtedly satisfies [the substantial impact] test because it has forced the states to spend money on various social services costs, which are clearly modif[ications] of substantive rights" (quotation omitted)). If the rule has a substantial impact on "the regulated industry, or an important class of the members or the products of that industry," then "notice and opportunity for comment should first be provided" because "[t]he exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated." *Phillips Petroleum Co.*, 22 F.3d at 620.

Considering these criteria, the Memoranda satisfy the substantial impact test. First, as discussed above, the Memoranda affect at least one of Texas's legal obligations. *See supra* II.B.2.b. Specifically, they affect Texas's legal and financial obligations to partially fund Emergency Medicaid to aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2) but, pursuant to the Memoranda, are not detained by ICE when they are released from state custody or during the removal period. The Memoranda also have a substantial impact because, as just described, they limit the discretion exercised by ICE

AMERICAN OVERSIGHT

field offices, agents, and officers. In sum, the February 18 Memorandum mandates a process for ICE field offices and agents to follow for obtaining preapproval to detain aliens the Memoranda deem to be nonpriorities. This mandatory policy restricts DHS from exercising discretion and conducting routine enforcement actions against aliens the Memoranda classify as nonpriorities. This curtailment of agency discretion in conducting routine civil immigration enforcement actions is yet another substantial impact the Memoranda have on those they regulate.

Finally, the Memoranda have a substantial impact on certain aliens already in detention. As discussed above, *see supra* II.B.2.b, and as another district court's ruling demonstrates, the Memoranda make certain nonpriority aliens' removal "unlikely to be imminent," thus entitling some of those aliens to be released from detention. *Hussein S.M.*, 2021 WL 1986125, at *3; *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. Considering the many ways the Memoranda affect rights and obligations, it is clear that the Memoranda have a substantial impact and, therefore, the substantial impact test weighs against classifying the Memoranda as procedural rules.

The second test for determining whether a rule is procedural asks the Court to weigh two considerations. First, the Court must consider the "effect on those interests ultimately at stake in the agency proceeding." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013)) (quotation omitted). "Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns.*, 931 F. Supp. 2d at 107). This consideration clearly

AMERICAN OVERSIGHT

weighs against characterizing the Memoranda as procedural rules, given that the Court has already found that the Memoranda affect the rights and obligations of Texas, DHS, and certain aliens. *See supra* II.B.2.b.

Second, the Court must assess whether the Memoranda affect the substantive standards by which DHS determines whether to detain certain aliens. *See Texas DAPA*, 809 F.3d at 176–77 ("[R]ules are generally considered procedural so long as they do not 'change the substantive standards by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide." (quotation omitted)). Here, the Memoranda alter the substantive standards by which DHS determines whether and when to detain certain aliens by departing from the plain statutory requirements in Sections 1226(c) and 1231(a)(2) and effectively replacing them with new standards for making such determinations. As discussed above, Section 1226(c) requires DHS to detain aliens falling within the ambit of that provision when they are released from state custody. *See supra* II.B.3.a. Section 1231(a)(2) requires DHS to detain an alien with a final order of removal during the removal period. *See supra* II.B.3.a. The Memoranda, however, require DHS to do something different, setting forth a prioritization scheme that declares some aliens falling within the ambit of Section 1226(c) and 1231(a)(2) as enforcement "priorities" and others also falling within those same statutory categories as "nonpriorities." *See* (Dkt. No. 19-2 at 4–7). And to detain nonpriorities, the February 18 Memorandum *requires* ICE agents to obtain preapproval. *See* (*Id.* at 7). No such prioritization scheme or preapproval process exists in Sections 1226(c) and 1231(a)(2). Rather, these provisions plainly require DHS to detain *all* aliens who meet the

AMERICAN OVERSIGHT

enumerated statutory criteria and that DHS detain them at or during the time stated in the provisions. *See* 8 U.S.C. §§ 1226(c), 1231(a)(2). Thus, the Memoranda change the "substantive standards by which [DHS] evaluates" whether or not to detain an alien who falls within the ambit of Section 1226(c) and 1231(a)(2). *See Texas DAPA*, 809 F.3d at 177 ("DAPA establishes the substantive standards by which the agency evaluates applications which seek a benefit that the agency purportedly has the power to provide—a critical fact requiring notice and comment." (cleaned up)). Therefore, this test also weighs against classifying the Memoranda as procedural rules.

Texas Has Met Its Burden on Its Procedural APA Claim

In sum, the Court finds that the Memoranda do not constitute a rule that is exempt from the notice and comment requirements of Section 553. The 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. Likewise, the Memoranda are not procedural rules because they have a significant impact on DHS, the states, and certain aliens. Therefore, the Court finds Texas has shown a substantial likelihood of success on the merits of its procedural APA claim.

2. Irreparable Harm

In addition to demonstrating a substantial likelihood of success on the merits, the States must demonstrate "a substantial threat of irreparable injury if the injunction is not issued." *Texas DAPA*, 809 F.3d at 150. Put another way, the States must show they are "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20, 129 S.Ct. at 374 (emphasis added). For an injury to be sufficiently "irreparable," the

AMERICAN OVERSIGHT

States need only show 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 States argue their injuries are irreparable because they will incur financial costs that are unrecoverable. (Dkt. No. 18 at 40–41); (Dkt. No. 51 at 31). The States also argue they will suffer irreparable harm because non-detention will result in increased crime. (*Id.*). In response, the Government contends there is no irreparable harm because "there is not a significant impact on the States." (Dkt. No. 42 at 50). The Court concludes the States have demonstrated they are likely to suffer irreparable harm for the following reasons.

As discussed in this Court's standing analysis, the States have presented evidence demonstrating the Memoranda cause financial harm in the form of increased costs for detention facilities. *See supra* II.A.1.a. The States have also demonstrated the Memoranda harm their interests as *parens patriae* because of an increase in criminal activity resulting from the Memoranda's implementation. *See supra* II.A.1.b. The Court found these two injuries were concrete, imminent, and traceable to the Memoranda. The Court also concludes the threat of injuries to the States is "likely" as that term is used by the Supreme Court. *See Winter*, 555 U.S. at 20, 129 S.Ct. at 374.

There is also no indication the States can recover for their injuries. Indeed, there is no immediately discernable theory under which a state can "pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669,

AMERICAN OVERSIGHT

at *47. To that point, no Party has suggested the States can recover any of their likely financial injuries here. And the Fifth Circuit rebuffed an attempt by Texas in the late 1990s to force the federal government to pay medical, educational, and criminal justice expenditures caused by immigration. *See Texas*, 106 F.3d at 663–64 ("The State of Texas and its political subdivisions . . . appeal a Fed.R.Civ.P. 12(b)(6) dismissal of their complaint seeking declaratory and injunctive relief which would require that the United States pay the educational, medical, and criminal justice expenses allegedly incurred as a result of the presence of undocumented or illegal aliens in Texas. Concluding that the complaint raises questions of policy rather than colorable claims of constitutional or statutory violations, we affirm."). Thus, any financial injury is irreparable. *See Burgess*, 871 F.3d at 304.

As for injuries to the States' interests as *parens patriae*, the Supreme Court has determined that "law enforcement and public safety interests" can constitute irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (granting a stay of a judgment after finding Maryland experienced ongoing irreparable harm because it was enjoined from effectuating a statute that assisted government officials in investigating crimes and arresting violent offenders). Here, law-enforcement and public-safety interests underlie the States' *parens patriae* injuries. Accordingly, the States have demonstrated they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Benisek*, ____ U.S. at ____, 138 S.Ct. at 1944.

AMERICAN OVERSIGHT

3. The Balance of Equities and the Public's Interest

Having concluded the States have satisfied the first two elements for obtaining a preliminary injunction, the Court must now determine whether "the threatened injury outweighs any harm that may result from the injunction to the non-movant" and whether "the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051, 1056 (5th Cir. 1997); *accord Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294 (5th Cir. 2020). Federal courts have considered the balance-of-equities and public-interest elements together as they overlap considerably. *Texas DAPA*, 809 F.3d at 187; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 n.36 (N.D. Tex. 2016). And because the Government is the nonmoving party, these two elements "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 1762, 173 L.Ed.2d 550 (2009); *accord Texas DAPA*, 809 F.3d at 187.

In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376. As for determining whether an injunction will undermine the public interest, a court should consider the public interests that may be injured and those that may be served by granting or denying a preliminary injunction. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997–98 (8th Cir. 2011) (citing *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)).

AMERICAN OVERSIGHT

The States argue the Government has no interest in the implementation and enforcement of the unlawful policy contained in the Memoranda. (Dkt. No. 18 at 41–42). The States contend the public interest is furthered when the Executive Branch follows congressional mandates. *See* (*Id.* at 42); (Dkt. No. 51 at 31–32). In response, the Government characterizes any injunction as a restraint on "core Article II authority" which "outweighs any harm to the States and undermines the public interest." (Dkt. No. 42 at 55). In the Government's view, an injunction would inhibit its ability to prioritize limited resources, cause confusion within the Executive Branch, and impede any effort to draft final guidance. (*Id.* at 55–56). The Government also contends the public interest is served when it has the ability "to prioritize national security, border security, and public safety." (*Id.* at 57). Considering these arguments, the Court finds the States have the upper hand.

Notably, without a preliminary injunction, the States will be "threatened with substantial harm" to their state budgets and interests as *parens patriae*. *See Burwell*, 227 F. Supp. 3d at 694. As discussed earlier, the Court is unpersuaded by the Government's claim that the States' injuries are "speculative." *See* (Dkt. No. 42 at 22–23). Instead, the Court has found the States' injuries from costs relating to detention facilities and increased criminal activity are traceable to the implementation of the Memoranda. *See supra* II.A.2.

Although the States face substantial harm from the implementation of the Memoranda, the Government nevertheless attempts to show that the harm it faces is worse. The Government, however, postulates harms "that are less substantial" and

AMERICAN OVERSIGHT

"vague." *See Texas DAPA*, 809 F.3d at 186. Specifically, the Government makes much of an injunction's supposed harm to the Executive Branch's authority. *See* (Dkt. No. 42 at 55–56). Although it is true that the Executive Branch retains vast discretion in immigration enforcement, *see Arizona*, 567 U.S. at 396, 132 S.Ct. at 2499; *Reno*, 525 U.S. at 490, 119 S.Ct. at 946, that discretion ebbs when Congress sets forth a statutory mandate. Indeed, "[i]t is undisputed that Congress may *mandate* that the Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring) (emphasis added). Sections 1226(c) and 1231(a)(2) do just that: they *require* the Executive Branch to detain certain aliens at or for a specified time.[59] Any harm to the Government is therefore exaggerated and should be addressed to Congress.

The Government next complains that an injunction would create inefficiency because it would inhibit the Executive Branch's ability to prioritize limited resources.[60] (Dkt. No. 42 at 55–56). The Court is unpersuaded. First, in at least one case, the Fifth Circuit has concluded that any inefficiency resulting from an injunction inhibiting the Executive's ability to prioritize certain immigration-enforcement actions is "outweighed

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[59] The Government implicitly invokes prosecutorial discretion with respect to any harm an injunction may cause its Article II authority. *See* (Dkt. No. 42 at 55). This argument does not warrant much discussion. Indeed, the Court has already extensively discussed the extent of the Executive's discretion in enforcing a law when a clear congressional mandate is in place. *See supra* II.B.3.

[60] Relatedly, the Government argues that an injunction would harm it by dismantling the two-step process ICE currently undergoes to determine whether to detain an alien in state custody. *See* (Dkt. No. 42 at 56). Sections 1226(c) and 1231(a)(2) already mandate which aliens must be detained and the time at or for which the Government must detain the alien.

AMERICAN OVERSIGHT

by the major financial losses [that] states face." *See Texas DAPA*, 809 F.3d at 187. Here, the Court, in its standing analysis, has already found the Memoranda will result in significant financial losses for the States. *See supra* II.A.1.a. Second, the Government overestimates the effect of an injunction on the Executive's limited resources. Rather than dictate the use of resources, the injunction precludes the Executive Branch from instructing officials to act in a manner contrary to a clear congressional mandate. In other words, the Government remains free to expend its resources in a *lawful* manner.

To this point, "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), 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. *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."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases) ("[T]he public interest in enforcement of the immigration laws is significant."); *cf. Nken*, 556 U.S. at 436, 129 S.Ct. at 1762 ("There is always a public interest in prompt execution of removal orders[.]"). The public interest is particularly strong here because, as fully described earlier, Sections 1226(c) and 1231(a)(2) are statutes that Congress enacted for the benefit of the United States, its citizens, and its legal immigrants. *See supra* I.A.; *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; *Zadvydas*, 533 U.S. at 697, 121 S.Ct. at 2502.

Finally, the Government argues an injunction would result in confusion inside the Executive Branch because immigration officials will be left with little to no guidance on

AMERICAN OVERSIGHT

how to exercise their enforcement discretion. (Dkt. No. 42 at 56). Relatedly, the Government also theorizes that injunctive relief would impede its effort to draft final guidance. (*Id.* at 56–57). These arguments are puzzling because, with or without an injunction in place, the Government is free to craft new guidance or instruct Executive Branch officials to act in a certain manner *so long as such guidance and instructions comport with the law* (*i.e.*, congressional mandates).

Given the discussion above, the Court concludes the potential harms to the States arising out of the Memoranda outweigh any potential harms to the Government. The Court also concludes the public interest is served, rather than undermined, by an injunction. Thus, the States have satisfied all four elements for a preliminary injunction.

C. SCOPE OF RELIEF

The States have satisfied the standard for a preliminary injunction. This conclusion raises two additional inquiries: the geographic scope of the injunction as well as the nature of the injunctive remedy. The Court addresses each in turn.

1. Geographic Scope

The States request a nationwide injunction. (Dkt. No. 18 at 42–43). The Court has expressed its substantial skepticism of nationwide injunctions. *Texas*, ____ F. Supp. 3d at ____, 2021 WL 247877, at *6–7; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51. Indeed, nationwide injunctions of executive actions are an area of fierce disagreement in the courts and in legal academia. *See id.* But, as with any case, this Court is bound by applicable Fifth Circuit precedent in determining whether a nationwide scope for an injunction is appropriate. That precedent explains that a federal district

AMERICAN OVERSIGHT

court, under "appropriate circumstances," has authority "to issue a nationwide injunction." *Texas DAPA*, 809 F.3d at 188. One such appropriate circumstance is when a nationwide injunction is necessary is to ensure uniformity in immigration policies as prescribed by federal law. *Id.* at 187–88; *see also E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("[C]ases implicating immigration policy have a particularly strong claim for uniform, nationwide relief." (citation omitted)). Another such circumstance is when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries [of the unlawful policy] would be free to move among states." *Texas DAPA*, 809 F.3d at 188.

The Court finds both circumstances exist here. First, the Memoranda affect national immigration policy, which is designed to be uniform. *See id.* at 187–88. Second, given what has been detailed in the Court's standing analysis, 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. *See supra* II.A.2 & II.A.3; *see also Texas DAPA*, 809 F.3d at 188. The States submitted evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Accordingly, a nationwide injunction is appropriate. *See Texas DAPA*, 809 F.3d at 187–88; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51.

The Government offers a handful of arguments in opposition to issuing a nationwide injunction. None carry the day.

AMERICAN OVERSIGHT

First, the Government argues nationwide relief is inappropriate because lawsuits concerning the Memoranda in other jurisdictions have been unsuccessful. (Dkt. No. 42 at 60). This misses the point. In determining the appropriate scope of an injunction, the Court's task is to fashion a remedy that prevents the plaintiffs *in this case* from suffering irreparable harm. *See ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) ("When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979)); *see also Dep't of Homeland Sec. v. New York*, ____ U.S. ____, ____, 140 S.Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring in the grant of a stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a *particular plaintiff in a particular lawsuit*. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place." (emphasis added)); *ODonnell v. Goodhart*, 900 F.3d 220, 224 (5th Cir. 2018) ("The district court must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order." (emphasis added) (quoting *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004))). In concluding the States are entitled to injunctive relief, this Court has determined, based on Fifth Circuit precedent and the record before it, that a nationwide injunction is appropriate to prevent the States from suffering irreparable harm.

Next, the Government argues nationwide relief is generally ill-advised because, in effect, any attempt by the Government to create a new federal policy is thwarted by "a

AMERICAN OVERSIGHT

single successful challenge" to the policy, even if other challenges to the policy are unsuccessful. (Dkt. No. 42 at 60) (quoting *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 601 (Gorsuch, J., concurring in the grant of a stay)). Frankly, the Court shares these concerns. Nonetheless, the Court, in fashioning a proper remedy, is bound by precedent, *see Texas DAPA*, 809 F.3d at 187–88, and "must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order," *Goodhart*, 900 F.3d at 224 (emphasis added) (quoting *Veneman*, 380 F.3d at 818); *see also Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of a stay). The Court therefore finds the Government's argument unpersuasive.

Third, the Government attempts to distinguish this case from *Texas DAPA* and *Texas I* by asserting that this case involves *individual* detention decisions rather than a blanket policy pausing enforcement actions against aliens. (Dkt. No. 42 at 60). To be sure, individual enforcement decisions are "inherently discretionary and non-uniform," *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *51, but the States are not challenging individual enforcement decisions. Rather, the States, like the plaintiffs in *Texas DAPA* and *Texas I*, are challenging a blanket policy. *See Texas DAPA*, 809 F.3d at 146–49; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *30. Specifically, the States are challenging the Memoranda, which implement and enforce a blanket policy regarding the detention of certain aliens—a policy that contravenes congressional mandates. Accordingly, the Government's argument that this case is distinguishable from *Texas I* and *Texas DAPA* falls short.

AMERICAN OVERSIGHT

Finally, the Government argues that, because the States' injuries are supposedly premised on detainers in Texas and Louisiana, an injunction limited in geographic scope to the boundaries of those two states will sufficiently protect them from any irreparable harm they may suffer due to the Memoranda. (Dkt. No. 42 at 60–61). The Court disagrees for two reasons. First, the Government incorrectly asserts that the States' injuries are premised on detainers when the States' injuries are, in fact, premised on the increased costs to their detention systems and their interests as *parens patriae*. *See* (Dkt. No. 1 at 15–16); (Dkt. No. 18 at 15–16, 18, 35–37). Second, in arguing that the geographic scope of the injunction should be limited to the boundaries of Texas and Louisiana, the Government ignores that, if aliens are not detained in other states, those aliens can migrate to Texas and Louisiana thus causing them harm. *See Texas DAPA*, 809 F.3d at 188 (recognizing that "there is a substantial likelihood that a geographically-limited injunction would be ineffective because" the beneficiaries of the unlawful policies "would be free to move among states"). Indeed, the evidence produced in this case regarding the migration patterns of aliens to Texas and from other states buttresses this point. *See supra* II.A.2 & II.A.3; (Dkt. No. 19-21 at 5–7); (Dkt. No. 19-22 at 5–7, 14); (Dkt. No. 19-23 at 2). The Government's argument is therefore meritless.

Thus, for the foregoing reasons, the States are entitled to a nationwide injunction.

2. <u>Remedy</u>

As stated above, "the scope of injunctive relief is dictated by the extent of the violation established." *ODonnell*, 892 F.3d at 163 (quoting *Califano*, 442 U.S. at 702, 99 S.Ct. at 2558); *see also Goodhart*, 900 F.3d at 224 ("The district court must narrowly tailor

AMERICAN OVERSIGHT

an injunction to remedy the specific action which gives rise to the order." (quoting *Veneman*, 380 F.3d at 818)). Since the States have satisfied the four elements required for a preliminary injunction, the Court finds that it is appropriate to enjoin the Executive Branch from implementing and enforcing the Memoranda. Specifically, the Court enjoins (1) Section B of the January 20 Memorandum, and (2) the sections from the February 18 Memorandum entitled "Civil Immigration Enforcement and Removal Priorities" and "Enforcement and Removal Actions: Approval, Coordination, and Data Collection." (Dkt. No. 1-2 at 4–8). These sections implement and enforce a policy that directly contravenes congressional mandates. As stressed above, agency policies that contravene congressional mandates are unlawful—plain and simple. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Barnhart*, 534 U.S. at 462, 122 S.Ct. at 956. Moreover, the States have met their burden to show a substantial likelihood that the Memoranda's policy prioritizing the detention of certain aliens over others is arbitrary and capricious and fails to comply with the APA's notice and comment requirement. The Court therefore enjoins the implementation and enforcement of these sections.[61]

IV. CONCLUSION

Although this case involves many issues of administrative and immigration law, its core concerns whether the Executive Branch may implement a policy that directly

[61] The States also request that the Court issue a positive injunction to compel agency action unlawfully withheld. (Dkt. No. 18 at 25–26); (Dkt. No. 51 at 33). The Government is opposed. (Dkt. No. 42 at 57–61). Under the APA, a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Court reserves ruling on this issue until later in the litigation.

AMERICAN OVERSIGHT

conflicts with laws that Congress enacted. The answer is no. In the end, through all their detailed explanations of the Executive's seemingly unending discretion, the Government substantially undervalues the People's grant of "legislative Powers" to Congress.

Because the States have demonstrated that there is a substantial likelihood that portions of the Memoranda direct Executive Branch officials to act in a way that is contrary to Sections 1226(c) and 1231(a)(2), those sections of the Memoranda cannot stand and are hereby enjoined. Additionally, the Court enjoins the sections of the Memoranda described above because the States have demonstrated a substantial likelihood that the policy concerning detention of certain aliens set forth in the Memoranda is arbitrary and capricious under the APA and the Memoranda fail to comply with the APA's notice and comment requirement.

For the foregoing reasons, the Court **GRANTS** the States' Motion for Preliminary Injunction. (Dkt. No. 18). Therefore, it is hereby **ORDERED** that:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from enforcing and implementing the policies described in:

    a. Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4);

    b. The section entitled "Civil Immigration Enforcement and Removal Priorities" in the February 18 Memorandum. (Dkt. No. 1-2 at 4–6); and

AMERICAN OVERSIGHT

c. The section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the February 18 Memorandum.[62] (Dkt. No. 1-2 at 6–8).

2. This Preliminary Injunction is granted on a nationwide basis and prohibits enforcement and implementation in every place the Government has jurisdiction to enforce and implement the January 20 and February 18 Memoranda.

3. This Preliminary Injunction shall remain in effect pending a final resolution of the merits of this case or until a further Order from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

To ensure compliance with this Preliminary Injunction, the Court further **ORDERS** the following:

1. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of these aliens in light of the fact that the Memoranda have been enjoined.

2. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1231(a)(2) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of aliens in light of the fact that the Memoranda have been enjoined.

3. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens known to the Government, who are covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release.

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[62] This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's subsections entitled "Notice of At-Large Enforcement Actions" and "Weekly Reporting of All Enforcement and Removal Actions."

AMERICAN OVERSIGHT

For each of these aliens, provide under seal the alien's last known residence or address and the offense for which the alien had been incarcerated.

Additionally, for each alien not detained, the Government shall make and retain a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

4. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens in their removal period as defined in 8 U.S.C. § 1231(a)(1). Of those, provide the number who were not detained pursuant to 8 U.S.C. § 1231(a)(2).

For each of these aliens not detained, provide under seal the alien's last known residence or address.

Additionally, for each alien not detained, the Government shall make a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the January 20 Memorandum's sections entitled "A. Comprehensive Review of Enforcement Policies and Priorities" and "D. No Private Right Statement."[63] This Memorandum Opinion and Order also does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's sections entitled "Purpose," "Background," "Questions," and "No Private Right Statement."

No security bond is required under Federal Rule of Civil Procedure 65(c).

It is SO ORDERED.

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[63] This Court previously enjoined Section C of the January 20 Memorandum. *See Texas I*, ___ F. Supp. 3d at ____, 2021 WL 2096669, at *52.

AMERICAN OVERSIGHT

Signed on August 19, 2021.

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004124

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. _____

EXHIBIT A

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004125

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracey Renaud
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services

CC: Karen Olick
Chief of Staff

FROM: David Pekoske
Acting Secretary

SUBJECT: **Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities**

This memorandum directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement. It also sets interim policies during the course of that review, including a 100-day pause on certain removals to enable focusing the Department's resources where they are most needed. The United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century. In light of those unique circumstances, the Department must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security.

This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

AMERICAN OVERSIGHT

A. Comprehensive Review of Enforcement Policies and Priorities

The Chief of Staff shall coordinate a Department-wide review of policies and practices concerning immigration enforcement. Pursuant to the review, each component shall develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel, detention space, and removal assets; policies governing the exercise of prosecutorial discretion; policies governing detention; and policies regarding interaction with state and local law enforcement. These recommendations shall ensure that the Department carries out our duties to enforce the law and serve the Department's mission in line with our values. The Chief of Staff shall provide recommendations for the issuance of revised policies at any point during this review and no later than 100 days from the date of this memo.

The memoranda in the attached appendix are hereby rescinded and superseded.

B. Interim Civil Enforcement Guidelines

Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances. DHS's civil immigration enforcement priorities are protecting national security, border security, and public safety. The review directed in section A will enable the development, issuance, and implementation of detailed revised enforcement priorities. In the interim and pending completion of that review, the Department's priorities shall be:

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.

These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole. In

AMERICAN OVERSIGHT

Case 6:21-cv-00016 Document 1-2 Filed on 04/06/21 in TXSD Page 4 of 6

addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.

While resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein. In order to ensure appropriate allocation of resources and exercise of prosecutorial discretion, the Acting Director of ICE shall issue operational guidance on the implementation of these priorities. This guidance shall contain a protocol for the Acting Secretary to conduct a periodic review of enforcement actions to ensure consistency with the priorities set forth in this memorandum. This guidance shall also include a process for the Director of ICE to review and approve of any civil immigration enforcement actions against individuals outside of federal, state or local prisons or jails.

These interim enforcement priorities shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the review directed in section A.

C. Immediate 100-Day Pause on Removals

In light of the unique circumstances described above, DHS's limited resources must be prioritized to: (1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact. In addition, we must ensure that our removal resources are directed to the Department's highest enforcement priorities. Accordingly, and pending the completion of the review set forth in section A, I am directing an immediate pause on removals of any noncitizen[1] with a final order of removal (except as noted below) for 100 days to go into effect as soon as practical and no later than January 22, 2021.

The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who:

1. According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
2. Was not physically present in the United States before November 1, 2020; or
3. Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver

[1] "Noncitizen" as used in this memorandum does not include noncitizen nationals of the United States.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004128

and has been given a meaningful opportunity to access counsel prior to signing the waiver;[2] or

4. For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

No later than February 1, 2021, the Acting Director of ICE shall issue written instructions with additional operational guidance on the further implementation of this removal pause. The guidance shall include a process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause. The process shall provide for assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

D. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[2] A voluntary waiver encompasses noncitizens who stipulate to removal as part of a criminal disposition.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004129

APPENDIX

Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest,* Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Implementing the President's Border Security and Interior Immigration Enforcement Policies*, Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement*, Memorandum of August 15, 2017.

US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* Policy Memorandum of June 28, 2018. (US Citizenship and Immigration Services should revert to the preexisting guidance in Policy Memorandum 602-0050, US Citizenship and Immigration Services, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, Policy Memorandum of Nov. 7, 2011.)

US Citizenship and Immigration Services, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA,* Policy Memorandum of June 28, 2018.

U.S. Customs and Border Protection, *Executive Orders 13767 and 13768 and the Secretary's Implementation Directions of February 17, 2017*, Memorandum of February 21, 2017.

AMERICAN OVERSIGHT

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. _____

EXHIBIT B

AMERICAN OVERSIGHT

Policy Number: 11090.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

February 18, 2021

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director

SUBJECT: Interim Guidance: Civil Immigration Enforcement and Removal Priorities

Purpose

This memorandum establishes interim guidance in support of the interim civil immigration enforcement and removal priorities that Acting Secretary Pekoske issued on January 20, 2021. Acting Secretary Pekoske issued the interim priorities in his memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memo).

This interim guidance is effective immediately. It applies to all U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning.

This interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines. The Secretary has informed me that he will issue new guidelines only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices. He anticipates issuing these guidelines in less than 90 days.

I have requested approval of certain revisions to the Interim Memo until the Secretary issues new enforcement guidelines. My requested revisions have been approved, and they are incorporated into this guidance. To the extent this guidance conflicts with the Interim Memo, this guidance controls. As you will read below, the revisions include, but are not limited to: (1) authorization to apprehend presumed priority noncitizens[1] in at-large enforcement actions without advance approval; (2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; (3) authorization to apprehend

[1] For purposes of this memorandum, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

AMERICAN OVERSIGHT

without prior approval other presumed priority noncitizens who are encountered during enforcement operations; (4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended; (5) the further delegation of approval authority; and (6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

Section C of the Interim Memo has been enjoined. This memorandum does not implement, nor take into account, Section C. This memorandum implements Section B (Interim Civil Enforcement Guidelines).

Background

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021), which articulated the Administration's baseline values and priorities for the enforcement of the civil immigration laws.

On the same day, Acting Secretary Pekoske issued the Interim Memo. The Interim Memo did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review. Fourth, it rescinded several existing policy memoranda, including two ICE-related memoranda, as inconsistent with EO 13993.[2] The Interim Memo further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining the Department from enforcing and implementing the 100-day removal pause in Section C.

Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others.

In addition to resource constraints, several other factors render ICE's mission particularly complex. These factors include ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and, relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

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[2] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017); Memorandum from Tracy Short, Principal Legal Advisor, ICE, to All OPLA Attorneys, *Guidance to OPLA Attorneys Regarding Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

AMERICAN OVERSIGHT

Accordingly, in executing its critical national security, border security, and public safety mission, the Department must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission.

Civil Immigration Enforcement and Removal Priorities

In support of the interim priorities, the guidance established in this memorandum shall be applied to all civil immigration enforcement and removal decisions made after the issuance of this memorandum. The civil immigration enforcement and removal decisions include, but are not limited to, the following:[3]

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions;
- Deciding whether to grant deferred action or parole; and
- Deciding when and under what circumstances to execute final orders of removal.

For ease of reference, the interim priorities identified in the Interim Memo, and as revised by this guidance, are set forth below along with further explanation.

As a preliminary matter, it is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen. Rather, officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Enforcement and removal actions that meet the criteria described below are presumed to be a justified allocation of ICE's limited resources. Actions not reflected in the criteria described below may also be justified, but they are subject to advance review as outlined further below.

In determining whether to pursue an action that falls outside the criteria described below, all relevant facts and circumstances regarding the noncitizen should be considered. For instance, officers and agents should consider: whether there are criminal convictions; the seriousness and recency of such convictions, and the sentences imposed; the law enforcement resources that have been spent; whether a threat can be addressed through other means, such as through recourse to criminal law enforcement authorities at the federal, state, or local level, or to public health and other civil authorities at the state or local level; and, other relevant factors (including, for example, the mitigating factors identified on page 5).

[3] As discussed above, the Department is enjoined from enforcing the Immediate 100-Day Pause on Removals in the Interim Memo. This following interim guidance should not be read to permit implementation of Section C of the Interim Memo.

AMERICAN OVERSIGHT

Criteria Defining Cases That Are Presumed to be Priorities

Priority Category 1: National Security. A noncitizen is *presumed* to be a national security enforcement and removal priority if:

1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities;
2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities;[4] or
3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

In evaluating whether a noncitizen's "apprehension, arrest, or custody is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat (as distinguished from a public safety threat) and is discussed below.

Priority Category 2: Border Security. A noncitizen is *presumed* to be a border security enforcement and removal priority if:

1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020[5]; or
2) he or she was not physically present in the United States before November 1, 2020.

To be clear, the border security priority includes any noncitizen who unlawfully entered the United States on or after November 1, 2020.

Priority Category 3: Public Safety. A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA[6]; or

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[4] For purposes of the national security enforcement priority, the terms "terrorism or terrorism-related activities" and "espionage or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws.

[5] The statutory mandates in Section 235 of the INA (regarding asylum seekers) continue to apply to noncitizens.

[6] This criterion tracks Congress's prioritization of aggravated felonies for immigration enforcement actions. Whether an individual has been convicted of an aggravated felony is a complex question that may involve securing and analyzing a host of conviction documents, many of which may not be immediately available to officers and agents. Even when all conviction documents are available, whether a conviction is for an aggravated felony may be a novel question under applicable law. Accordingly, in deciding whether a noncitizen has been convicted of an

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004135

2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

In evaluating whether a noncitizen currently "pose[s] a threat to public safety," officers and agents are to consider the extensiveness, seriousness, and recency of the criminal activity. Officers and agents are to also consider mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.

Officers are to base their conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consult with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

Particular attention is to be exercised in cases involving noncitizens who are elderly or are known to be suffering from serious physical or mental illness. Similarly, particular attention is to be exercised with respect to noncitizens who have pending petitions for review on direct appeal from an order of removal; have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or have pending applications for immigration relief and are prima facie eligible for such relief. In such cases, execution of removal orders should have a compelling reason and are to have approval from the FOD.

A civil enforcement or removal action that does not meet the above criteria for presumed priority cases will require preapproval as described below.

Enforcement and Removal Actions: Approval, Coordination, and Data Collection

To ensure compliance with this guidance and consistency across geographic areas of responsibility, and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim guidance, ICE will require that field offices collect data on the nature and type of enforcement and removal actions they perform. In addition, ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases. The data and coordination will inform the development of the Secretary's new enforcement guidance.

No Preapproval Required for Presumed Priority Cases

Officers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases, beyond what existing policy requires and what a supervisor instructs.

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aggravated felony for purposes of this memorandum, officers and agents must have a good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004136

Preapproval for Other Priority Cases

Any civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval from the FOD or SAC. In deciding to undertake an enforcement action or removal, the agent or officer must consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors. In requesting this preapproval, the officer or agent must raise a written justification through the chain of command, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place.

The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above. An approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above.

In some cases, exigent circumstances and the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action. While it is impossible to preconceive all such circumstances, they generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property. If preapproval is impracticable, an officer or agent should conduct the enforcement action and then request approval as described above within 24 hours following the action.[7]

As always, it is important that ICE endeavor to remove noncitizens with final removal orders who have remained in post-order detention for more than 90 days. ICE will continue to review such noncitizens' cases on a regular basis, consistent with existing law and policy. ICE will endeavor to remove such noncitizens consistent with legal requirements and national, border security, and public safety priorities.

Periodically, ICE receives requests to exercise some form of individualized discretion in the interests of law and justice. ICE will create and maintain a system by which personnel can evaluate these individualized requests.

Notice of At-Large Enforcement Actions

The execution of an at-large enforcement action should be preceded by notification to the relevant state and local law enforcement agency or agencies. This notification will advance

[7] Where approval is sought following the enforcement action due to exigent circumstances, the request shall explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained. Additionally, when the location of a proposed or completed enforcement action is a courthouse, as defined in ICE Directive 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018, or as superseded), or a sensitive location, as defined in ICE Directive No. 10029.2, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011, or as superseded), that should be explicitly highlighted in the request.

AMERICAN OVERSIGHT

public safety and help ensure that planned immigration enforcement actions do not improperly interfere with state and local law enforcement investigations and actions.

Weekly Reporting of All Enforcement and Removal Actions

The Director will review all enforcement actions to ensure compliance with this guidance and consistency across geographic areas of responsibility and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim priorities.

Each Friday, the Executive Associate Directors for Enforcement and Removal Operations and Homeland Security Investigations will compile and provide to the Office of the Director, the Office of the Deputy Director, and the Office of Policy and Planning (OPP), a written report: (1) identifying each enforcement action taken in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the action; and (3) identifying the date, time, and location of the action.

In addition, each Friday the Executive Associate Director for Enforcement and Removal Operations will provide to the Office of the Director, the Office of the Deputy Director, and OPP, a written report: (1) identifying each removal in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the removal; and (3) identifying the date, time, and location of the removal.

These reporting requirements will be assessed periodically during this interim period to ensure that they are both productive and manageable.

The weekly reports will be made available to the Office of the Secretary.

Questions

Questions regarding this interim guidance or the Interim Memo should be directed to OPP through the chain of command and Directorate or Program Office leadership. Answers to frequently asked policy questions will be published on OPP's inSight page on an ongoing basis. Please note, however, that case-specific questions should generally be addressed by Directorate or Program Office leadership.

No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

AMERICAN OVERSIGHT

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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DECLARATION OF PETER B. BERG

I, Peter B. Berg, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since October 4, 2020. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.

2. Prior to this position, I served as the Assistant Director for Field Operations beginning on June 21, 2020 and had been acting in that role since January 31, 2020. In these capacities, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 24 Field Offices and 188 sub-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004139

offices. I further managed ERO Headquarters components, including Domestic Operations, Special Operations, and Law Enforcement Systems and Analysis.

3. I have been a career law enforcement officer since 1996, serving in various capacities with both ICE and the former Immigration and Naturalization Service (INS). Other leadership positions I have held within ICE include: Field Office Director and Deputy Field Office Director for the St. Paul Field Office, Acting Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and Acting Deputy Assistant Director for the ERO Headquarters Field Operations Division.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 3.2 million cases, which

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004140

includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

III. Guidance for Immigration Enforcement and Removal Actions

6. On February 18, 2021, ICE's Acting Director, Tae D. Johnson, issued interim guidance titled, *Civil Immigration Enforcement and Removal Priorities* (Johnson Memorandum) (Feb. 18, 2021), which implements with revisions the priorities set forth in DHS's January 20, 2021 Memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (January 20 Memorandum). The Johnson Memorandum lays out a process to allocate ICE's limited law enforcement resources to achieve its mission by focusing on cases that fall within three "presumed priority" categories: national security, border security, and public safety.

7. Further, the Johnson Memorandum emphasizes that the priorities do not prohibit the arrest, detention, or removal of any noncitizen; to the contrary, the memorandum presumes and sets out a process with respect to actions involving cases that fall outside the three priority categories. As a result, under the Johnson Memorandum, ICE has continued to arrest and remove individuals who meet the three presumed priorities, as well as those who constitute "other priority cases." Under the memorandum, no immigration enforcement action or removal is categorically prohibited. Rather, actions that do not meet the presumed priority criteria require preapproval by the appropriate ERO Field Office Director or Homeland Security Investigations Special Agent in Charge except where exigent circumstances and public safety make preapproval impracticable. Pursuant to this guidance, ICE took approved enforcement actions against individuals with serious and violent pending criminal charges, non-aggravated felon sexual predators, individuals with a nexus to national security threats to

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004141

the United States, individuals who are identified as members of Transnational Organized Crime groups, individuals with warrants from foreign governments identified by an INTERPOL issued "Red Notice," and individuals with a range of violent criminal convictions.

IV. Irreparable Harm to ICE from Issuance of the Preliminary Injunction

8. I have read and am familiar with the preliminary injunction issued by the U.S. District Court for the Southern District of Texas in this case.

Inability to Prioritize Use of Finite Resources

9. On August 19, 2021, the U.S. District Court for the Southern District of Texas enjoined DHS from enforcing and implementing the policies described in: Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4); the section entitled "Civil Immigration Enforcement and Removal Priorities" in the Johnson Memorandum. (Dkt. No. 1-2 at 4–6); and the section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the Johnson Memorandum, with certain exceptions. (Dkt. No. 1-2 at 6–8). Implementing the terms of the injunction and the reporting requirements, discussed in more detail below, would be unreasonably and unduly burdensome, if not entirely impossible.

10. First, the number of noncitizens who likely would fall within the scope of the court's order and nationwide preliminary injunction significantly exceeds ICE's capacity to detain. In July of this calendar year alone, CBP apprehended a total of over 212,000 individuals seeking to cross the southwest border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited August 19, 2021). Even with over 95,000 expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004142

authorities, over 116,000 were processed under Title 8. Another 64,000 Title 8 cases were apprehended in March; 66,000 in April; 67,000 in May; and 83,000 in June. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code.

11. Enforcement actions against the entire population covered by the court's order and preliminary injunction would require ICE bedspace, personnel, and other resources that simply do not exist. ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide, including approximately 31,500 single adult beds and approximately 2,500 family unit beds, to support its mission to enforce immigration law. ICE's access to its full inventory of bedspace is severely limited due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, detention facility contract modifications, and the ongoing COVID-19 pandemic. Specifically, ICE's Pandemic Response Requirements (PRR) for its detention facilities, which are informed by the Centers for Disease Control and Prevention's COVID-19 guidelines, require that facilities undertake efforts to reduce populations to approximately 75% capacity.[1] Last year, the U.S. District Court for the Central District of California issued a nationwide preliminary injunction recognizing the 75% capacity limit, and ordering ICE to maintain additional strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020). In light of these mandates, ICE's currently available bedspace inventory is only approximately 26,800 beds.

[1] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements (PRR), Version 6.0 (March 16, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited August 19, 2021).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004143

12. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public-safety threats, and/or recent border entrants. According to data last viewed on August 20, 2021, the currently-detained population of 25,596 noncitizens constitutes more than 95% of the approximately 26,800 currently available beds. The court's order and the preliminary injunction would make it impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety and national security mission in a fair, consistent, and effective manner. Specifically, the injunction and the order would likely result in the release of noncitizens ICE has deemed priorities for removal.

13. Second, the order and the preliminary injunction could adversely impact the ability of ICE to take immediate enforcement action against noncitizens who pose a security threat or other real harm to U.S. communities. Indeed, implementation of ICE's interim priority structure has enabled the agency to focus resources on arresting and detaining the most dangerous noncitizens.

14. If ICE were required to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, it would significantly curtail ERO's ability to protect communities from public safety threats. And given the limited detention capacity described above, detaining such individuals may well prevent ICE from detaining other individuals not subject to detention under section 1226(c) or section 1231(a)(2), even where those individuals present a danger to the community or a flight risk.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004144

15. Third, compliance with the nationwide preliminary injunction would adversely impact ICE's ability to plan targeted enforcement operations focused on security or public safety threats. ICE's best understanding is that there are approximately 11 million noncitizens in the United States who do not have authorization to reside here. It is critical that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated enforcement operation that builds on ongoing efforts to arrest and remove noncitizen sex offenders from our communities. Historically, ICE has used targeted operations like Operation SOAR as a mechanism to focus agency resources on the most egregious offenders in the interest of public safety, even where those offenders may not be subject to the statutory provisions at issue in this case.

16. The Johnson Memorandum focuses agency resources on enforcement actions against the most serious offenders. From February 18, 2021, through July 31, 2021, ERO processed 25,916 administrative arrests. Almost 20% of those arrests were noncitizens convicted of aggravated felony offenses. For the same period in the year 2020, ERO processed 39,107 administrative arrests. However, less than 8% of those arrests were noncitizens convicted of aggravated felony offenses.

17. Fourth, compliance with the nationwide preliminary injunction would effectively eliminate the ability of the Secretary to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5).. The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909 to maximize use of scarce agency resources, to protect the United States from national security threats and to protect our citizens and communities from harm. *See Department of*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004145

Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.,* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

18. The implementation of the enforcement priorities set forth in the DHS January 20 Memorandum and the Johnson Memorandum has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, to date, approximately 300 officers have been detailed to the Southwest Border to support CBP operations. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b); and transfers of those taken into custody. This support has significantly increased over the past few months.

19. This flexibility has enabled ERO to prioritize border security, consistent with the Johnson Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. Implementing the terms of the court's order and the preliminary injunction would likely force ERO to realign field teams and other assets to allocate limited time and resources on non-criminal and other lower priority targets. Such a reallocation would likely disrupt ERO's ability to have a meaningful impact on important border security efforts.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004146

Lack of Clear Guidance for Nationwide Workforce

20. Absent clear priorities, ERO immigration officers may be left with only very general guidance—or without guidance at all—on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to initiate enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable apportionment of ICE's limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

Unduly Burdensome and Impossible Reporting Requirements

21. The court's order requires ICE to produce monthly reports stating the number of noncitizens known to be "covered by or subject to 8 U.S.C. § 1226(c)(1)(A)-(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release," and to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1226(c) reporting requirement"). The order further requires ICE to produce monthly reports stating the number of noncitizens "in their removal period as defined in 8 U.S.C. § 1231(a)(1)," along with the number of those "who were not detained pursuant to 8 U.S.C. § 1231(a)(2)," to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1231(a) reporting requirement").

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004147

Case 6:21-cv-00016 Document 63-2 Filed on 08/20/21 in TXSD Page 12 of 12

22. ICE's ability to comply to the court's satisfaction with the 1226(c) reporting requirement, for instance, depends almost entirely on ICE's ability to determine whether a noncitizen is covered by or subject to § 1226(c) prior to a decision whether to take the noncitizen into custody, but that would be exceedingly burdensome or, in some instances, impossible to accomplish. When ICE receives information from a state or local law enforcement agency about a noncitizen in detention, the agency only needs probable cause of removability in order to lodge a detainer request. The probable cause standard constitutes neither a conclusive determination that a noncitizen is in fact removable nor a determination that the noncitizen may be covered by one of the statutes at issue in this case. It is only after ICE encounters the individual, assumes custody, and conducts an initial intake screening, that those formal determinations are currently made. In fact, in light of the complexities of the immigration laws, although a removability determination may be possible, a determination regarding the applicable detention authority may require obtaining and reviewing criminal records and ever-evolving developments in caselaw.

23. ICE's ability to determine whether a noncitizen in state or local custody would be covered by or subject to § 1226(c) is further limited by the fact that some states have enacted laws barring information sharing with ICE and/or prohibiting ICE access to facilities.

24. Additionally, even where ICE would be able to make determinations upfront that a noncitizen in state or local custody is covered by or subject to § 1226(c), ICE's ability to learn when a noncitizen may be released from custody is significantly limited in many jurisdictions. Many jurisdictions across the country neither honor ICE detainers nor notify ICE when inmates are released from custody. As of July 19, 2021, ICE had identified 463 jails or prisons that do not notify ICE prior to the release of a noncitizen, and 155 jails or

AMERICAN OVERSIGHT

prisons that provide notification to ICE prior to a noncitizen's release from custody but do not provide adequate hold time for ICE to take an individual into custody. For many cases in these jurisdictions, ICE is not aware when noncitizens are released from criminal custody and has no knowledge of their last known residence. Some jurisdictions have also significantly limited ICE's access to state and local databases, which would include some of the information being sought by the court.

25. The 1231(a) reporting requirement similarly poses significant burdens for ICE and may, depending upon the court's interpretation of the requirement, apply to a very large class of individuals. There are currently an estimated 1.2 million noncitizens in the United States who have been issued final orders of removal. If the 1231(a) reporting requirement is intended to include both noncitizens who were detained at the time the order of removal became administratively final and those who were not detained, providing updated information on this population every month would significantly strain ICE's capacity to manage and track statistical data for any other purpose, including its mandatory congressional reporting requirements, statutory FOIA obligations, and myriad reporting requirements in this and other litigation.

26. The requirement that ICE make contemporaneous records of the decision not to detain will impose a serious administrative burden on the line officers making those decisions. Because of the constraints on available bedspace, the number of noncitizens subject to detention under either § 1231(a)(2) or § 1226(c) who will not be detained will likely be significant. Under the terms of the order, the line officers will be required to document that decision, thus diverting them from other important duties, including other enforcement efforts.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004149

Case 6:21-cv-00016 Document 63-2 Filed on 08/20/21 in TXSD Page 12 of 12

27. Simply put, it would be impossible for ICE to accurately and completely comply with these requirements. And it would pose extraordinary burdens on ICE to attempt to do so. ICE simply does not collect and retain data in the way that the court has requested. Moreover, with respect to noncitizens against whom no enforcement action has been taken, ICE's databases and systems do not (and cannot) capture information pertaining to the detention authority that would have applied to those noncitizens. In other words, ICE can only track the detention authority of individuals who are presently in ICE custody. Even then, ICE systems are not designed to capture the level of granularity needed to accurately report the number of noncitizens subject to § 1226(c) mandatory custody or the subset of noncitizens subject to § 1231(a) custody authority for whom custody is mandatory.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 20th day of August, 2021.

PETER B BERG

Digitally signed by PETER B BERG
Date: 2021.08.20 23:13:13 -04'00'

Peter B. Berg
Acting Deputy Executive Associate Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004150

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-00016

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO FOR A STAY PENDING APPEAL

EXHIBIT A

DECLARATION OF THOMAS HOMAN

AMERICAN OVERSIGHT

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

STATE OF TEXAS, STATE OF LOUISIANA, *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants*.	Civ. Action No. 6:21-cv-00016

DECLARATION OF THOMAS HOMAN

1. My name is Thomas Homan I am over the age of eighteen and competent to testify to the matters addressed in this declaration. I make this declaration on the basis of my own personal and professional knowledge and experience, as well as information available to me in my positions in public service

2. I am the former Acting Director of the U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS), a position I held from January 2017 to June 30, 2018.

3. I have over thirty-two years of experience working for ICE and its predecessor entity, the Immigration and Naturalization Service (INS). I am a 34-year veteran of law enforcement, having begun my career as a police officer in New York in 1983. In 1984, I became a U.S. Border Patrol Agent with the former Immigration and Naturalization Service (INS) in Campo, California. In 1988, I became an INS Special Agent in Phoenix, Arizona, and was later promoted to Supervisory Special Agent and Deputy Assistant Director for Investigations. In 1999, I became the Assistant District Director for Investigations (ADDI) in San Antonio, Texas, and three years later transferred to the ADDI position in Dallas, Texas.

4. The INS was abolished by the Homeland Security Act of 2002, and ICE was created to perform many of its former enforcement functions, along with the investigative functions of the former U.S. Customs Service. Upon the creation of ICE in March 2003, I was named the Assistant Special Agent in Charge in Dallas, Texas. In August 2004, I was named the Deputy Special Agent in Charge (DSAC) in that same office. As DSAC, I directed the day-to-day operations of seven local offices, with more than 200 special agents and support personnel, conducting investigations related to terrorism, export

AMERICAN OVERSIGHT

enforcement, illicit financing, money laundering, human trafficking, intellectual property rights violations, and cybercrimes.

5. In March of 2009, I became Enforcement and Removal Operations (ERO) Assistant Director for Enforcement at ICE Headquarters. In that position, I was responsible for ICE's enforcement initiatives and components through which ERO identifies and arrests removable aliens, including the Criminal Alien Program, the National Fugitive Operations Program, Field Training, the 287(g) Program, the Law Enforcement Support Center (LESC), the Fugitive Operations Support Center (now the National Criminal Analysis and Targeting Center (NCATC)), the Detainee Enforcement and Processing Offenders by Remote Technology Center, and the Interoperability Response Centers. In October of the following year, I was promoted to Deputy Executive Associate Director for ERO, and in May 2013, I was promoted to Executive Associate Director for ERO, a position I held until January 2017.

6. From November 2017 to January 2018, I held the position of Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement, DHS. From January 2017 until June 30, 2018, I served as Acting Director of ICE. In both positions, I directly oversaw ICE's core operational programs, as well as the agency's managerial and administrative support functions. I also directed and oversaw ICE's day-to-day work of enforcing the nation's immigration and customs laws; investigating a wide range of domestic and international activities arising from the illegal movement of people and goods into, within, and outside of the United States and supporting the OPLA litigators who prosecute exclusion, deportation, and removal proceedings, including against national security threats, criminal aliens, and other aliens posing a threat to public safety. ICE employs more than 20,000 federal civil servants and contract staff in more than 400 offices within the United States and 50 foreign countries.

7. I previously provided a declaration in this case. In my declaration, I outlined my concerns about the impact and effects of the memorandum issued by Acting Director David Pekoske dated January 20, 2021, and the February 18, 2021 memorandum issued by Acting Director of ICE, Tae Johnson. I provided my declaration on April 25, 2021, and understand it was filed in this cause as Document 19-4.

8. I have been provided a copy of the stay motion and the accompanying affidavit of Peter Berg filed by the Department of Justice in this matter. I have profound disagreements with the assertions contained in Mr. Berg's affidavit.

9. In the stay motion, the Department of Justice says, "ICE lacks the resources, including appropriated funds and bedspace, to detain all noncitizens potentially implicated by the injunction, as well as to protect the public by detaining and removing those individuals DHS has already identified as presenting safety threats and as deemed necessary for border security." I disagree with that assertion.

10. ICE's budget is sufficient to maintain higher levels of enforcement to cover the necessary expenses. As an initial matter, ICE has benefited from a significant budget increase in the

AMERICAN OVERSIGHT

last decade compared to prior budget years. For example, in 2012 the enacted ICE budget was 5.8 billion, and in FY 2021 the enacted budget is $7.97 billion. That is nearly a $2.2 billion, or 37.4%, increase. And while the specific line item for detention funding has decreased, the ICE budget is at historic highs and those funds can be reallocated to fund additional detention capacity. This has occurred at various times in the past. Thus, in my opinion, ICE has sufficient resources to maintain higher levels of enforcement.

11. The Department of Justice's contrary belief seems to be based on a misunderstanding of ICE's budget. Mr. Berg declares that "ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide," but ICE can use additional funding within their budget for detention needs. Congress has authorized DHS to transfer funds from other portions of its budget to "custody operations." Using this authority, ICE and DHS can fund significantly more than the 34,000 detention beds that Mr. Berg mentions, in the event that became necessary.

12. ICE's ability to transfer funds in this way is not new. During my tenure, ICE commonly utilized that authority to fund additional detention capacity. In fact, it occurred in approximately eight of my last ten years of service at headquarters.

13. During both the Obama and Trump Administrations, officials concluded that ICE needed additional funding, beyond that specifically appropriated for detention, to detain aliens in the United States. In those circumstances, officials would transfer the necessary amount of money from other portions of the ICE or DHS budget where it was less urgently needed.

14. For example, ICE and DHS re-purposed millions of dollars of funds to support increased detention capacity during the migrant surge of 2014 and 2015.

15. Insofar as Mr. Berg suggests that ICE cannot detain more than 34,000 aliens at one time, the suggestion is incorrect.

16. ERO's Average Daily Population (ADP) measures the number of individuals in ICE custody on an average day during the fiscal year. In FY 2019, ERO's ADP was 50,165 and at times during that year, ERO's detention population exceeded 56,000. *See* https://www.ice.gov/features/ERO-2019. During that year the average length of stay for ICE's detained population was 34.3 days.

17. It is worth nothing that during the same period, FY 2019, ICE removed over 267,258 aliens and 56% of those were reportedly convicted of a crime. Even with the limitations imposed by the COVID-19 pandemic, there is no good reason ICE could not detain similar numbers of aliens again and increase detention capacity as needed.

18. In addition, ICE has multiple options for detention facilities. First, it operates some facilities itself. Second, it contracts with other governmental entities, including the U.S. Marshal Service and various local governments, to operate detention facilities that house aliens through intergovernmental service agreements. Third, ICE contracts with private providers, such as GEO Care and CoreCivic to increase detention capacity and bedspace

AMERICAN OVERSIGHT

to detain migrants. I have learned that both GEO Care and CoreCivic have the additional capacity to easily provide over 15,000 additional detention beds.

19. During the Biden Administration, ICE has canceled or reduced multiple contracts with other governmental entities and private providers. This includes providers who have been reliable long-term partners. As a result, those entities have detention capacity that ICE could use but is not currently using. Some of these providers were low-cost providers of detention capacity for ICE, so the loss of their facilities is particularly harmful to ICE's mission. ICE has flexibility to utilize multiple options to increase its potential detention capacity. In my opinion ICE has chosen not to maximize those options.

20. I have also reviewed Mr. Berg's claim that implementing the Court's "reporting requirements" "would be unreasonably and unduly burdensome, if not entirely impossible." I disagree with Mr. Berg's assertions and believe that he overstates the burden such a requirement imposes. ICE has existing advanced databases that can track the vast majority of information addressed by the Court.

21. In some cases, ICE may lack sufficient information to reach a definitive conclusion about whether an alien is covered by Section 1226(c) or Section 1231(a)(2), but that does not prevent ICE from reporting information about aliens it knows or reasonably believes to be covered by Section 1226(c) or Section 1231(a)(2). In my view, ICE can reasonably comply with the Court's reporting requirements.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of August, 2021.

/s/ Thomas Homan

Thomas Homan

AMERICAN OVERSIGHT

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-00016

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO FOR A STAY PENDING APPEAL

EXHIBIT B

NICK MIROFF, *WHY IMMIGRATION DETENTION BEDS BECAME A NEW ISSUE IN TRUMP BORDER WALL FIGHT*, WASHINGTON POST (FEB. 12, 2019)

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 221 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 3 of 5

The Washington Post *Democracy Dies in Darkness*

Why immigration detention beds became a new issue in Trump border wall fight

By Nick Miroff

February 12, 2019 8:00:00 a.m.

128

Democrats opposing President Trump's push for a border wall used this week's budget negotiations to launch an attempt to rein in his administration's deportation efforts, proposing to reduce the number of detention beds available for immigration arrests inside the United States.

Though the congressional deal struck late Monday omits a strict new cap Democrats had sought for immigrants detained within the United States — as opposed to at the border — it returns funding levels for detention beds maintained by the U.S. Immigration and Customs Enforcement agency to 2018 levels. Lawmakers backing the proposal, amid calls by some Democrats to "abolish" U.S. Immigration and Customs Enforcement, said they hoped a bed limit would force the agency to refocus its attention on violent criminals while backing off immigrants who lack legal status but have not committed serious offenses.

Before the deal scrapped the proposal, Trump administration officials had denounced the idea, saying a reduction in detention beds would hamstring ICE and force the release of thousands of criminals. Matthew Albence, ICE's deputy director, said he had never seen a proposal for such a cap during his 24-year career.

"It would be extremely damaging to public safety," Albence said.

But the Democrats' maneuver was not entirely unprecedented: It takes a little-known funding mechanism long-wielded by border hawks and tries to turn it against them.

Proponents of a more-rigorous approach to immigration enforcement have for more than a decade treated detention bed funding as a way to ensure a minimum number of immigration arrests. By tying funding levels to a specific number of beds — 40,500 per day last year — appropriators were able to establish an informal quota for enforcement activity. Unofficially known as the "bed mandate," Republican lawmakers typically pushed for as many beds as possible and encouraged ICE officials to fill them with potential deportees.

In their clash with the president over border wall funding, Democrats were working to use the bed

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 222 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 3 of 5

By Laris Karklis and Tim Meko/Post, undefined and undefined
12:26 p.m.

Despite a partial government shutdown that lasted nearly 35 days, President Trump's efforts to secure border wall funding fizzled last month. However, that has not stopped efforts that were already underway to shore up sections of the southern border in two Texas counties.

The Democrats' proposal aimed to cap the number of detention beds available for interior enforcement at 16,500 per day. Democrats also wanted to reduce the overall number of available beds to 35,400, far below the 52,000 that the Trump administration has requested.

"ICE has been overspending and overjailing," said Kerri Talbot, an advocate with Immigration Hub, a group that is backing the Democrats' proposal. "Democrats want controls on ICE because ICE is out of control."

President Barack Obama came under criticism during his first term from many Democrats and immigrant advocates when annual deportations reached levels that far exceed current totals. By his second term, ICE had developed a more tailored enforcement approach that targeted serious and violent offenders but gave greater latitude to immigrants who were otherwise law-abiding.

After Trump took office, ICE officials praised him for "taking the shackles off" and giving agents greater discretion to make arrests. Criminal violators remain the agency's priority, ICE officials say, but they also have sparked a backlash with arrests of immigrants with deep community ties, American children and well-established lives in the United States.

ICE arrests increased 11 percent last year, and the agency carried out 14 percent more deportations. But enforcement efforts have fallen far short of Trump's post-election promise to immediately remove 2 million to 3 million immigrants living in the United States illegally.

At a time when record numbers of Central American families have been showing up at the border, the number of people held in ICE custody has soared to nearly 50,000 per day, far above the number of beds Congress has funded.

Albence told reporters Monday his agency has paid for the additional beds by making the best use of its resources, but noted that ICE has an obligation to enforce immigration laws. A cap on interior enforcement would ask ICE "to ignore the very laws that Congress has already passed," he said.

"We cannot have a system whereby immigration enforcement is only effectuated against individuals once they commit a subsequent crime to their immigration violation," he said. "If they know there is no enforcement arm within the interior of the United States that is out there looking for them, you will continually have that pull factor and you will never secure the border."

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 223 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 4 of 5

GOP aides said after Monday's deal was reached that ICE would have enough money and flexibility to maintain its current detention levels and add more when needed.

Albence held a White House conference call hours after senior Trump adviser Stephen Miller had a separate call with the president's surrogates and supporters, telling them the Democrats "want illegals released" and "won't fund ICE officers," according to a person who listened to the briefing.

ICE relies on a network of government-run and privately operated detention centers to hold immigration violators in custody while awaiting deportation or a court hearing.

Costs for those beds vary widely, and some county jails in rural areas have converted sections of their facilities into immigration detention centers by offering rock-bottom rates to the federal government.

The number of beds funded annually by Congress is based on the average daily cost for one detainee, so the agency can also hold more people in custody by using less-expensive facilities.

John Sandweg, who was acting director of ICE under President Obama and who held other senior positions at the agency, said the debate showed the necessity of devising more sophisticated ways to assess the flight risk of immigration violators that wouldn't require locking them up.

Because the U.S. immigration court system prioritizes the cases of those held in custody over those who have been paroled, it can give lawmakers a misleading impression that the only way to ensure someone shows up in court is to keep them jailed.

"Detention is not the key to deportation," said Sandweg, adding that immigration violators should be treated more like criminal defendants, with a greater range of cost-effective parole options.

But Albence said that such alternatives are ineffective. He said 72 percent of immigrants in ICE custody are subject to "mandatory detention" because of serious criminal records, a pending deportation order or some other administrative restriction on their ability to qualify for parole or GPS monitoring.

This article has been updated.

Josh Dawsey contributed to this report.

By Nick Miroff

Nick Miroff covers immigration enforcement and the Department of Homeland Security for The Washington Post. He was a Post foreign correspondent in Latin America from 2010 to 2017, and has been a staff writer since 2006. Twitter

AMERICAN OVERSIGHT

AMERICAN OVERSIGHT

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

STATE OF TEXAS, STATE OF LOUISIANA	)	
Plaintiffs,	)	
v.	)	No. 6:21-cv-00016
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF
MONICA BURKE

I, Monica Burke, declare the following under 28 U.S.C. § 1746:

1. I presently serve as Acting Assistant Director of Custody Management Division (CMD), Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS or Department). I have served in this capacity since August 2, 2021. I started my career at ICE in the Office of the Principal Legal Advisor, ERO Law Division (EROLD) in 2011. I was a Section Chief and Deputy Division Chief in EROLD. Prior to my current position, I was the Deputy Assistant Director for Custody Programs within CMD from March 2020 to August 2021.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004161

2. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of two divisions – the Oversight Compliance and Acquisitions Division (OCAD) and the Custody Programs Division (CPD).
3. As the Assistant Director, I am responsible for the effective and proficient performance of these divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 25,000 detainees daily at approximately 200 facilities nationwide.
4. This declaration is based on my personal knowledge and experience and information provided to me in my official capacity.
5. I have read and am familiar with the declaration of Thomas Homan submitted by Plaintiffs in this case.
6. If the court's order required ICE to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, ICE would need to contract and pay for orders of magnitude more detention beds than it currently possesses, especially when accounting for limitations required by the ongoing COVID-19 pandemic and pandemic guidance.
7. As an initial matter, reprogramming or transferring funds would not address the significant obstacles to identifying additional appropriate detention space. Over the past month, I have been working to identify additional beds and I am familiar with the many

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004162

challenges associated with this effort. Finding and contracting for additional detention beds is a complicated process that requires several months per facility. First, ICE must identify available facilities. Second, ICE must conduct multiple preoccupancy inspections to ensure the facility is suitable for civil immigration detainees. Third, ICE negotiates with the detention provider and awards the contract that must be funded.

8. This process is complicated by the fact that detention providers are facing challenges in hiring appropriate staff, especially medical staff, and after staff are identified, ICE needs several weeks to ensure that they have appropriate clearances.

9. Notably, some facilities have terminated their contracts with ICE during the pandemic. Further, civil immigration detention requires a heightened standard of care and Congress has regularly required DHS to monitor facilities and discontinue agreements under certain circumstances. Available facilities are also impacted by state laws prohibiting ICE detention. Further, ICE detention space is limited by ongoing litigation that enjoins ICE from using some of its detention capacity.

10. Based on the funding and operational challenges, I believe that ICE cannot readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained were the court to order it.

11. Any significant reprogramming or transferring of funds would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program. Beyond the custody sphere, there are many other significant programs within DHS and ICE that could be jeopardized by a court ordered mandate to reallocate funds without regard to the department's overall mission.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004163

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 23rd day of August 2021.

MONICA S BURKE

Digitally signed by MONICA S BURKE
Date: 2021.08.23 09:40:53 -04'00'

Monica Burke
Acting Assistant Director
U.S. Immigration and Customs Enforcement

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004164

2021 WL 3683913
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas, Victoria Division.

The STATE OF TEXAS; and the 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; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.

Civil Action No. 6:21-cv-00016
|
Filed 08/19/2021

MEMORANDUM OPINION AND ORDER

DREW B. TIPTON UNITED STATES DISTRICT JUDGE

***1** "No matter how successful Congress might be in crafting a set of immigration laws that would—in theory—lead to the most long-term benefits to the American people, such benefits will not actually occur if those laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996). That observation comes from a Senate Judiciary Committee Report addressing the problem of alien criminality in the United States. Similarly, the Supreme Court has stated "deportable criminal aliens who remain[ ] in the United States often commit[ ] more crimes before being removed." *Demore v. Kim*, 538 U.S. 510, 518, 123 S.Ct. 1708, 1715, 155 L.Ed.2d 724 (2003) (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). These observations, among others, led to the wholesale reform of our Nation's immigration laws in the 1990s.

Now, over two decades later, the States of Texas and Louisiana (the "States") seek to have the Executive Branch (the "Government")[1] adhere to two federal immigration statutes passed during that wholesale reform. The States want the Government to comply with 8 U.S.C. §§ 1226(c) and 1231(a)(2), which provide that the Government "shall" detain certain aliens when they are released from custody or during their removal period, respectively.[2] More specifically, the States move for a preliminary injunction to prohibit the Government from implementing two recent immigration memoranda which allegedly instruct Executive Branch officials to violate these laws.[3] (Dkt. No. 18).

These immigration memoranda, issued on January 20 and February 18, 2021 (the "Memoranda"), purport to "prioritize" certain categories of aliens for enforcement action. (Dkt. No. 1-1); (Dkt. No. 1-2). The States point out that the priority categories enumerated in these Memoranda omit certain others—namely, aliens convicted of serious drug offenses, aliens convicted of crimes of moral turpitude, and aliens subject to a final order of removal. The States argue that federal law requires the Government to take custody of aliens falling within these overlooked categories, and the Memoranda are grinding these required detentions to a halt. Unsurprisingly, the Government disagrees and argues that the Executive Branch is simply acting within its discretion.

***2** This case involves the intersection of several areas of administrative and immigration law. But more fundamentally, the claims made in this case implicate the separation-of-powers framework set forth in our Nation's Constitution. Put simply, the Government has instructed federal officials that "shall detain" certain aliens means "may detain" when it unambiguously mean *must* detain. Thus, the Court inquires whether the Executive Branch may direct officials to enforce a law enacted by Congress in a way that is contrary to the plain language of the law. That inquiry yields a clear answer: it may not. The Executive Branch may not instruct its officers to enforce a statute in a manner contrary to the law itself. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies ... , faithfully executes them. The

AMERICAN OVERSIGHT

power of executing the laws [however] ... does not include a power to revise clear statutory terms that turn out not to work in practice." (citing U.S. Const. art. II, § 3) (cleaned up)).

Having considered the pleadings, the record, and the applicable law, the Court finds the States have satisfied the requirements for a preliminary injunction. Accordingly, the States' Motion is **GRANTED**. [4]

I. BACKGROUND

At first glance, the background facts of this case are straightforward. The Government issued two memoranda concerning civil immigration enforcement which the States claim violate two immigration laws. But upon closer examination, the actions of the Government and the claims by the States are strikingly complex. Congress did not design our Nation's immigration laws on a whim. Therefore, to place this case in its proper context and facilitate understanding of the function of Sections 1226(c) and 1231(a)(2), the Court begins by briefly detailing some of the history behind those statutes. [5]

A. HISTORY OF SECTIONS 1226(C) AND 1231(A)(2)

The United States has long welcomed and benefited from immigration. [6] The Nation has, however, borne costs due to illegal immigration and the criminal conduct of illegal aliens. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 380–81 (2006). Congress in the 1990s was not blind to those concerns. As a legislative report from 1995 mentions, "[a]lthough immigrants to the United States have been, and continue to be, predominantly hard working and law abiding, there appears to be a growing criminal class among immigrants, especially among those here illegally." S. Rep. No. 104-48, at 7 (1995). Indeed, Congress directly linked illegal immigration with crime. The same legislative report provides:

> ***3** The fact that many criminal aliens have entered the U.S. illegally helps explain why so many aliens are involved in crime[.] [T]heir illegal situation conveys an "outlaw" status, often leading them into the shadowy realms of criminal lifestyles. The point was made succinctly in Congressional testimony by a former Commissioner of the INS, "[t]hose entering the United States illegally have no legitimate sponsors and are prohibited from holding jobs. Thus, criminal conduct may be the only way to survive."

Id. at 5.

Yet throughout much of its history, the United States had neither the means nor the ability to curb illegal immigration or alien criminality. Indeed, "[f]or much of this country's history there has been no comprehensive body of immigration law and no laws at all addressing criminal aliens." *Id.* at 10. Despite the enactment of the Immigration and Nationality Act in 1952—and numerous immigration bills signed into law in the subsequent decades—these issues were "dealt with ... mostly as an afterthought." *Id.* at 12. Prior to the 1990s, "no major immigration legislation ha[d] focused exclusively on the problem of criminal aliens." *Id.* And although there were attempts to solve the problem of illegal immigration and alien criminality, change happened in a "piecemeal fashion." *Id.* It is unsurprising, therefore, that the time leading up to the enactment of Sections 1226(c) and 1231(a)(2) has been regarded by the Supreme Court as a time of "wholesale failure by [the Executive Branch] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714 (citations omitted); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 698, 121 S.Ct. 2491, 2503, 150 L.Ed.2d 653 (2001). The Executive Branch's failures at that time led to costs and consequences borne by the states, the citizens of this country, and its legal immigrants. *See* *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; S. Rep. No. 104-48, at 1–2 (1995).

Congress's observations led to significant statutory reform in the federal detention of criminal aliens. Following numerous reports about the high rate of abscondment and recidivism among criminal aliens and the corresponding costs and negative effects, "Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. Section 1226(c)(1) reads:

> The Attorney General *shall take into custody* any alien who —
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

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AMERICAN OVERSIGHT

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] [7] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

***4** 8 U.S.C. § 1226(c)(1) (emphases added) (footnote added). And to buttress this detention mandate, Congress in Subsection (2) provided detailed instructions on the narrow circumstances under which the Attorney General could release a detained illegal alien.

> The Attorney General *may* release an alien described in paragraph (1) *only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General 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. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

Id. § 1226(c)(2) (emphases added).

Congress's efforts to protect the states, citizens, and legal immigrants from criminal illegal aliens through the INA during the 1990s were not confined to Section 1226(c). Through other statutes, too, "Congress explicitly expanded the group of aliens subject to mandatory detention." *Zadvydas*, 533 U.S. at 698, 121 S.Ct. at 2503 (citing Antiterrorism and Effective Death Penalty Act of 1996, § 439(c), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009–585, 3009–598 to 3009–599; 8 U.S.C. § 1226(c); and 8 U.S.C. § 1231(a)). That expansion is evident in 8 U.S.C. § 1231(a)(2), which outlines the Attorney General's discretion regarding the detention of illegal aliens who have been ordered removed:

> During the removal period, the Attorney General *shall detain* the alien. *Under no circumstance* during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphases added).

In view of the historical context and text of Sections 1226(c) and 1231(a)(2), Congress designed these two provisions to curtail the effects of illegal immigration and the concomitant concerns of alien criminality. But, as the Senate Judiciary Committee Report mentioned earlier admits, these statutory policies are futile if the "laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996).

B. DETENTIONS IN PRACTICE

Previously, in *Texas v. United States*, the Court provided an in-depth overview of the immigration removal process. ____ F. Supp. 3d ____, ____, 2021 WL 2096669, at *4–9 (S.D.

AMERICAN OVERSIGHT

Tex. Feb. 23, 2021) (hereinafter "*Texas I*"). That discussion touched upon parts of the detention process for aliens subject to removal proceedings, *id.* at *5, and aliens subject to final orders of removal, *id.* at *8–9. Given the specific focus on detentions in this Motion for Preliminary Injunction, it is appropriate to more fully discuss the detention process for aliens subject to Sections 1226 and 1231.

***5** To start, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, created a uniform procedure for deporting aliens or denying them entry into the United States. The detention and removal process under Section 240 of the Immigration and Nationality Act ("240 proceedings") commences when DHS files a Notice to Appear ("NTA") against an alien or noncitizen—who are designated as "respondents"—in immigration court. *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465 (2018); *see* 8 C.F.R. § 1003.14; Jennifer Williams, *The Potential Implications of the Supreme Court's Decision in* Pereira v. Sessions *on Prosecutions for Illegal Reentry Under 8 U.S.C. § 1326*, 67 DOJ J. Fed. L. & Prac. 141 (2019); *see also* (6:21-cv-3, Dkt. Nos. 82 at 12, 82-1 at 5, 83 at 14). Federal law then gives the Attorney General —and immigration judges by extension of DOJ's internal organizational structure—discretion on whether such an alien may continue to be detained during the proceedings or released on bond or conditional parole pursuant to Section 1226(a). 8 U.S.C. § 1226(a).

For criminal aliens, however, the start of the process is a bit different. Such aliens are taken into custody by officers within the Executive Branch (*i.e.*, Immigration and Customs Enforcement ("ICE") agents) in generally three ways: an ICE arrest; in execution of detainers after a local police stop, *see* 8 C.F.R. § 287.7(a) (2011); or after completion of incarceration for a prior criminal conviction, *see* 8 C.F.R. § 287.5(c) (2016). *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 302 (2013). Of the three, immigration detainers are particularly important:

> The Executive branch uses immigration detainers to control the release of non-citizens from state prisons and local jails. When federal immigration officials learn that a state or local law enforcement agency has custody of a non-citizen targeted for immigration proceedings or investigation, they issue a detainer to give notice to state or local officials that the federal government intends to take custody of the non-citizen upon release. The form detainer notice issued by federal immigration officials directs the recipient that federal regulations require the recipient agency to detain the non-citizen for a brief period of time after the non-citizen would otherwise be released from custody.[8] Absent the ability to issue detainers, immigration enforcement officials would have to be present at the gates of the state or local detention facility to apprehend the non-citizen upon release.

Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L. Rev. 164, 165 (2008) (footnote added) (citations omitted).[9]

***6** In the past, ICE and DHS have been known to "screen" state prison and local jail populations for criminal aliens who may be subject to Section 1226(c). *Id.* at 177 (citing U.S. Immigration and Customs Enforcement, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (Mar. 28, 2008), not available online (Aug. 2, 2021)). This screening takes place, at least in some circumstances, without cooperation from state and local authorities. *See, e.g., State v. Reyes-Armenta*, No. M2004-00419-CCA-R3-CD, 2004 WL 2804898, at *2 (Tenn. Crim. App. 2004) ("The codefendants were then taken to the Sumner County Jail for processing. The officers had made no attempt to contact federal immigration officials; however, Agent Robert Kinghorn, an immigration officer, happened to be at the Sumner County jail and issued detainers on the defendants."). Additionally, in the past, "DHS's practice appears to be to place a detainer as soon as DHS learns of a potentially deportable prisoner—in many cases before conviction, close in time to the alien's arrest." Lasch, *supra*, at 178.

AMERICAN OVERSIGHT

Once the alien is in mandatory custody pursuant to Section 1226(c), an NTA may be issued, formally beginning the immigration removal proceedings. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 83 (2012). Because certain criminal aliens are required to be detained, a Notice of Custody Determination ("Form I-286") may also be issued. *Id.* (citing 8 C.F.R. § 231.1(g)(1) (2011)). The Form I-286 explains an ICE officer's determination that an alien is subject to mandatory detention because the alien falls within certain categories of Section 1226(c). *Id.* For such aliens, "the NTA's removal charge will commonly be the [Form I-286] charge justifying mandatory detention." *Id.*

While in detention, the criminal alien is entitled to a "*Joseph* hearing." *Id.* at 63, 85–86; *see* *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). The hearing is the detainee's only chance to challenge the mandatory nature of his or her detention. *Joseph*, 22 I. & N. Dec. at 800; Noferi, *supra*, at 85–86; Savaresse, *supra*, at 303. The point of the *Joseph* hearing is to determine whether the detainee challenging mandatory detention was "properly included" within a mandatory detention category; that is, the categories enumerated in Section 1226(c). *See* *Joseph*, 22 I. & N. Dec. at 800; Savaresse, *supra*, at 303. If the detainee prevails, he or she is entitled to a bond determination. *See* *Joseph*, 22 I. & N. Dec. at 808–09.

The detention process is similar for aliens with final orders of removal, *i.e.*, those who exhausted the removal proceedings and were found to be deportable. *See* 8 U.S.C. § 1231(a)(2). Criminal aliens who were initially detained under Section 1226(c) must remain in ICE custody as their removals are processed. *See* 8 U.S.C. §§ 1226(c)(2) and 1231(a)(2). As for the aliens with final orders of removal who are not currently in ICE custody, ICE sends a "Bag-and-Baggage" letter requiring the aliens to report to an ICE facility for detention and deportation. *Qian Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007); *Bermudes-Cardenas v. Gonzales*, 184 F. App'x 406, 407 (5th Cir. 2006) (per curiam). An alien who fails to report is classified by ICE and the circuit courts as a "fugitive." *See, e.g., Giri v. Keisler*, 507 F.3d 833, 834–36 (5th Cir. 2007). Once an alien is in custody, ICE takes the lead in coordinating their removal from the country. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *9.

C. THE JANUARY 20 MEMORANDUM

More than two decades after Congress changed the way this country approached the issues of illegal immigration and alien criminality, the current Administration set forth its views advocating a different approach from its predecessor. *See* Revision of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021) ("[The current] Administration will *reset* the policies and practices for enforcing civil immigration laws to align enforcement with [certain] values and priorities." (emphasis added)).

*7 Once the current Administration assumed power on January 20, 2021, it wasted no time issuing its first memorandum on civil immigration enforcement (the "January 20 Memorandum"). (Dkt. No. 1-1). The January 20 Memorandum, signed by Acting DHS Secretary David Pekoske, announced changes to the enforcement of the Nation's immigration laws. (Dkt. No. 1-1). The January 20 Memorandum begins by acknowledging the current issues the federal government is encountering in enforcing immigration laws, noting the United States "faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century." (*Id.* at 2). The January 20 Memorandum goes on to say, "in light of those unique circumstances," DHS must substantially increase "resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security." (*Id.*) In Section A, the January 20 Memorandum calls for a "Department-wide review of policies and practices concerning immigration enforcement[.]" (*Id.* at 3). In Section B, the January 20 Memorandum articulates "interim enforcement priorities [that] shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the" Department-wide review. (*Id.* at 3–4). Pending completion of the Department-wide review, the January 20 Memorandum lists three DHS enforcement priorities:

1) **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise

AMERICAN OVERSIGHT

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). The January 20 Memorandum then qualifies its prioritization scheme by stating, "[w]hile resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." (*Id.* at 4).

In Section C, the January 20 Memorandum orders a temporary pause on removals of noncitizens, with some exceptions.[10] (*Id.* at 4–5). Specifically, the January 20 Memorandum directs "an immediate pause on removals of any noncitizen with a final order of removal ... for 100 days[.]" (*Id.* at 4). The January 20 Memorandum justifies this pause by pointing to DHS's "limited resources," which it claims "must be prioritized to ... provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently" and to "comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact." (*Id.*). Further, the January 20 Memorandum states, the pause is necessary for DHS to "ensure that [its] removal resources are directed to [its] highest enforcement priorities." (*Id.*).

This Court partially enjoined the January 20 Memorandum on January 26 with a temporary restraining order, *Texas v. United States*, ____ F. Supp. 3d ____, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021), and again on February 23 with a preliminary injunction, *Texas I*, ____ F. Supp. 3d ____, 2021 WL 2096669. Specifically, this Court enjoined Section C of the January 20 Memorandum, which paused removals of aliens with a final order of removal for 100 days. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52. In doing so, this Court explicitly left intact Section B of the January 20 Memorandum, which enumerates DHS's "enforcement priorities" going forward. (*Id.*). Section B is a subject of this litigation. (Dkt. No. 1-1 at 3–4).

D. THE FEBRUARY 18 MEMORANDUM

***8** On February 18, 2021, five days before the preliminary injunction was signed in *Texas I*, ICE Acting Director Tae D. Johnson issued the February 18 Memorandum to all ICE employees. (Dkt. No. 1-2). The February 18 Memorandum became "effective[ ] immediately" and controls to the extent it conflicts with the January 20 Memorandum. (*Id.* at 2). Designed to implement Section B of the January 20 Memorandum,[11] the February 18 Memorandum broadly delineates six "revisions":

1) authorization to apprehend presumed priority noncitizens in at-large enforcement actions without advance approval;

2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities;

3) authorization to apprehend without prior approval other presumed priority noncitizens who are encountered during enforcement operations;

4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended;

5) the further delegation of approval authority; and

6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

(*Id.* at 2–3).

Relevant to this case, the February 18 Memorandum lists three "criteria defining cases that are presumed to be priorities." (*Id.* at 5). The first priority category is national security.

> A noncitizen is *presumed* to be a national security enforcement and removal priority if: 1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-

AMERICAN OVERSIGHT

> related activities; 2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities; or 3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

(*Id.*) (emphasis in original). The second priority category is border security.

> A noncitizen is *presumed* to be a border security enforcement and removal priority if: 1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020; or 2) he or she was not physically present in the United States before November 1, 2020.

(*Id.*) (emphasis in original). And the final priority category is public safety.

> A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and: 1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA; or 2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

(*Id.* at 5–6) (emphasis in original).

In addition to the three enforcement priorities, the February 18 Memorandum explains, "[o]fficers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases"—*i.e.*, the three enforcement priorities—"beyond what existing policy requires and what a supervisor instructs." (*Id.* at 6). By contrast, preapproval is required for enforcement or removal actions that do not fall under the three enforcement priorities. (*Id.* at 7). But there are certain exceptions. The February 18 Memorandum, for example, posits that there are circumstances when "the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action." (*Id.*). But this is "generally ... limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*).

E. PROCEDURAL BACKGROUND

***9** The States filed this case on April 6, 2021. (Dkt. No. 1). In its six-count Complaint, the States allege the January 20 and February 18 Memoranda are unlawful because they violate:

1) the Administrative Procedure Act's ("APA") proscription of actions that are "not in accordance with law" and "in excess of ... authority" by transgressing a statutory duty of DHS to detain certain individuals pursuant to 8 U.S.C. § 1226(c) (Count I) and 8 U.S.C. 1231(a)(2) (Count II); [12]

2) the APA's proscription of actions that are "arbitrary [and] capricious" (Count III); [13]

3) the APA's requirement that agency rules be subject to notice and comment (Count IV); [14]

4) the Agreement between the States and DHS (Count V); [15] and

5) the Constitution's requirement that the President "take Care that the Laws be faithfully executed" (Count VI).

(Dkt. No. 1 at ¶¶ 94–131).

On April 27, 2021, the States filed a Motion for Preliminary Injunction moving to enjoin the implementation and enforcement of the January 20 and February 18 Memoranda. (Dkt. No. 18 at 43). The Government filed a Response in opposition, (Dkt. No. 42), to which the States filed a Reply. (Dkt. No. 51). Several amicus briefs have also been filed in support of and in opposition to the Motion. (Dkt. No. 25);

AMERICAN OVERSIGHT
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(Dkt. No. 48); (Dkt. No. 49). The Motion is now ripe for review.

II. JURISDICTION AND JUDICIAL REVIEW

Before addressing the merits, this Court must consider the threshold issues of whether the States have standing to bring this action and whether the APA allows this Court to review the Memoranda challenged by the States. The States contend they have standing, and their claims are reviewable. (Dkt. No. 18 at 35–40). The Government disagrees. (Dkt. No. 48 at 22–36). Based on the following, the Court finds the States have standing and their claims are reviewable.

A. STANDING

Article III of the Constitution confines judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2. "For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, ____ U.S. ____, ____, 139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019). A plaintiff has standing to sue only where it satisfactorily shows it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 856, ____, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990)); *see also Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). In short, injury, traceability, and redressability comprise the "irreducible constitutional minimum" of standing. *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136).

***10** Under certain circumstances, states like Texas and Louisiana are not "normal litigants." *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). Where a state alleges a defendant violated a congressionally accorded procedural right which affected the state's "quasi-sovereign" interests, that state is afforded "special solicitude" in its quest to establish standing. *Id.* at 520–21, 127 S.Ct. at 1454–55; *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015) , *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*) (hereinafter "*Texas DAPA*"). Specifically, a state armed with special solicitude can more easily satisfy the traceability and redressability elements of the traditional standing inquiry. *Massachusetts*, 549 U.S. at 520–21, 127 S.Ct. at 1454–55; *Texas DAPA*, 809 F.3d at 151–55.

Here, the States assert they have standing under the traditional inquiry *and* because they are owed special solicitude. (Dkt. No. 18 at 35–37). The Government counters that the States fail all three prongs of the traditional inquiry, and they are not entitled to special solicitude because they do not assert a proper quasi-sovereign interest. (Dkt. No. 42 at 22–25 & n.5). Based on the following, the Court finds the States have satisfied the traditional inquiry and, regardless, are owed special solicitude which would satisfy any doubts.

1. Injury in Fact

The States' first task is to establish an injury in fact. A plaintiff satisfies that burden where it shows it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136). An alleged injury is sufficiently concrete if it is "*de facto*," meaning it "actually exist[s]" and is not merely "abstract." *Id.* (alteration added) (citations omitted). An alleged injury is sufficiently particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (alteration added) (quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. at 2136 n.1). And lastly, an alleged injury is sufficiently actual or imminent, respectively, if the plaintiff suffers "continuing, present adverse effects" or demonstrates he "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending." *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (emphases in original) (citations omitted).

The States assert the Memoranda will injure two basic interests: their financial interests and their interest as *parens patriae* in protecting their citizens from criminal aliens. (Dkt. No. 35–37). As it pertains to their financial interests, the States claim the Memoranda will require them to spend more on detention facilities and several public benefits and

AMERICAN OVERSIGHT

services. (*Id.* at 35–36). Regarding the States' interest as *parens patriae*, the States allege the Memoranda will result in an increase in crime from aliens within their borders, thus harming their citizenries' physical and economic well-being. (*Id.* at 37).

The Government does not seriously refute the Memoranda will result in "a drop" in immigration enforcement actions. (Dkt. No. 42 at 23). Nor could it. For example, Texas has put forth undisputed evidence 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. (Dkt. No. 19-3 at 5). That's 68 more rescinded detainers than during the same period the year prior. (*Id.* at 3, 8) (showing no detainers were dropped from January 20, 2020, to March 20, 2020). Of note, the list includes 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 the sexual assault of a child. (*Id.* at 6–7). And at least six had received a final order of removal. (*Id.* at 5). Importantly, current ICE officials "attribute" the Government's sharp decline in maintaining detainers "to the new 'enforcement priorities' established by the [M]emoranda during the Biden Administration."[16] (Dkt. No. 46 at ¶ 17).

***11** Rather than challenge the suffocating effect of the Memoranda on federal detentions of criminal aliens, the Government counters that any drop in detentions is of no real consequence to the States. It argues, even if the Memoranda cause detentions to decline, the States' theories of injury rely on a "speculative chain of events involving independent actions by third parties." (Dkt. No. 42 at 23). Specifically, the Government asserts the States would incur increased financial expenses and exposure to crime only if two conditions are satisfied: (1) the aliens who would have otherwise been detained commit crimes or choose to use public benefits and services; *and* (2) those aliens do so at a higher rate than the noncitizens who *are* removed as a result of the Memoranda. (*Id.* at 23–24).

The Government's concern over the causal chain of events involving third-party action is noteworthy but out-of-turn. These concerns pertain to the "fairly traceable" prong of the traditional standing inquiry. *See* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565–66 (finding "traceability ... satisfied" where the plaintiffs' theory "relies ... on the predictable effect of Government action on the decisions of third parties"); *Texas DAPA*, 809 F.3d at 156–60 (finding a plaintiff–state's financial injury was "fairly traceable" to the independent conduct of third-party aliens); *see also* *California v. Texas*, ____ U.S. ____, ____, 141 S.Ct. 2104, 2116–17 (2021) (finding "an individual's decision to enroll [in] Medicaid" was not "fairly traceable" to the Affordable Care Act's "minimum essential coverage provision" (alteration added)). Therefore, although the Government's third-party causation concerns will need to be addressed, the Court reserves its analysis on those issues for discussion of the traceability of the States' alleged injuries. For now, the Court inquires whether the States have presented a cognizable injury to their financial interests or interests as *parens patriae*. *See also* *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (explaining "imminence" is shown where a plaintiff "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending" (emphases in original) (citations omitted)); *cf.* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565 (sidestepping the reliance of the plaintiff-states' "future" injuries upon independent decisions of third-party aliens to underreport in a census and holding the injuries were sufficiently "concrete and imminent" because the plaintiff–states demonstrated, "*if* noncitizen households are undercounted by as little as 2%[,] ... they will lose out on federal funds that are distributed on the basis of state population" (emphasis added)). They have.

a. Financial Injuries

Between the States, Texas marshals the lion's share of state-specific evidence concerning injury. *Compare* (Dkt. Nos. 19-5–19-9) *with* (Dkt. No. 19-12). The Court therefore focuses its attention on Texas's evidence. *See* *Texas DAPA*, 809 F.3d at 155 (same). Texas's alleged financial injury affects three categories of its public fisc: Texas's detention system, public education services, and healthcare-related costs. (Dkt. No. 18 at 35–36). Texas asserts that in these three categories it will incur unanticipated costs due to the "rushed implementation" of the Memoranda which "deprived [it] of the ability to adjust[ ] [its] policies in light of the federal shift." (*Id.* at 41).

To begin, Texas has alleged injury to a legally protected interest. *See* *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. Texas complains it will incur additional costs to its public

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fisc because of an unlawful and sudden shift in federal immigration policy. (Dkt. No. 18 at 35). Theories of injury to state or local financial interests predicated on the actions of the federal government are not novel. *See, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430–31, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393 (1998) (finding sufficient for standing purposes a local government's claim to suffering injury to its "borrowing power, financial strength, and fiscal planning"); *Texas DAPA*, 809 F.3d at 152–53 (finding sufficient for standing purposes several states' claims to suffering injury to their public fiscs); *see also* *Sch. Dist. of City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261–62 (6th Cir. 2009). And such financial harm is particularly acute in the context of federal immigration enforcement, where states have "an interest in mitigating the potentially harsh economic effects of *sudden shifts* in population." *Plyler v. Doe*, 457 U.S. 202, 228, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786 (1982) (emphasis added); *see id.* at n.23 (explaining, because the Constitution deprives states of any "direct interest in controlling entry into this country, ... unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service"); *Texas DAPA*, 809 F.3d at 152–54; *see also* *Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012) (acknowledging states "bear[ ] many of the consequences of unlawful immigration"); *DHS v. Regents of the U. of Cal.*, ____ U.S. ____, ____, 140 S.Ct. 1891, 1913, 207 L.Ed.2d 353 (2020) (finding a sudden shift in the government's immigration policy was arbitrary and capricious in part because the government "failed to address whether there was legitimate reliance" on the former immigration policy (quotation omitted)). In sum, the financial injuries incurred by states from "sudden shifts" in their population due to federal immigration policies are not nebulous. *Plyler*, 457 U.S. at 228, 102 S.Ct. at 2400. Rather, they are among the "serious and well recognized" vintage of legally protected interests. *Massachusetts*, 549 U.S. at 521, 127 S.Ct. at 1455. By requesting equitable relief from the impact of the Memoranda on its public fisc, then, Texas appropriately seeks judicial shelter.

***12** The remaining inquiries as to Texas's alleged financial injury concerns whether it is sufficiently concrete, particularized, and actual or imminent. *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. The Government does not contest that Texas's alleged injury is particularized to Texas, and the Court finds that it is. Texas can therefore establish an injury in fact for its financial injury if it is both concrete and actual or imminent.

Texas asserts a financial injury in the form of added costs to its detention system. Texas states the Memoranda will lead to an unanticipated rise in criminal activity from aliens the federal government would otherwise detain. (Dkt. No. 18 at 15–16, 35–36). On average, Texas spends $62.34 per day per inmate in its detention facilities. (Dkt. No. 19-6 at 3–4). In 2018, Texas detained 8,951 criminal aliens for a total of 2,439,110 days, costing $152,054,117.[17] (*Id.*). If even one alien not detained due to the Memoranda recidivates, Texas's costs "will increase" in accordance with its current cost per inmate. (*Id.* at 4); *cf.* *Dep't. of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565.

The Court finds Texas's claimed injury from unanticipated detention costs is sufficiently concrete and imminent. The harm is concrete because Texas incurs real financial costs in detaining criminal aliens. And the harm is imminent because Texas currently operates a detention system holding criminal aliens and plans to continue doing so in the future.[18]

b. *Parens Patriae* Injury

In addition to its financial injury, the States assert they have been injured in their interests as *parens patriae*. (Dkt. No. 18 at 37). The Government counters that the States are precluded from bringing a *parens patriae* action against the federal government. (Dkt. No. 42 at 24 & n.5). Based on the following, the Court concludes the States properly lay claim to a *parens patriae* injury.

"*Parens patriae* means literally 'parent of the country.' " *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (quoting Black's Law Dictionary 1003 (5th ed. 1979)). The concept derives from the English constitutional system. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972). As that system developed, the Crown retained certain "duties and powers" referred to as the "royal prerogative." *Id.* (citation omitted). For example, as the "father of the country," the King served as the guardian of persons with legal disabilities.

AMERICAN OVERSIGHT
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Id. (internal quotations omitted). When the United States achieved independence, "the prerogatives of the crown devolved upon the people of the States." *Wheeler v. Smith*, 50 U.S. (9 How.) 55, 78, 13 L.Ed. 44 (1850). That is, "[t]he State, as a sovereign," became "the *parens patriae*." *Id.* Like the King before them, the states were now responsible for acting "in the interests of humanity" and "for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 808, 34 L.Ed. 478 (1890).

***13** Once vested in the states, the scope of a *parens patriae* action under American law "greatly expanded." *Hawaii*, 405 U.S. at 257, 92 S.Ct. at 889. The first such expansion is noteworthy. Coincidentally, in a previous dispute between the States in this case, Louisiana sought through a *parens patriae* action to enjoin Texas from continuing a trade embargo that was allegedly injuring Louisiana's economy. *Louisiana v. Texas*, 176 U.S. 1, 3–4, 11–12, 20 S.Ct. 251, 251–52, 254, 44 L.Ed. 347 (1900). Texas's lead health official had cinched the spigot on all commerce flowing between the city of New Orleans and the State of Texas "under the guise of a quarantine against yellow fever." *Id.* at 11, 20 S.Ct. at 254. A standing issue arose because Louisiana had simultaneously invoked the Supreme Court's original jurisdiction, which required a "controversy arising directly between" the states as sovereigns, *and* asserted an interest as *parens patriae*, which had traditionally been a tool for a state to vindicate "the grievances of particular individuals" within its borders. *Id.* at 16, 20 S.Ct. at 256. To reconcile this seeming conflict, the Court determined Louisiana had properly stated an interest as *parens patriae* in protecting "her citizens at large" from economic harm due to Texas's quarantine regulations. *Id.* at 19, 20 S.Ct. at 257. This interest, reasoned the Court, stemmed in part from the fact that Louisiana, as a state, held no right under the Constitution to regulate "the freedom of interstate commerce." *Id.* Although the Supreme Court ultimately held Louisiana lacked standing for other reasons, *id.* at 22–23, 20 S.Ct. at 258–59, the case is considered the first to expand the notion of *parens patriae* to a state's interest in protecting its citizens' interests broadly. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266.

Perhaps unsurprisingly, the concept of a *parens patriae* action to vindicate the rights of a state's citizens-at-large proved popular. *See id.* at 603, 102 S.Ct. at 3266–67 (listing cases brought by various states during the early 20th century). And not long after *Louisiana v. Texas*, Justice Holmes referred to a state's interests in such broader matters as "quasi-sovereign" interests. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907). The term stuck. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365, 374, 44 S.Ct. 138, 139, 68 L.Ed. 342 (1923); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447, 450, 65 S.Ct. 716, 721, 722, 89 L.Ed. 1051 (1945). And before long, the doctrine evolved to the point that the Supreme Court determined quasi-sovereign interests to be not simply a branch of traditional *parens patriae* actions, but the *sine qua non* of *parens patriae* actions. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266. ("[T]o have [*parens patriae*] standing, the State *must* express a quasi-sovereign interest[.]" (alteration and emphasis added)).

But lending this workable term to the abstract concept of a state's interest in its citizenry did not resolve all questions regarding *parens patriae* standing. Namely, the referent "quasi-sovereign interest," without more, proved useless in settling whether a state's injury is sufficiently "concrete" for purposes of Article III standing. *Id.* After all, a quasi-sovereign interest itself is nothing more than a "judicial construct" that does "not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. at 3265. On its surface, the term clearly was crafted to help distinguish from a state's "sovereign interests, proprietary interests, or private interests." *Id.* at 602, 102 S.Ct. at 3266. And an inch deeper, the term represented "a set of interests that the State has in the well-being of its populace." *Id.* But those broad contours alone, absent further granularity, "risk[ed] being too vague to survive the standing requirements" of the Constitution. *Id.*

Recognizing this concreteness issue, the Supreme Court in *Alfred L. Snapp & Son* took it upon itself to hammer out, as best it could, the notion of a quasi-sovereign interest. 458 U.S. 592, 102 S.Ct. 3260. While at once conceding that "the articulation of such interests is a matter for case-by-case development," the Supreme Court nevertheless provided "two general categories" into which characteristics of a true quasi-sovereign interest may fall.

AMERICAN OVERSIGHT

"First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. at 3269. Regarding the first category, the Supreme Court further elaborated, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the state standing to sue as *parens patriae* is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* And regarding the latter, the Supreme Court explained, "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents." *Id.*

***14** Building on this rubric, the Fifth Circuit has concluded that a state's claim to a "quasi-sovereign" interest for standing purposes is sufficient when the state seeks to "protect[ ] its citizens from criminal activity." *Castillo v. Cameron County*, 238 F.3d 339, 351 (5th Cir. 2001) (citing *Snapp*, 458 U.S. at 602, 102 S.Ct. at 3260). In *Castillo*, Texas sought to overturn a federal district court's injunction which permitted a local County Sheriff to refuse to incarcerate alleged parole violators to reduce the county's jail population. 238 F.3d at 343–47. To prove standing in that circumstance, Texas was required to show, among other things, it had a "personal stake" in the outcome. *Id.* at 350–51. The panel held that Texas satisfied this showing in part by alleging a valid quasi-sovereign interest in protecting its citizens from criminal activity. *Id.* at 351. As a result of the injunction, the panel explained, "parole violators who should be incarcerated remain[ed] free, potentially increasing the level of criminal activity." *Id.* Although fully aware that "the concept of quasi-sovereign standing 'risks being too vague to survive the standing requirements of Article III,' " the panel found that Texas's interest in protecting its citizens from increased criminal activity "[fell] within the category of 'a quasi-sovereign interest in the health and well–being—both physical and economic—of its residents in general.' " *Id.* (quoting *Snapp*, 458 U.S. at 602, 102 S.Ct. 3260).

Bearing these principles in mind, the Court now turns to the States' basis for *parens patriae* standing in this case. The States assert a quasi-sovereign interest in protecting their citizens' physical and economic well-being "from crime caused by [the Government's] failure to detain criminal aliens." (Dkt. No. 18 at 37). As it pertains to "criminal activity" in general, *Castillo* resolves that the States here possess a quasi-sovereign interest in protecting their citizens. 238 F.3d at 351.

As it pertains to the criminal activity of "aliens" specifically, the States' interests are perhaps stronger than the circumstances presented in *Castillo*. Whereas in *Castillo* the State of Texas sought to protect its citizens from criminal activity in an area of law over which the State retained extensive authority—the procedure for detaining alleged parole violators—here the States retain *no* authority over the detention of criminal aliens upon their release from state prison and during the pendency of their removal proceedings. That is, the injury to the States' quasi-sovereign interest in protecting their citizens from criminal aliens is especially severe here because the States' hands are tied, in effect, when it comes to federal immigration policy. *See* U.S. Const. art. I, § 8, cl. 4 (conferring upon Congress the Power "[t]o establish an uniform Rule of Naturalization"); *Arizona*, 567 U.S. at 394–95, 132 S.Ct. at 2498 (holding that a state law "authorizing state officers to decide whether an alien should be detained for being removable ... violates the principle that the removal process is entrusted to the discretion of the Federal Government" (citations omitted)).

By seeking relief for an injury to their populace from which they have no constitutional mode of recourse, the States align themselves with the rationale employed by the Supreme Court to support the first expansion of *parens patriae* standing in *Louisiana v. Texas*. Just as Louisiana once sought "vindication of the freedom of interstate commerce" that was "not committed" to it by the Constitution, here the States seek protection from an effect of a federal immigration policy that the States possess no constitutional authority to change.[19] *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also* *Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269. Accordingly, the Court holds that the States possess a quasi-sovereign interest in protecting their citizens-at-large from the criminal activity of aliens subject to mandatory detention under federal law.

***15** The Government contends that the States nevertheless are barred from bringing a *parens patriae* action "against the federal government." (Dkt. No. 42 at 24). For this proposition the Government relies exclusively upon *Massachusetts v. Mellon*, where the Supreme Court denied *parens patriae* standing to a state suing the federal government to protect

AMERICAN OVERSIGHT

its citizens from the "operation of" a federal statute called the Maternity Act. 262 U.S. 447, 479, 485–86, 43 S.Ct. 597, 598, 600, 67 L.Ed. 1078 (1923). A critical feature of the Supreme Court's rationale was that the state had not identified any "rights of the state falling within the scope of the judicial power," such as "quasi sovereign rights." *Id.* at 485, 43 S.Ct. at 600. These twin aspects of *Mellon*—the challenge to the "operation of federal statutes" and the state's lack of an identifiable "right"—were later acknowledged by the Supreme Court as the defining characteristics of its bar on *parens patriae* actions *vis-à-vis* the federal government. *See* *Massachusetts*, 549 U.S. at 520 n.17, 127 S.Ct. at 1455 n.17; *Georgia*, 324 U.S. at 447, 65 S.Ct. at 721 (holding that Georgia could bring a *parens patriae* action to protect a quasi-sovereign interest because, unlike *Mellon*, it did not seek "to protect her citizens from the *operation of* federal statutes" and it possessed "rights ... based on federal [anti-trust] laws" (emphasis added)). And a long train of federal courts have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a *parens patriae* action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right. *See, e.g., Texas v. United States*, 328 F. Supp. 3d 662, 696–98 (S.D. Tex. 2018); *See* *Texas v. United States*, 86 F. Supp. 3d 591, 625–28 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*); *New York v. Sebelius*, No. 1:07-cv-1003, 2009 WL 1834599, at *12–13 (N.D.N.Y. June 22, 2009); *Puerto Rico Pub. Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *City of New York v. Heckler*, 578 F. Supp. 1109, 1122–25 (E.D.N.Y. 1984); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984).

The *parens patriae* injury set forth by the States safely navigates this well-trodden distinction from the *Mellon* rule. The States do not challenge the operation of any federal statute. Rather, they primarily challenge the Executive Branch's putative refusal to enforce certain immigration statutes which, they claim, should benefit their citizenries. (Dkt. No. 1 at 21–24). The States allege that the Executive Branch's policy of non-enforcement infringes upon rights they derive from the APA. (*Id.* at 21–27). Specifically, the States claim that the federal government's policy creating a categorical refusal to enforce certain immigration statutes is an unlawfully withheld agency action, contrary to law, arbitrary and capricious, procedurally defunct, and constitutionally injurious. By asserting these federal statutory rights, the States have not presented this Court with "abstract questions of political power." *Cf.* *Mellon*, 262 U.S. at 485, 43 S.Ct. at 600. Rather, the States have demonstrated concrete injuries to their quasi-sovereign interests as *parens patriae*. *See* *Castillo*, 238 F.3d at 351; *see also* *Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269; *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Texas*, 328 F. Supp. 3d at 697–98 (finding the state had "demonstrated a concrete injury to its quasi-sovereign interest in the economic well-being of its citizens" in a *parens patriae* action against the federal government (quotation omitted)). The Court therefore concludes that the States have demonstrated a cognizable *parens patriae* injury.

2. Traceability

The States must next establish a "fairly traceable link" between their injuries and the Government's allegedly unlawful action. They can establish this link with "no more than *de facto* causality." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). That is to say, a federal plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S.Ct. 1154, 1164, 137 L.Ed.2d 281 (1997); *see also* *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734–35, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008).

***16** Both States' injuries depend on the future behavior of criminal aliens whom the Government would otherwise detain. Regarding Texas's detention costs injury, the States argue the Memoranda will cause a significant number of criminal aliens who otherwise would have been detained by the federal government to be detained again or longer in Texas. (Dkt. No. 18 at 16, 18, 35–37). Regarding the States' *parens patriae* injury, the States urge that the Memoranda will lead to a significant number of criminal aliens who would otherwise have been detained by the federal

AMERICAN OVERSIGHT

government causing harm—both physical and economic—to their respective citizenries. (*Id.* at 37). Thus, at their core, both States' injuries depend upon criminal aliens behaving unlawfully in the future.

The Government contends that whether the aliens who would have otherwise been taken into custody will commit crimes is speculative. (Dkt. No. 42 at 23). The Government further contends that, even if the States can make this showing, they must also prove that those aliens would commit crimes at a higher rate than the aliens who *are* removed because of the Memoranda. (*Id.*).

Regarding the Government's first concern, the Supreme Court has traditionally denied standing wherever the traceable link between the government's action and the plaintiff's injury depends in part on the future behavior of third parties. *See* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S.Ct. 1138, 1150, 185 L.Ed.2d 264 (2013) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). This tradition is especially firm where, as here with the States' asserted injuries, it is alleged that the third parties' future behavior will be unlawful. *See* *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666–67, 75 L.Ed.2d 675 (1983).

That said, the Supreme Court embraces standing theories dependent on third parties' future behavior under certain circumstances. In *Department of Commerce*, for instance, the Supreme Court traced a governmental action to aliens' future unlawful behavior where evidence established a likelihood that aliens have "historically" behaved in a certain manner. ____ U.S. at ____, 139 S.Ct. at 2566. This type of evidence, the Supreme Court concluded, demonstrated that traceability was not "mere speculation," but rather, the product of a "predictable effect of Government action on the decisions of third parties." *Id.* (citations omitted). Similarly, in *Davis v. Federal Election Commission*, the Supreme Court traced a governmental action to the future behavior of the plaintiff's political opponent where evidence showed that "most candidates" had behaved in a certain manner and there was "no indication" the opponent would do otherwise. 554 U.S. at 734–35, 128 S.Ct. at 2769; *see also* *Texas DAPA*, 809 F.3d at 156 (finding a traceable link between DAPA and aliens' likelihood of obtaining driver's licenses where driving was a "practical necessity" for residents of the state). From these cases, it becomes apparent that an injury may be traced through third-party behavior to governmental action where the plaintiff demonstrates individuals similarly situated to the third party have a propensity to engage in the relevant behavior.

Considering this principle, the link between the States' alleged harm and the Memoranda is virtually unassailable. As mentioned, the undisputed evidence demonstrates that the Memoranda are *already* causing a dramatic increase in the volume of criminal aliens released into the public. The States further present evidence suggesting that criminal aliens, as a group, have a strong propensity to recidivate. (Dkt. No. 18 at 15–16). Indeed, the States submit evidence from a Texas Sheriff's Office showing that a group of 209 recently held criminal alien inmates with detainers had a recidivism rate of 73.68%. (Dkt. No. 19-5 at 3). The States also submit a 2018 study from the United States Department of Justice's Bureau of Justice Statistics showing that state offenders generally recidivate at 44% within the first year following release, 68% within the first three, 79% within the first six, and 83% within the first nine. (Dkt. No. 19-20 at 1). And these weren't one-time recidivists. The same study shows, during the nine-year period following release, there were on average five arrests per released *prisoner.* (*Id.*).

***17** This foregoing evidence confirms what the Supreme Court and Congress have long acknowledged: "deportable criminal aliens who remain[ ] in the United States often commit[ ] more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)); *see also* *Zadvydas*, 533 U.S. at 713–14, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (warning of the "risk to the community posed by the mandatory release" of criminal aliens when accounting for "statistical studies showing high recidivism rates for released aliens").

These facts and precedents should come as no surprise to the Government. Congress and the Executive have long provided financial aid to states to ameliorate the strain criminal aliens place on state detention facilities. Through the State Criminal Alien Assistance Program ("SCAAP"), the federal government partially reimburses states for costs associated with detaining criminal aliens.[20] (Dkt. No. 19-2 at 2–4). For example, in 2018 the federal government through SCAAP

AMERICAN OVERSIGHT

reimbursed Texas $14,657,739 of the total $152,054,117 Texas spent on detaining criminal aliens. (*Id.* at 4). Although amounting to less than 10% of Texas's actual costs in 2018, SCAAP payments demonstrate 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.

In sum, the States present evidence of criminal alien and state felon recidivism through a Texas Sheriff and the DOJ's own dataset, Supreme Court precedent citing the congressional record making similar findings as to criminal aliens, and the existence of the SCAAP program. Considering this substantial evidence, the Court is not persuaded that the link between the States' injuries and criminal aliens being released is "speculative" as the Government suggests. The Court finds that criminal aliens "historically" recidivate. *See* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566.

Next, the Government asserts that the risk of criminal aliens committing further crimes is insufficient for the States to trace their injuries to the Memoranda. (Dkt. No. 42 at 23). Rather, the Government hypothesizes that "it is possible" the Memoranda's reprioritization "will result in a net reduction in crimes." (*Id.*). This argument fails in three respects.

First, evidence already in the record demonstrates that the Government is not just refusing to detain its newly deprioritized categories of criminal aliens, but even the "prioritized" variety. For instance, in Texas alone, some of the 68 individuals whose detainers were dropped were serving time for an "aggravated felony," a supposedly prioritized category. *Compare* (Dkt. No. 19-3 at 6–7) *with* 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" under the INA).

Second, the Government provides no support for its contention that its enforcement of the prioritized categories of criminal aliens will exceed any decline in enforcement of the deprioritized categories. The Government's subjective belief cannot overcome the States' evidence demonstrating to the contrary.

Finally, even if the Government *could* demonstrate that increased enforcement in the prioritized categories might displace a drop in the total number of detained aliens resulting from the deprioritized categories, this "offset" would be irrelevant as a matter of law. The "standing analysis is not an accounting exercise." *Texas DAPA*, 809 F.3d at 156 (internal quotation omitted). Absent a "tight[ ] nexus" between the alleged "benefits" and the "costs" of the Memoranda, there can be no "offset." *Id.* Here, other than what it noted in the Memoranda, the Government makes no showing that the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories. And the evidence put forward by the States regarding a drop in enforcement actions—even for prioritized aliens—makes that "possibility" unlikely. Accordingly, there is no connection between the results of enforcement of prioritized categories and the results of enforcement of deprioritized categories.

***18** The Court further notes that the number of aliens who would otherwise be detained in the entire United States is relevant to estimating the impact of the Memoranda on the States in this case. The Fifth Circuit made clear in *Texas DAPA* that injury to a state can flow from the fact that aliens are "free to move among states." 809 F.3d at 188. Indeed, the States proffer evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Given the Fifth Circuit's acknowledgement of this interstate migration principle and the data provided by the States, the prospect that criminal illegal aliens falling within the deprioritized categories of the Memoranda who are not detained elsewhere in the Nation could move to the States' territories—thereby amplifying their injuries—is not mere "conjecture," as the Government posits. *See* (Dkt. No. 42 at 61).

Considering the foregoing, the Court holds that the States have established a traceable link between their injuries and the challenged Memoranda. The Memoranda are already leading to an increased volume of criminal aliens released into Texas who otherwise should have been detained by the federal government. Criminal aliens and state offenders have a demonstrable propensity to recidivate. The Memoranda will therefore cause a traceable injury to the States' financial and *parens patriae* interests.

3. Redressability

The States must next demonstrate that their requested relief would remedy their harm. The "redressability" element of the standing to sue doctrine requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332,

AMERICAN OVERSIGHT

341 (5th Cir. 2020) (cleaned up). The States' request for relief does that.

The States request two forms of injunctive relief. First, they ask this Court to *restrain* the Government from "enforcing and implementing the policies described" in Section B of the January 20 Memorandum and the February 18 Memorandum. (Dkt. No. 18-1 at 2). This Court will refer to this requested relief as the "negative injunction." Second, the States ask this Court to *order* the Government to comply with "the mandatory duty" to "take into custody" and "detain" aliens covered by 8 U.S.C. §§ 1226(c)(1) and 1231(a)(2), respectively, and to "refrain from releasing" aliens covered by Section 1226(c)(1) except as permitted by Section 1226(c)(2). (*Id.*). The Court will refer to this requested relief as the "positive injunction." The positive injunction relates directly to the States' Count I claim that the Government is "unlawfully withholding and unreasonably delaying agency action" pursuant to 5 U.S.C. § 706(1). (Dkt. No. 1 at 23). The States further seek to implement both the negative and positive injunctions nationwide. (Dkt. No. 18-1 at 2).

Assuming, as the Court must for purposes of standing, that the States are "correct on the merits of [their] claims," either form of requested relief is substantially likely to remedy the States' alleged injuries. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Regarding the requested positive injunction, it is perhaps self-evident that an order compelling the federal government to take criminal aliens into custody and detain them pursuant to the relevant statutes would relieve the States from harm they anticipate from the criminal behavior of criminal aliens. Requiring an agency action, the withholding of which is causing injury, will logically alleviate that injury. Notably, the Government offers no clear argument to the contrary regarding the benefit of a positive injunction. (Dkt. No. 42 at 25).

But even if the Court were to grant only the requested negative injunction, then, too, the States are substantially likely to obtain reprieve. Namely, the federal government would be *required* to act in conformance with the standards set by Congress in Sections 1226(c) and 1231(a)(2) as interpreted by this Court. The Government does not quibble with the notion that, under Congress's standards, the States' injuries would be redressed. Rather, the Government argues that, if the Memoranda are enjoined, the States are unable to show that "the resulting *prioritization scheme*" will "result in a decrease in crime levels" within the States' boundaries. (Dkt. No. 42 at 25) (emphasis added). The Government's argument misses the mark for two reasons.

***19** First, this argument suggests the Memoranda were issued in a vacuum in which no prior policy concerning the detention of criminal aliens ever existed. Of course, such a suggestion is demonstrably false: the Government's own affidavits demonstrate that the United States has "had policies guiding such exercise since as early as 1909." (Dkt. No. 42-6 at 6); (Dkt. No. 42-5 at 8).

Second, the Court's concern over redressability in an APA case such as this cuts not to the executive-level policy which would be applied in the absence of the faulty one, but rather, whether *Congress*'s express standards—both for the immigration laws challenged and the procedural standards allegedly discarded—if followed, would provide the States recourse. *See* *Texas DAPA*, 809 F.3d at 161. By nullifying the constraints flowing from the Memoranda's "prioritization," this Court would require that agency to return to or pursue a specific standard for exercising its discretion within the bounds set by Congress. The States have supplied evidence demonstrating that in times past, such an exercise of discretion led to significantly fewer criminal aliens who are not in custody and roaming their streets. (Dkt. No. 19-3 at 5). The Government's inability to refute this evidence is telling. It suggests that conformance with the strictures set by Congress in Sections 1226(c) or 1231(a)(2) as practiced prior to the issuance of the Memoranda would result in a reduction of the volume of criminal aliens moving freely within the interior of the States.

Accordingly, the Court finds that, regardless of which form it takes, the injunctions sought by the States would redress their injuries flowing from the Memoranda. The States have standing under the traditional inquiry.

4. Special Solicitude

Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. The Supreme Court in *Massachusetts v. EPA* determined that states are owed special solicitude wherever they assert a congressionally bestowed procedural right and the governmental action at issue affects the state's quasi-

AMERICAN OVERSIGHT

sovereign interests. 549 U.S. at 519–20, 127 S.Ct. at 1454–55. The Fifth Circuit has acknowledged that the holding in *Massachusetts* applies to procedural claims under the APA. *Texas DAPA*, 809 F.3d at 152–55. Specifically, the Fifth Circuit in *Texas DAPA* granted the state special solicitude where it sought judicial review of an immigration policy memorandum which imposed "direct, substantial pressure" on a state's "lawmaking authority"—that is, pressure to change its laws subsidizing driver's licenses for aliens. *Id.*

The States are likewise owed special solicitude here. The States seek judicial review of immigration policy memoranda which they allege constitute final agency action, and they assert that the resulting policies cause injury to Texas's public fisc because its budget for detention facilities "has been set months or years in advance." (Dkt. No. 18 at 41). Additionally, and as discussed above, the States have shown they possess a quasi-sovereign interest in protecting their citizenries from the unlawful activity of criminal aliens. The Government's sole argument in opposition is that special solicitude still requires an injury in fact. (Dkt. No. 42 at 24–25 n.7). But this argument falls short because, as detailed in this Memorandum Opinion and Order, *see supra* II.A.1., the States have demonstrated an injury in fact. Accordingly, the States have satisfied their burden to demonstrate they are entitled to special solicitude in the standing inquiry.

***20** In *Massachusetts*, a state armed with special solicitude was permitted to establish causation between the EPA's decision not to regulate certain greenhouse gas emissions and the state's interest in protecting its physical territory. 549 U.S. at 523–24, 127 S.Ct. at 1456–57. As detailed above, the links between the States' injuries and the Memoranda here are not perceptibly frailer than in *Massachusetts* and likely are firmer. *See also* *Lujan*, 504 U.S. at 572 n.7, 112 S.Ct. at 2142 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). The States have standing under the special solicitude inquiry. Accordingly, the Court finds it has jurisdiction to consider the States' claims. [21]

B. JUDICIAL REVIEW

The Court must next determine whether the States' claims are reviewable before turning to the merits of the Motion. *Lexmark*, 572 U.S. at 128, 134 S.Ct. at 1387–88. In so doing, the Court narrows the focus to the States' APA claims. The APA imposes four general requirements that must be satisfied before a federal court can review agency action. *See* *Bennett*, 520 U.S. 154, 117 S.Ct. 1154. To start, no statute may bar judicial review. *Id.* at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(1). Next, the new guidance outlined in the February 18 Memorandum must constitute a "final agency action." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 704. Third, the new guidance must not be "committed to agency discretion by law." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(2). Finally, the States must show that their injuries are within the "zone of interests" to be protected by the statutes allegedly violated by the Government. *Bennett*, 520 U.S. at 163, 117 S.Ct. at 1161; 5 U.S.C. § 702. The Court finds that the States have met each of these requirements.

1. Statutory Bars to Judicial Review

Under the APA, an action may not proceed when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). With respect to immigration, Congress enacted "many provisions ... aimed at protecting the Executive's discretion from the courts[.]" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S.Ct. 936, 945, 142 L.Ed.2d 940 (1999). Banking on this, the Government contends that Sections 1252, 1231(h), and 1226(e) protect the Executive Branch's discretion from the States' claims before this Court. (Dkt. No. 42 at 30–35). The Court will address each in turn.

First, the Government makes the same arguments it articulated in *Texas I* that 8 U.S.C. § 1252(a)(5) and (b)(9) bar judicial review of the States' APA claims. (*Id.* at 30–31); *see also* (6:21-cv-3, Dkt. No. 83 at 27). [22] The States disagree arguing that the provisions are irrelevant to this case because they apply "only with respect to review of an order of removal under subsection (a)(1)." (Dkt. No. 51 at 27–28) (quotations omitted). As in *Texas I*, the Court agrees with the States and incorporates by reference its decision on the issue in that case. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42; *see also* *Nielsen*

AMERICAN OVERSIGHT

v. Preap, ____ U.S. ____, ____, 139 S.Ct. 954, 962, 203 L.Ed.2d 333 (2019) (holding that Section 1252(b)(9) does not preclude judicial review of respondents' challenge to the Government's detention authority under Section 1226 because respondents "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal as opposed to the decision to deny them bond hearings; and they are not even challenging any part of the process by which their removability will be determined" (quotations omitted)); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("[W]hile [Sections 1252(a)(5) and 1252(b)(9)] limit *how immigrants* can challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel *judicial review over final orders of removal to the courts of appeals*."(emphases added)).

***21** Next, the Government, again repeating its stance in *Texas I*, argues that any of the States' claims brought under Section 1231 are precluded from judicial review by Subsection (h). (Dkt. No. 42 at 34); *see also* (6:21-cv-3, Dkt. No. 83 at 30–32). Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). In this case, the Government rehashes its prior argument in *Texas I* that the meaning of "party" in Section 1231(h) includes the States. This time around, it argues that because Black's Law Dictionary defines the word "party" as "one by or against whom a lawsuit is brought," the Court was in error when it concluded that "party" in that section narrowly means "alien in a removal proceeding." (*Id.* at 34–35); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. For their part, the States unsurprisingly agree that the Court got it right the first time around and succinctly agrees with the Court's disposition. (Dkt. No. 51 at 28–29). The Court agrees with the States.

Although the Government is correct in arguing that "party" may have a broad dictionary definition, statutory construction is more complex. On the surface, the plain meaning of "party" in Section 1231(h)—even when accounting for the dictionary definition—could refer to (1) any party *to the removal proceedings* or (2) *any* party to *any* proceeding. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24. This potential for multiple meanings of "party" in Section 1231(h) does not necessarily render the text ambiguous; if "all but one of the meanings" of the word *party* in Section 1231(h) can be "ordinarily eliminated by context," that remaining meaning is correct.[23] *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 1996–97, 124 L.Ed.2d 44 (1993) (superseded by statute on other grounds). The well-established process for interpreting a text with *potential* ambiguity focuses on "text, context, structure, and history." *See Texas v. EPA*, 983 F.3d 826, 836 (5th Cir. 2020). "Statutory language has meaning only in context." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415, 125 S.Ct. 2444, 2449, 162 L.Ed.2d 390 (2005)). While a dictionary can illuminate the "core meanings of a term," "the meanings of common words (which typically have multiple definitions) must be determined in the context in which they appear." *Texas*, 983 F.3d at 837 n.2 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 418–19 (2012)). In short, the Court in *Texas I* conducted an in-depth analysis of the term "party," the statute, and the history of the statutory scheme and, having done so, the Court determined that "party" in Section 1231(h) means "alien in a removal proceeding." *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. The Government has offered nothing to convince the Court that its analysis and conclusion in *Texas I* were in error. Thus, the Court adopts its prior reasoning and conclusion in *Texas I* with respect to Section 1231(h).

Lastly, the Government contends that Section 1226(e) bars the States' claims as they relate to Section 1226(c). (Dkt. No. 42 at 32–33). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding

AMERICAN OVERSIGHT

> the detention or release of any alien or the grant, revocation, or denial of bond or parole.

***22** 8 U.S.C. § 1226(e). The Government insists that determinations under Section 1226(c) are discretionary because the federal government "may detain a noncitizen under § 1226—under either subsection (a) or subsection (c)—only 'pending a decision' on removal." (Dkt. No. 42 at 32). According to the Government, "[d]etention authority is thus contingent on the Secretary's separate, predicate, and discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear." (*Id.*) (citations omitted).

Voicing their disagreement, the States allege that Subsection (e) is irrelevant to the action since it applies only to discretionary decisions to detain *individual* aliens and not to lawsuits on the Government's detention authority. (Dkt. No. 18 at 39); (Dkt. No. 51 at 28). And because Section 1226(c) imposes a mandatory duty to detain, as the States argue, it follows that Section 1226(e) does not apply to Subsection (c). (*Id.*); *see infra* II.B.3.a. The Court agrees with the States.

The Supreme Court has clearly stated that Subsection (e)'s limitation "applies only to 'discretionary' decisions about the 'application' of § 1226 to *particular cases*." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added). Section 1226(e), therefore, "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*, ____ U.S. ____, ____, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (quoting *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714)). Indeed, "Section 1226(e) ... deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions." *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). So, for instance, Subsection (e) poses no hurdle for a respondent who challenges the statutory framework that permits his detention without bail under Section 1226. *See* *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714. Section 1226(e) does not preclude challenges to the Government's alleged authority to detain certain aliens without a bond hearing under Sections 1225(b), 1226(a), and 1226(c). *Jennings*, ____ U.S. at ____, 138 S.Ct. at 839, 841. It also does not bar habeas corpus petitions. *See* *Parra*, 172 F.3d at 957. Further, Subsection (e) does not prevent plaintiffs from questioning whether the Government has the power under Section 1226(c) to detain certain aliens despite failing to detain the aliens *immediately after* they were released as required by Section 1226(c). *Preap*, ____ U.S. at ____, 139 S.Ct. at 961–62; *see also infra* II.B.4. Thus, Section 1226(e) does not prohibit parties from "disput[ing] the *extent of the statutory authority* that the Government claims." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added).

Here, the States' claims against the Government clearly "dispute the extent of the statutory authority that the Government claims." *See id.* In their Complaint, the States allege the Government does not have any discretion under Section 1226(c) to determine whether certain aliens must be detained when released from custody. *See* (Dkt. No. 1 at ¶¶ 35, 37–38, 94–101); *see also* (Dkt. No. 18 at 39). In effect, "the general extent of the Government's authority under § 1226(c) is precisely the issue here." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962. Thus, "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*, ____ U.S. at ____, 138 S.Ct. at 841.

***23** Accordingly, the Court concludes Sections 1252(a)(5) and (b)(9), 1231(h), and 1226(e) do not preclude the States' claims. There are no statutory bars to reviewing these claims.

2. Final Agency Action

The Court next considers whether the enforcement priorities set forth in the January 20 and February 18 Memoranda constitute "final agency action" subject to judicial review. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). "Under the APA, an aggrieved party may file suit in a federal district

AMERICAN OVERSIGHT

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 Def.*, ____ U.S. ____, ____, 138 S.Ct. 617, 626, 199 L.Ed.2d 501 (2018) (citing 5 U.S.C. § 704) (internal quotations omitted). The States and the Government agree on the standard used to determine whether an agency action is "final." *See* (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26). That standard requires two conditions to be satisfied. *See* *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 1129, ____, 136 S.Ct. 1807, 1813, 195 L.Ed.2d 77 (2016). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168). The Parties disagree whether the Memoranda constitute final agency action. (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26–28). The Court finds that they do for the following reasons.

a. The Consummation of the Agency's Decision-Making Process

The first condition that must be satisfied for a court to find that an agency's action is final is that the action constitutes "the consummation of the agency's decisionmaking process." *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. A consummation of this decision-making process is present when the action is "definitive [in] nature" rather than "advisory in nature." *Id.* The Court finds the Memoranda easily satisfy this condition.

As an initial matter, the text of the February 18 Memorandum indicates the Memoranda are the consummation of DHS's decision-making process. It states, "[t]his interim guidance is effective *immediately.*" (Dkt. No. 19-2 at 2) (emphasis added). Moreover, the February 18 Memorandum states, "[i]t applies to *all* U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning." (*Id.*) (emphasis added). The immediacy and definite nature of the application of this guidance to *all* enforcement actions and custody decisions made by *all* ICE Directorates and Program Offices strongly suggest the agency's decision is final. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813.

The Government attempts to overcome these indicia of final agency action by arguing "the Secretary retains the discretion to change or abandon these policies at any time[.]" (Dkt. No. 42 at 27). This argument stems from the February 18 Memorandum, which states, "[t]his interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines," which will occur "only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices." (Dkt. No. 19-2 at 2). The Government's argument is unpersuasive. The mere fact that an agency *says* an action is not final because it maintains "discretion" to alter a policy is insufficient to *render* an action nonfinal. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." (citation omitted)); *Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

***24** Here, the Government's insinuation that agency action is not final simply because the agency says so, would produce the absurd result of precluding judicial review of *any* policy that the agency says is not final. Indeed, if such a rule were followed, then an agency could avoid judicial review of its action in perpetuity simply by labeling its action as "interim" or "temporary" and stating that the agency maintains the ability to repeal or revise it in the future. In fact, this case demonstrates how an agency could potentially tie the judiciary's hands if the agency's action is not final simply because the agency says it is not.

In this case, the February 18 Memorandum took effect immediately upon issuance. (Dkt. No. 19-2 at 2). The Memorandum states it would "remain in effect until Secretary Mayorkas issues new enforcement guidelines." (*Id.*). It also states Secretary Mayorkas "anticipate[d] issuing these guidelines in less than 90 days," meaning the new guidance would be issued before May 19, 2021. (*Id.*). But that did not happen. *See* (Dkt. No. 63 at 3–4). In fact, in a separate challenge to the February 18 Memorandum, the Government represented to the district court that it "currently expect[s]

AMERICAN OVERSIGHT
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that the Secretary will issue new immigration priorities in the beginning of July." *Arizona v. Dep't of Homeland Sec.*, No. 2:21-cv-00186-SRB, 2021 WL 2787930 (D. Ariz. June 7, 2021), Dkt. No. 85 at 2. Once again, the new guidance was not released. *See* (Dkt. No. 63 at 3–4). The Government now projects "the Secretary will issue new immigration enforcement priorities by the end of August or the beginning of September." (Dkt. No. 63 at 3–4). Notably, the Government "caution[s] that this is *only* [*its*] *current expectation*." (*Id.* at 4) (emphasis added). In other words, the Government's expectation could once again change, and the issuance of the new guidance could be delayed even longer. Thus, a purely subjective definition of nonfinality would be awfully convenient for the Government—but that is not what the law provides. Rather, because the agency-wide application of this guidance has an immediate and definite nature, it objectively demonstrates the agency's decision is indeed final. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Court therefore finds that the Memoranda satisfy the first condition.

b. Rights, Obligations, and Legal Consequences

The second condition that must be satisfied for a court to find that an agency's action is final is that the challenged action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Government argues the Memoranda do not satisfy this condition because the Memoranda do not change DHS's legal obligation to enforce the law in the manner prescribed in Sections 1226(c) and 1231(a)(2). (Dkt. No. 42 at 26–28). The Government also argues the Memoranda do not "change any person's legal status, confer any legal benefits, or have any 'legal consequences.' " (*Id.* at 27). Stated differently, the Government contends the Memoranda do not affect the rights or obligations of the States, aliens, or any other person or entity. In support, the Government points to the February 18 Memorandum, which states that the Memorandum does not "create any right or benefit, substantive or procedural, enforceable at law." (*Id.* at 27) (citing (Dkt. No. 19-2 at 8)). But once again, what the Memoranda say and do are different. The Court finds the Memoranda satisfy the second condition.

First, the Government's assertion that the Memoranda do not alter DHS's legal obligations to detain certain aliens under Sections 1226(c) and 1231(a)(2) is demonstrably false. In deciphering the meaning of Sections 1226(c) and 1231(a)(2) below, *see infra* II.B.3.a., the Court goes to great lengths to discuss what obligations those statutory provisions create for DHS. In sum, Section 1226(c) obligates DHS to detain *all* aliens who fall within the ambit of that provision *when they are "released" from state custody.* Section 1231(a)(2) requires DHS to detain *all* aliens with final orders of removal "*during the removal period.*"

***25** The Memoranda require something quite different. Specifically, the February 18 Memorandum effectively substitutes a prioritization scheme in place of the enforcement mandates set forth in these statutory provisions. This new scheme creates two categories of aliens who are required to be detained: priorities and nonpriorities. *See* (Dkt. No. 19-2 at 4–7). It also sets forth a requirement that ICE agents obtain preapproval to detain aliens who are deemed nonpriorities. (*Id.* at 7). The plain meaning of Sections 1226(c) and 1231(a)(2) allows for neither this specific prioritization scheme nor its preapproval process; they simply require DHS to detain *all* aliens described therein at a certain time or for a specific duration. Because the Memoranda *require* DHS to enforce the law in a different way than what Sections 1226(c) and 1231(a)(2) prescribe, the Memoranda constitute a change in DHS's legal obligations. Such a change weighs in favor of classifying the Memoranda as final agency action. *See* *Texas*, 86 F. Supp. 3d at 648–49 (finding that DAPA is a final agency action, in part, because "[a]s evidenced by the mandatory language throughout the DAPA Memorandum requiring USCIS and ICE to take certain actions, the Secretary's Directive clearly establishes the obligations of the DHS and assigns specific duties to offices within the agency").

Next, the Government contends the Memoranda do not alter the rights or obligations of the States or aliens in the country. The Court disagrees. Based on the record before the Court, the Memoranda affect Texas's legal obligation to provide Emergency Medicaid to certain noncitizens. "Emergency Medicaid is a *federally required* program *jointly funded* by the federal government and the *states*." (Dkt. No. 19-7 at ¶ 7) (emphases added). Illegal aliens are eligible to participate in this program. *See* (*Id.*); 8 U.S.C. § 1611(b)(1)(A). An alien in Texas who is eligible for Emergency Medicaid and

AMERICAN OVERSIGHT

presently in state custody can benefit from the program after being released. [24] Texas is therefore legally obligated to bear part of the cost of Emergency Medicaid for aliens who qualify for the program and are not detained by ICE after being released from state custody.

But as should be clear by now, not all aliens released from state incarceration are returned to society. And that is because of Sections 1226(c) and 1231(a)(2). Again, pursuant to Section 1226(c), DHS is *required* to detain *all* aliens who have committed certain serious offenses *as soon as* they are released from state custody. And per Section 1231(a)(2), DHS is *required* to detain certain aliens during their removal period. Instead, because of the Memoranda, DHS is no longer detaining all of these aliens as soon as they are released from state custody or during their removal periods. Texas will therefore have a legal obligation to share the cost of providing Emergency Medicaid to aliens who qualify for the program and, under the Memoranda, are not detained by ICE after being released from state custody. [25]

***26** As for the rights of aliens, another district court has already concluded the Memoranda affect the rights of certain aliens presently detained. *See Hussein S.M. v. Garland*, No. CV 21-348 (JRT/TNL), 2021 WL 1986125, at *3 (D. Minn. May 18, 2021). As this Court noted in *Texas I*, "an [alien] who has been detained for six months may be entitled to release if 'it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.' " ____ F. Supp. 3d at ____, 2021 WL 2096669, at *31 (quoting *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505). In *Hussein S.M.*, a detained alien with a final of order of removal filed a petition for a writ of habeas corpus to secure his release from detention. 2021 WL 1986125, at *1. The district court granted the petition, relying on the civil immigration enforcement priorities set forth in the January 20 Memorandum and later reaffirmed in the February 18 Memorandum. *Id.* at *3. Because the alien in *Hussein S.M.* did not fall within one of the priority groups, the district court found "his removal is *unlikely to be imminent* despite ongoing removal enforcement." *Id.* (emphasis added). In short, *Hussein S.M.* demonstrates the Memoranda directly affect an alien's right to be free from prolonged detention. The Court therefore concludes the Memoranda affect the rights of and have significant legal consequences for detained aliens with final orders of removal.

In sum, the Court finds the Memoranda are the consummation of DHS's decision-making process and determine certain rights and legal obligations. Therefore, the Court concludes the Memoranda constitute final agency action under Section 704 of the APA. [26]

3. Committed to Agency Discretion by Law

In determining whether an agency action is reviewable, the Court must also determine whether the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Accordingly, the Court now inquires whether the implementation of the new guidelines found in the Memoranda is "committed" to the Government's discretion by law.

The APA embodies a "basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). But this is "just" a presumption. *Lincoln*, 508 U.S. at 190, 113 S.Ct. at 2030. " '[R]eview is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Id.* at 191, 113 S.Ct. at 2031 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985)). Where there is no meaningful standard to apply, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Lincoln*, 508 U.S. at 191, 113 S.Ct. at 2031 (quoting *Heckler*, 470 U.S. at 830, 105 S.Ct. at 1655).

One category of administrative decisions that courts "traditionally have regarded as 'committed to agency discretion' " is relevant to this discussion. *Id.* (citation omitted). Namely, "an agency's decision not to institute enforcement proceedings." *Id.* (citing *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655–56). Non-enforcement decisions, however, are only "presumptively unreviewable." *Heckler*, 470 U.S. at 832–33, 105 S.Ct. at 1656. The Supreme Court has outlined a narrow but clear roadmap to overcoming that presumption and a second, less–traveled path. As for the first: "the presumption may be rebutted

AMERICAN OVERSIGHT

where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* As for the second: it may be "justifiably ... found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4, 105 S.Ct. at 1656 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Although the Supreme Court has not (yet) found this latter type of "abdication," it has nevertheless instructed that any such inquiry should focus on "the statute conferring authority on the agency," which "might indicate that such decisions were not 'committed to agency discretion.' " *Heckler*, 470 U.S. at 833 n.4, 105 S.Ct. at 1656 n.4; *see also* *Texas DAPA*, 809 F.3d at 166–67.

***27** In this case, the Government argues the States' claims are unreviewable because the new guidelines contained in the February 18 Memorandum are committed to agency discretion by law. More precisely, the Government argues: (1) the substantive statutes in question, Sections 1226(c) and 1231(a)(2), do not set out the specific mandatory duties the States assert, that is, the duty to detain certain aliens subject to those two sections; (2) even if these statutes establish mandatory duties, the new guidelines "simply establish[ ] enforcement priorities" since they do "not direct ICE officials to cease detaining any particular noncitizen subject to either § 1226(c) or § 1231(a)(2)"; and (3) assuming the first two arguments fail, the Executive Branch may, in effect, dispense with a congressional mandate because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President." (Dkt. No. 42 at 28–30). Opposing the Government's suppositions, the States contend that, although the Government wields tremendous discretion in this area of immigration law, Sections 1226(c) and 1231(a)(2) limit this discretion by mandating the detention of certain aliens when they are released or during the removal period. (Dkt. No. 51 at 29–30). The Court now turns to each of these arguments.

a. Whether "Shall" Means "Must"

The Government first argues that "shall" in Sections 1226(c) and 1231(a)(2) does not impose any mandatory duties or guidelines for the Government to follow. The Court disagrees. Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable under the INA "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

Recent Supreme Court precedent establishes "shall" means "must" in these sections. In *Johnson v. Guzman Chavez*, the Supreme Court noted "detention is mandatory" during an alien's removal period, as prescribed by Section 1231(a)(2). ____ U.S. ____, ____, 141 S.Ct. 2271, 2281 (2021) (citing 8 U.S.C. § 1231(a)(2)). And under Section 1226(c), "detention is mandatory and release is permitted in very limited circumstances" "[f]or certain criminal aliens and aliens who have connections to terrorism." *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)). In light of *Guzman Chavez*, it seems there is no dispute that Sections 1226(c) and 1231(a)(2) are mandatory.

This is not surprising. *Guzman Chavez*'s holding follows the well-established principle that Sections 1226(c) and 1231(a)(2) mandate the detention of certain aliens at specific points in time. *See* *Preap*, ____ U.S. at ____, 139 S.Ct. at 959 (finding under Section 1226(c) certain criminal aliens "*must* be arrested when 'they are released' from custody on criminal charges and ... *must* be detained without a bond hearing until the question of their removal is resolved" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 835 ("§ 1226(c) makes clear that detention of aliens within its scope *must* continue 'pending a decision' on removal" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Zadvydas*, 533 U.S. at 683, 121 S.Ct. at 2495 ("After entry of a final removal order and during the 90-day removal period, however, aliens *must* be held in custody." (citing 8 U.S.C. § 1231(a)(2)) (emphasis in original)); *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716 (noting Section

AMERICAN OVERSIGHT

1226 "*requir[ed]* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability" (emphasis added)); *Hosh v. Lucero*, 680 F.3d 375, 377, 381 (4th Cir. 2012) ("Section 1226(c) *requires* the mandatory federal detention, without the possibility of bond, of certain deportable criminal aliens '*when*' those aliens are released from other custody." (emphases added)); *Rodney v. Mukasey*, 340 F. App'x 761, 764 & n.3 (3d Cir. 2009) (per curiam) (interpreting "shall" in Section 1231(a)(2) to mean the Attorney General "*must*" detain the alien for a certain period (emphasis added)); *Khotesouvan v. Morones*, 386 F.3d 1298, 1300 (9th Cir. 2004) (observing that, in *Demore*, the Supreme Court "approved the *mandatory* detention of a criminal alien during removal proceedings under 8 U.S.C. § 1226(c) even in the absence of an individualized finding that the alien was unlikely to appear for his removal hearing if released on bond" (emphasis added)); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 & n.4 (9th Cir. 2008) (noting that detention under Section 1231(a)(2) is *mandatory*); *Nyonton v. Brackett*, No. 18-CV-481-PB, 2019 WL 1082203, at *2 (D.N.H. Mar. 7, 2019) (holding Section 1231(a)(2) is "crystal clear" in mandating the detention of aliens subject to Section 1231, especially with respect to individuals "who have been found inadmissible because of a controlled substance violation"); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 235 (S.D.N.Y. 2010) (explaining that, while Section 1226(a) provides ICE with the discretion to detain any alien pending a decision in removal proceedings, "[a]liens who have been convicted of certain enumerated offenses, however, including drug crimes ... *are subject to mandatory detention*" pursuant to Sections 1226(c)(1)(B), 1227(a)(2)(B), and INA § 126(c) (emphasis added)).

***28** Accordingly, the Court concludes, following *Guzman Chavez* and the foregoing overwhelming precedent, the word "shall" means "must" in Sections 1226(c) and 1231(a)(2). Consequently, the Government is required to detain certain criminal aliens and aliens with final orders of removal at certain points in time to comply with those statutes.

Despite the Supreme Court's clear interpretation of Sections 1226(c) and 1231(a)(2), the Government nevertheless argues that *Guzman Chavez* and, by extension, all other related court rulings are irrelevant here. The Government contends *Guzman Chavez* "did not address the Department of Homeland Security's discretion whether to detain individuals covered by 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a)(2)." (Dkt. No. 67 at 1). "Rather," according to the Government, *Guzman Chavez* "addressed under which authority certain individuals were detained and whether such individuals were entitled to bond hearings." (*Id.*). In short, the Government argues the Court should disregard *Guzman Chavez*'s statements on Sections 1226(c) and 1231(a)(2)—and the numerous court holdings that precede *Guzman Chavez*—because those were not central to the case's holding and thus were dicta that need not be followed. The Court disagrees.

Guzman Chavez's treatment of Sections 1226 and 1231 were central to its holding. The case's key question was whether certain aliens could be released on bond while petitioning for relief from removal. That question was necessarily answered by analyses of both sections—analyses that included looking at the mandatory nature of Sections 1226(c) and 1231(a)(2)'s detention provisions. The respondents in *Guzman Chavez*—aliens who were detained following their unlawful reentrance into the United States after previously being removed—sought release on bond while they were pursuing relief from removal. *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280. The respondents argued that Section 1226, which generally conferred discretion to the Government to detain aliens, provided them an avenue to be released on bond. *Id.* at ____, 141 S.Ct. at 2283–84. However, the Government in that action contended that Section 1231, which mandates detention of aliens with orders of removal, applied to the respondents, effectively requiring their detention to be *without* bond. *Id.*; *see also* Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897), 2020 WL 4938065. The Supreme Court was thus required to determine which INA provision applied to the respondents. This task necessitated a finding as to whether, and in what circumstances, detention was mandatory under the relevant statutes. *See Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280–82.

Guzman Chavez ultimately held Section 1231 applies to the respondents since they had effectively been ordered removed through the reinstatement of their previous orders of

AMERICAN OVERSIGHT

removal. *See id.* at ____, 141 S.Ct. at 2287–91. In reaching this conclusion, the Supreme Court compared Section 1226, which, again, applies to the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States," *id.* at ____, 141 S.Ct. at 2281, with Section 1231, which applies to an alien ordered removed, *id.* In the Supreme Court's discussion of Section 1226, it noted "DHS," pursuant to that provision, "*may* arrest and detain the alien," pending that alien's removal decision. *Id.* Such an alien "may generally apply for release on bond or conditional parole." *Id.* Nevertheless, the Supreme Court probed further, stating "there is one exception" to this general rule: for certain criminal aliens, "*detention is mandatory*" under Section 1226(c). *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)) (emphasis added). Like Section 1226(c)'s exception, the Supreme Court stated Section 1231's detention is "mandatory" precisely because of Section 1231(a)(2). *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2281 (citing 8 U.S.C. § 1231(a)(2)). Thus, *Guzman Chavez*'s interpretation of Sections 1226(c) and 1231(a)(2) as mandating detention was essential to the case's holding.

***29** Tellingly, the Government itself admitted during briefing in *Guzman Chavez* that Section 1226(c) imposed a mandatory duty to detain certain criminal aliens.[27] The Government explained, although "Section 1226(a) makes detention discretionary," "a separate provision, Section 1226(c), *makes an exception* to that general rule, providing that the government 'shall' take into custody and not release certain criminal aliens." Brief for Petitioner, 2020 WL 4938065, at *5 (No. 19-897) (emphasis added). The Government also argued in its reply brief that the Supreme Court's "intervention" in *Guzman Chavez* would "determine[ ] whether Section 1226(c)—which provides for the *mandatory* detention of certain criminal aliens—applies to aliens who have reinstated orders of removal and are in withholding-only proceedings." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 3124376, at *7 (emphasis added). Likewise, with respect to Section 1231(a)(2), the Government stated it had "long read" the statute "to *require* the detention of terrorist and *criminal* aliens." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 7249055, at *17 & footnote (emphases added). Thus, in conjunction with *Guzman Chavez*, the Court takes the Government at its word and finds "shall" means "must" in Sections 1226(c) and 1231(a)(2) with respect to the detention of certain criminal aliens.

Second, even if the clear principles delineated in *Guzman Chavez, Preap, Zadvydas*, and the like are dicta, they are persuasive, nonetheless. As the Fifth Circuit has noted, "[i]t is well established in this circuit that, although we are 'not bound by dicta, even of [this court,] [d]icta of the Supreme Court are, of course, another matter.' " *Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152, 154 n.3 (5th Cir. 2018) (quoting *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015)).[28] Thus, the Court follows the Fifth Circuit and its sister circuits and defers to *Guzman Chavez, Preap, Zadvydas*, and other related Supreme Court precedent even if the statements on Sections 1226(c) and 1231(a)(2) in those cases were dicta, as the Government contends. The Court is not free to treat Supreme Court dicta as cavalierly as the Government suggests. Accordingly, the Court applies the caselaw discussed above and holds that the "shall" found in Sections 1226(c) and 1231(a)(2) means "must," imposing on the Government a duty to detain certain criminal aliens and those with final orders of removal when released and during the removal period, respectively.

***30** Arguments about dicta aside, the Court's own statutory interpretation of Sections 1226(c) and 1231(a)(2) also leads to the conclusion that "shall" means "must" in those sections. *See* Scalia & Garner, *supra*, at 53 ("*Every* application of a text to particular circumstances entails interpretation." (emphasis added)).

"The task of statutory interpretation begins and, if possible, ends with the language of the statute." *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013). "When the language is plain, [the court] 'must enforce the statute's plain meaning, unless absurd.' " *Id.* (quoting *In re Nowlin*, 576 F.3d 258, 261–62 (5th Cir. 2009)); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means

AMERICAN OVERSIGHT

in a statute what it says there.' " (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))). "A statute is ambiguous if it is susceptible of more than one accepted meaning." *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003). Thus, as before, regarding interpreting Section 1231(h), the Court must initially determine whether "all but one of the meanings" of the word "shall" in Sections 1226(c) and 1231(a)(2) is "ordinarily eliminated by context." *Deal*, 508 U.S. at 132–33, 113 S.Ct. at 1996–97.

For this analysis, the Court applies "the traditional means of statutory interpretation, which include the text itself, its history, and its purpose." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) (citation omitted). Put differently, the Court must initially "look first to the word's ordinary meaning," *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 131 S.Ct. 1885, 1891, 179 L.Ed.2d 825 (2011), since "[s]tatutory language has meaning only in context." *Graham Cnty.*, 545 U.S. at 415, 125 S.Ct. at 2449 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 382, 160 L.Ed.2d 271 (2004)). Only "when traditional methods of statutory construction fail to reveal a provision's meaning" may the Court "conclude that it is ambiguous." *Perry*, 102 F.3d at 147.

"[T]he word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, ____ U.S. ____, ____, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020); *see also* Scalia & Garner, *supra*, at 112 ("When drafters use *shall* and *may* correctly, the traditional rule holds—beautifully."). The Supreme Court has nonetheless cautioned, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co. v. Hecht*, 95 U.S. 168, 170, 24 L.Ed. 423 (1877).

This need for legislative intent to demonstrate "shall" should be construed as "must" against the government is present in Supreme Court jurisprudence. In *Texas I*, this Court identified *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), a Supreme Court case upon which the Government relies, (6:21-cv-3, Dkt. No. 82 at 19); (6:21-cv-3, Dkt. No. 83 at 25–26, 34); (6:21-cv-16, Dkt. No. 42 at 36–38), as an apt example of the need for legislative intent to determine that "shall" connotes a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *33. In *Castle Rock*, the respondent claimed her due process rights were violated because a police department refused to enforce restraining orders despite language printed on the orders themselves stating that an "officer shall arrest" a restrained person where probable cause of a violation was evident. 545 U.S. at 754, 759, 125 S.Ct. at 2802, 2805. The Supreme Court, however, found "the presence of seemingly mandatory legislative commands" like "shall" could not automatically impose a "true mandate" against the police. *Id.* at 760–61, 125 S.Ct. at 2805–06. What was needed—and lacking in *Castle Rock*—was "some stronger indication" from the legislature. *Id.* at 761, 125 S.Ct. at 2806. Such an "indication" was not present because the "shall" used in the restraining orders was "not perceptibly more mandatory than" other state statutes using the word "shall" where the police force was traditionally accorded discretion. *Id.*; *see also Chicago v. Morales*, 527 U.S. 41, 61–62 n.32, 119 S.Ct. 1849, 1861 n.32, 144 L.Ed.2d 67 (1999) (noting that interpreting "shall" as mandatory in the context of police action "flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances").

***31** With the foregoing in mind, this Court in *Texas I* previously explained how a "stronger indication" from Congress may be gleaned. In *Richbourg Motor Co. v. United States* and *Escoe v. Zerbst*, the Supreme Court noted one "indication" sufficient to conclude that the word "shall" in a statute imposes an obligation upon the Government is present when the statute's manifest purpose is to protect the public or private interests of innocent third parties. *See Richbourg Motor Co. v. United States*, 281 U.S. 528, 533–34, 50 S.Ct., 385, 387–88, 74 L.Ed. 1016 (1930); *Escoe v. Zerbst*, 295 U.S. 490, 494, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34. The Court finds it appropriate to reiterate its explanations of these cases here.

AMERICAN OVERSIGHT

In *Richbourg Motor Co.*, the Supreme Court expressly found reason to avoid the rule in *Hecht* where a statute provided that an officer "shall" take possession of a vehicle used in the act of transporting liquor. 281 U.S. at 533–34, 50 S.Ct. at 387–88. After noting that the statute in question was "in form mandatory throughout," the Court explained it "detail[ed] ... successive steps to be taken, which, if followed, [led] unavoidably to forfeiture under that section ... , *with the important consequence of protecting the interests of innocent third persons.*" *Id.* (emphasis added). These qualities of the relevant text, the Supreme Court explained, "suggests a definite purpose to make the protection effective" by imposing a mandatory duty. *Id.*

Five years after *Richbourg Motor Co.*, the Supreme Court in *Escoe* concluded that any doubt regarding the mandatory nature of a statutory "shall" is "dispelled when we pass from the words alone *to a view of ends and aims.*" 295 U.S. at 492–93, 55 S.Ct. at 819–20 (emphasis added). In *Escoe*, the relevant statute appeared to require a trial court to bring a probationer to court to revoke his probation. *Id.* The Supreme Court determined, because it was "[c]lear[ ] [that] the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation," the presentment of the probationer was "necessary, or so the Congress must have thought, to protect the individual against malice or oppression." *Id.* at 493, 55 S.Ct. at 820. Thus, *Escoe* concluded the "shall" in the relevant statute was "mandatory in meaning as well as mandatory in form." *Id.* at 494, 55 S.Ct. at 820. Leaving no doubt, the Supreme Court stated, "[s]tatutes are not [optional] when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect." *Id.*; *see also* *Ralpho v. Bell*, 569 F.2d 607, 627–28 & n.149 (D.C. Cir. 1977) (applying *Escoe* to "prefer a construction" of mandatory language in a statute guiding governmental officials' discharge of duties "that bestows the benefits of the Act on those for whom it was chiefly intended").

Given the caselaw, the key in this case is whether Sections 1226(c) and 1231(a)(2) demonstrate a purpose to protect public or private interests. If so, the word "shall," as used in both sections, would connote a requirement against the Government in the manner envisioned by *Richbourg Motor Co.* and *Escoe*. Based on the following, the Court finds that the statutes do indeed demonstrate such a purpose.

The Supreme Court in *Demore* clearly explains that the purpose of Section 1226(c) was to protect third-party interests: that of the states, citizens, and legal immigrants of this country. Essentially, Section 1226(c) was enacted "against a backdrop of wholesale failure by the INS [ICE's predecessor] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. "INS' near-total inability to remove deportable criminal aliens imposed" overpopulation in federal and state prisons, caused monetary costs, took away immigration opportunities that could have been provided to others, and increased crime in the Nation's communities. *Id.* at 518–20, 123 S.Ct. at 1714–15. Crucially, "Congress also had before it 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, 123 S.Ct. at 1715. Before Section 1226, "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society." *Id.* (citing 8 U.S.C. § 1252(a) (1982 ed.)). Thus, to alleviate these issues, Congress "enacted 8 U.S.C. § 1226, *requiring* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521, 123 S.Ct. at 1716 (emphasis added). Given *Demore*'s findings, the purpose of Section 1226 is to protect the public and private interests of third parties, namely, the states, the citizens, and legal immigrants of the United States.

***32** Considering the context and purpose of Section 1226, it is no wonder why Subsection (c) "subtract[s]," from the discretion given to the Government in Section 1226(a). *See* *Preap*, ____ U.S. at ____, 139 S.Ct. at 966. In fact, it does more than that. Subsection (c) also subtracts from the general "broad discretion" that the Attorney General originally had prior to the enactment of Section 1226. *See* *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. "Shall" in Section 1226(c), therefore, must be construed to mean "must."

AMERICAN OVERSIGHT

Like Section 1226(c), Section 1231(a)(2) was enacted to protect public and private interests of the states and the people of the United States. As the Supreme Court noted in *Zadvydas*, "protecting the community from dangerous aliens" is a "statutory purpose" of that section. 533 U.S. at 697, 121 S.Ct. at 2502. What's more, Section 1231 "is part of a statute that has as its basic purpose effectuating an alien's removal," a purpose related to the community's protection. *Id.* Coupled with *Demore*'s detailed explanation of the burdens criminal aliens impose on both the country and its people when the Government fails to deport them, 538 U.S. at 518–20, 123 S.Ct. at 1714–15, it is evident that Section 1231(a)(2)'s purpose was to similarly protect the states, the citizens, and legal immigrants' interests against the harmful effects the Government's failure to remove certain aliens would bring about.

Additionally, numerous federal courts—including this Court—have recognized *other* parts of Section 1231 use "shall" as a mandatory command. *See Shuaibu v. Gonzales*, 425 F.3d 1142, 1144 (8th Cir. 2005) (interpreting the "shall" in Section 1231(b)(1)(C) to mean the Attorney General "must" attempt to remove the alien to certain countries); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (interpreting "shall" in Section 1231(a)(3) to mean all aliens ordered released "must" comply with supervision requirements); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *32–37 (analyzing Section 1231(a)(1)(A) and holding the "shall" in that provision imposes a mandate on the Government to deport aliens with final orders of removal within 90 days). These interpretations of "shall" as mandatory in other parts of Section 1231 are yet further indication the "shall" in Section 1231(a)(2) bears the same meaning, because "a word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra*, at 170; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Thus, for all these reasons, the "shall" in Section 1231(a)(2) necessarily means must.

The Government does not disagree that Congress enacted Sections 1226(c) and 1231(a)(2) to protect public or private interests. Rather, the Government demurs that a statutory purpose of protecting third parties, as held in *Richbourg Motor Co.* and *Escoe*, is not a "stronger indication," per *Castle Rock*, to make "shall" mandatory against any governmental actor. (Dkt. No. 42 at 36–38); *see Richbourg*, 281 U.S. at 533–34, 50 S.Ct., at 387–88; *Escoe*, 295 U.S. at 493–94, 55 S.Ct. at 820; *Castle Rock*, 545 U.S. at 761, 125 S.Ct. at 2806. In making this argument, the Government reasons that the "protection of a third party" rationale *cannot* serve as a stronger indication because, it claims, the very "statute [in *Castle Rock*] concerned enforcement of restraining orders entered to benefit a 'protected person.' " (*Id.* at 37–38) (emphasis omitted) (quoting *Castle Rock*, 545 U.S. at 758–59, 125 S.Ct. at 2804–05). In doing so, however, the Government ignores the Supreme Court's holdings in *Richbourg Motor Co.* and *Escoe*. *See* (*Id.* at 36–39). In short, the Government implies that *Castle Rock* overruled *Richbourg Motor Co.* and *Escoe sub silentio*. That argument fails.

***33** As an initial matter, this Court cannot ignore *Richbourg Motor Co.* and *Escoe* where the Supreme Court or the Fifth Circuit has not expressly instructed it to do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Lopez v. City of Hous.*, Civil Action No. H-09-0420, 2009 WL 1456487, at *15 (S.D. Tex. May 22, 2009) (Lake, J.) ("[I]t is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals." (quoting *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 925 (S.D. Tex. 1997) (Jack, J.))). The Court did not disregard those cases in *Texas I*, nor will it disregard them here. [29]

But even if the Court could ignore *Richbourg Motor Co.* and *Escoe*, *Castle Rock* is easily distinguishable from this case. The state statute ostensibly mandating the police to enforce restraining orders in *Castle Rock* was drafted upon a background of "[a] well established tradition of police discretion" that "ha[d] long coexisted with apparently

AMERICAN OVERSIGHT

mandatory arrest statutes." *Castle Rock*, 545 U.S. at 760, 125 S.Ct. at 2805–06 (citing 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980)). A similar tradition is not present with respect to Sections 1226(c) and 1231(a)(2). As explained above, it was precisely the federal government's "wholesale failure" "to deal with increasing rates of criminal activity by aliens" that prompted Congress to *limit* the Executive's discretion in such matters by enacting Section 1226. *See* *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. Such specific legislative intent, backed by Supreme Court acknowledgment, was not present in the statute interpreted in *Castle Rock*. *Cf.* 545 U.S. at 760–61, 125 S.Ct. at 2805–06.

***34** Furthermore, the Government's contention that Sections 1226(c) and 1231(a)(2) do not confer a mandatory duty against the Government goes against an analysis of the statutes' text within the whole statutory scheme. The Supreme Court has noted that "[t]he word 'may' customarily connotes discretion" and that such a "connotation is particularly apt where ... 'may' is used in contraposition to the word 'shall.' " *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (citing *Haig v. Agee*, 453 U.S. 280, 294 n.26, 101 S.Ct. 2766, 2775 n.24, 69 L.Ed.2d 640 (1981)). That principle proved crucial in *Jama*, where the Supreme Court held that because Section 1231(b)(2) of the INA states that the Attorney General "shall remove" an alien to a designated country, it would be inappropriate to read as mandatory another provision explaining that the Attorney General "may" disregard the designation if certain circumstances arise. *Id.* This principle applies to this case as well.

Section 1231(a)(2) states that the Attorney General "shall" detain certain aliens "during the removal period," which is defined to be a period of 90 days when an alien is ordered removed. 8 U.S.C. § 1231(a)(1)–(2). Before Section 1231(a)(2), Subsection (a)(1)(C) provides that the removal period "shall" be extended beyond 90 days if certain circumstances arise, and the alien "may" remain in detention during that extended period. *Id.* § 1231(a)(1)(C). Again, it would be absurd if Section 1231(a)(2)—with its use of "shall"—is read to provide merely discretionary authority to the Government to detain people during the removal period when Section 1231(a)(1)(C)—using "may"—clearly provides discretion to the Government to detain people *after* the initial 90-day removal period.

Likewise, Section 1226(c) clearly juxtaposes "may" and "shall" so that there is no ambiguity as to whether the "shall" used in 1226(c)(1) imposes a mandatory duty. Subsection (c)(1) states that the Attorney General "shall" detain certain aliens "when the alien is released." 8 U.S.C. § 1226(c)(1). Just right after that, Subsection (c)(2) notes that the Attorney General "may" release aliens described in Subsection (c)(1) "only if" certain circumstances are present. *Id.* § 1226(c)(2). As such, for Subsection (c)(2) to have any meaning, Subsection (c)(1) must be read as a mandate: the Attorney General *must* detain aliens when released and such aliens *may* be released *only if* certain situations call for it. If Subsection (c)(1) is not interpreted in this way, then Subsection (c)(2)—the release provision—loses its significance. It would be superfluous for Congress to state how certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place. This analysis of the two statutes within the overall scheme indeed tracks how the Supreme Court and other federal courts have construed Sections 1226(c) and 1231(a)(2), as described more fully above.

b. Whether "Prioritization" Contravenes Congressional Mandates

Having concluded that "shall" means "must" in Sections 1226(c) and 1231(a)(2), the Court turns to the Government's second argument in support of its assertion that the new guidelines in the February 18 Memorandum are committed to agency discretion by law. That is, regardless of the relevant sections' mandatory nature, the new guidelines "simply establish[ ] enforcement priorities" because they do "not direct ICE officials to cease detaining any particular noncitizen." (Dkt. No. 42 at 28–29). Put differently, the Government argues that the guidelines do not *actually* stop detentions and, instead, merely prioritize who gets detained first. As a result, the Government concludes that the guidelines do not contravene the statutes. *See* (*Id.*). Thus, in essence, the Government argues that it has discretion to determine the *timing* of when certain aliens should

AMERICAN OVERSIGHT

be detained—if not the discretion to determine *who* gets detained. This argument fails as well.

***35** Although the Government describes the February 18 Memorandum as only a reprioritization of immigration enforcement priorities, a review of the Memorandum itself establishes that it is more than that. *See* *Texas DAPA*, 809 F.3d at 171–72 ("Although the DAPA Memo facially purports to confer discretion, the district court determined that nothing about DAPA genuinely leaves the agency and its employees free to exercise discretion." (cleaned up)). The new guidelines violate the statutory commands of Sections 1226(c) and 1231(a)(2) which are: to detain certain aliens "when the alien is released," per Section 1226(c), or "during the removal period," per Section 1231(a)(2).

The Government opines that the February 18 Memorandum "directs 'officers and agents ... to exercise their discretion thoughtfully' after consideration 'of all relevant facts and circumstances' " concerning the arrest, detention, or removal of criminal illegal aliens. (Dkt. No. 42 at 29) (alteration in original) (citing Dkt. No. 42-2 at 4). That statement demonstrates that the new guidelines wade into areas that are not committed to agency discretion. *See* (*Id.*). Because "shall" means "must" in Section 1226(c), the Executive Branch is required to detain criminal aliens who have committed "*any* offense covered in section 1182(a)(2)," "*any* offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)," or *any* alien who "is deportable under section 1227(a)(2)(A)(i)," "inadmissible under section 1182(a)(3)(B)," or "deportable under section 1227(a)(4)(B)." 8 U.S.C. § 1226(c)(1)(A)–(D) (emphases added). This leaves no room for the Executive's agent to "thoughtfully" exercise discretion. *See* (Dkt. No. 42 at 29). And crucially, to protect the public, Congress mandated that *any* alien falling under any of these categories must be detained "when the alien is released" from state custody. *Id.* Likewise, Section 1231(a)(2) requires both the detention of aliens who possess orders of removal *and* aliens who have been found "inadmissible under section 1182(a)(2)," "1182(a)(3)(B)," or "deportable under section 1227(a)(2) or 1227(a)(4)(B)."[30] *Id.* § 1231(a)(2). And, like Section 1226(c), Congress in Section 1231(a)(2) mandated the timing of such detention: the aliens must be detained "during the removal period." *Id.*

***36** Because of the clear mandates set forth in Sections 1226(c) and 1231(a)(2), determining whether and when an alien should be detained is not a decision committed to agency discretion. And by prioritizing the detention of some aliens over others, the Government has effectively conferred upon itself discretion as to the timing of detention—discretion it does not have. Put differently, the Government has assumed a discretionary power that Congress has explicitly foreclosed. Such a maneuver is impermissible. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446 ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." (alteration in original) (citation omitted) (citing U.S. Const. art. II, § 3)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 956, 151 L.Ed.2d 908 (2002) (finding that an agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

"Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets." *Preap*, ____ U.S. at ____ n.6, 139 S.Ct. at 969 n.6 (emphasis in original). In this case, Section 1226(c)'s "when ... released" language "clarifies when the duty to arrest is triggered: upon release from criminal custody." *Id.* at ____, 139 S.Ct. at 969. And as a logical extension of that reasoning, Section 1231(a)(2)'s "during the removal period" language also clarifies when a duty to arrest is triggered: when the alien is provided with a final order of removal.[31] *See* 8 U.S.C. § 1231(a)(1)–(2). In sum, Congress has clearly specified when the *duty* to detain is *triggered*: when the alien is released as provided by Section 1226(c) and during the removal period for Section 1231(a)(2). *When* that duty to detain is triggered is not left for the agency to decide. Thus, choosing to detain certain aliens "when ... released," *see* Section 1226(c), or "during the removal period," *see* Section 1231(a)(2), over others who are mandated to be detained at

AMERICAN OVERSIGHT

those specific points in time is not left to agency discretion. Indeed, it is a violation of the clear letter of the law. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446.

c. Whether the Executive may "Dispense" with Laws

Finally, the Government argues that the Memoranda are committed to agency discretion because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President" and that such "discretion" is "greatly magnified" in the immigration law context. (Dkt. No. 42 at 29–30) (citing *Reno*, 525 U.S. at 490, 119 S.Ct. at 946). As this Court stated in *Texas I*, "whatever 'inherent authority' the Executive may have in the area of immigration, that authority—along with the executive Power—does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws." ____ F. Supp. 3d at ____, 2021 WL 2096669, at *36. The Government's suggestion that the Executive's discretion is so significant that it may, in effect, dispense with laws has significant implications for the separation-of-powers system enshrined in the Constitution. The subject is therefore worth addressing, albeit briefly, at this early stage in the litigation. However grand the Executive's discretion might be in enforcing immigration laws, the Constitution does not empower the Executive to set forth a policy that, in effect, dispenses with a congressional immigration mandate.[32]

***37** Concern over the Executive's power to dispense with laws dates back to before the founding of this Nation. The Framers of the Constitution were well aware of how the English Crown had abused the dispensing power a century prior to the ratification of the Constitution. *See* Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 118 (2020) (concluding that the Framers addressed the royal "prerogatives of suspending or dispensing with the laws" in the Take Care Clause "[g]iven that the Committee [of Detail] explicitly dealt with virtually every one of the royal prerogatives, and especially the notorious prerogatives that had animated the overthrow of Charles I and James II"); Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell & Samuel L. Bray, *The Constitution of the United States* 317 (Robert C. Clark et al. eds., 2d ed. 2013) (opining that the President's duty to " 'take care that the laws be faithfully executed' ... means that the president is not permitted to dispense with or suspend statutes the way King James II did before the Glorious Revolution of 1688"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 797–98 & n.95, 804–09 (2013) (detailing how the "suspending power" was abused by English Monarchs, such as James II, and how that history influenced Americans in limiting "[t]he executive Power"); *see also* Randy Barnett & Evan Bernick, *The Letter & The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 20–21 (2018) (contending the Founding Fathers constructed the new American government as a fiduciary of We the People, "bound by fiduciary duties to *honor the law*, ... *remain loyal to the public interest*, ... and *account for violations of these duties*." (emphasis added) (citations and quotations omitted)). As a prime example, King James II dispensed with the Test Acts,[33] which effectively barred Catholics from holding government or military office, "to create an enlarged standing army under the control of Catholic officers ... and ... put Catholic peers in key positions in the Privy Council and the government" because he did "[n]ot trust[ ] Protestant militias and gentry to protect him from rebellion[.]" McConnell, *supra*, at 116; *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 691 (2014) ("King James enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters."); Delahunty & Yoo, *supra*, at 805–06 ("James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics."). This decision angered many Englishmen[34] and played a significant role in igniting the Glorious Revolution, which resulted in William III and Mary II replacing James II on the throne. Delahunty & Yoo, *supra*, at 807. Although no longer on the throne, James II had already left his mark on the future powers of the Crown. Indeed, the English Bill of Rights of 1689 barred William III and Mary II and all future monarchs from suspending or dispensing with laws.[35]

By 1776, Americans had developed a similar sentiment about the dispensing power as had the English in 1689. *See* Price, *supra*, at 692. Notably, one of the grievances against King George III articulated in the Declaration of Independence[36] was that he "often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing him to halt their execution." Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy

AMERICAN OVERSIGHT
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Rabkin as Amici Curiae Supporting Respondents at 5–6, *United States v. Texas*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (mem) (per curiam) (citing Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 224–27, 256–68 (1934)). This "allowed the king not only to dispense with the implementation of statutes, but also to force changes to their content—an essentially legislative power." *Id.* at 5–6; *see also* Declaration of Independence ¶¶ 3–4.

***38** Prior to the United States Constitution's ratification, states were aware of this sentiment and crafted state constitutions of their own that barred the Executive from exercising the suspending or dispensing power. *See* Price, *supra*, at 692 ("Drawing from this English model, several states during the American revolutionary period adopted constitutions including prohibitions on executive suspension of laws."); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights In 1787 and 1791: What Individual Rights Are Really Deeply Rooted In American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534–35 (2012) (explaining that, at the time of the founding, "state constitutions ... had constitutional clauses restricting the power to suspend or dispense with laws to the legislature"); *cf.* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425–26 (1999) (noting that, "[i]n the 1760s and 1770s, during the crisis that eventually tore apart the British empire, the American colonists had this long English heritage of popular rights to draw upon," including the English Bill of Rights, which "declared illegal certain actions of the crown, including its dispensing with laws"). By 1787, six states—Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia—had state constitutions containing provisions barring the Executive from exercising the suspending or dispensing power. *See* Del. Const. of 1776 Decl. of Rights, § 7 ("That no power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature."); Md. Const. of 1776 Decl. of Rights, § VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); Mass. Const. of 1780 pt. 1, art. XX ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."); N.H. Const. of 1784 pt. 1, art. XXIX ("The power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for."); N.C. Const. of 1776 Decl. of Rights, § V ("That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised."); Va. Const. of 1776 Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."); *see also* Calabresi, Agudo & Dore, *supra*, at 1534. This number soon grew to eight after Pennsylvania added a provision prohibiting the Executive from suspending or dispensing with laws to its constitution in 1790, and Vermont, which already had such a provision in its constitution, became a state in 1791.[37] *See* Pa. Const. of 1790 art. IX, § 12 ("That no power of suspending laws shall be exercised, unless by the legislature, or its authority."); Vt. Const. of 1786 Decl. of Rights, § XVII ("The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for."); *see also* Calabresi, Agudo & Dore, *supra*, at 1535.

Although the Constitution does not contain a provision of its own explicitly prohibiting the Executive from dispensing with laws,[38] it in no way sanctions such action by the Executive for at least two reasons. First, the Constitution separates power among three branches, vesting executive power *exclusively* in the President and legislative power *exclusively* in Congress. *See* U.S. Const. art. I, § 1; U.S. Const. art. II, § 1; U.S. Const. art. III, § 1; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 130 S.Ct. 3138, 3146, 177 L.Ed.2d 706 (2010) ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.' " (quoting *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983))); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949) ("When the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."). Dispensing of laws

AMERICAN OVERSIGHT

is, in effect, a *legislative* power. *See* *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13, 9 L.Ed. 1181 (1838); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (stating that the President does not have the dispensing power, in part, because only Congress has "dominion" over the laws—*i.e.*, the legislative power); *see also* Del. Const. of 1776 Decl. of Rights, § 7; Md. Const. of 1776 Decl. of Rights, § VII; Mass. Const. of 1780 pt. 1, art. XX; N.H. Const. of 1784 pt. 1, art. XXIX; N.C. Const. of 1776 Decl. of Rights, § V; Va. Const. of 1776 Bill of Rights, § 7; Pa. Const. of 1790 art. IX, § 12; Vt. Const. of 1786 Decl. of Rights, § XVII. As such, the Executive does not possess this power. *See* *Kendall*, 37 U.S. (12 Pet.) at 612–13 (stating that giving the President the dispensing power "would be clothing the President with a power entirely to *control the legislation of congress*, and paralyze the administration of justice" (emphasis added)); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids[.]"); *cf.* *Clinton*, 524 U.S. at 438, 118 S.Ct. at 2103 ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

***39** Second, the dispensing power conflicts with the Executive's *duty* to *faithfully* execute the laws. *See* U.S. Const. art. II, § 3. In vesting the executive power in the President,[39] the Constitution requires the President to channel that power to perform certain duties and prescribes how he or she is to carry out those duties.[40] *See id.* One of those duties, contained in the Take Care Clause, is that "he *shall take Care*[41] that the Laws be *faithfully*[42] executed[43] ...."[44] *Id.* (emphasis added) (footnotes added); *see* *Morrison v. Olson*, 487 U.S. 654, 689–90, 108 S.Ct. 2597, 2618, 101 L.Ed.2d 569 (1988) ("The analysis contained in our removal cases is designed ... to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his *constitutionally appointed duty* to 'take care that the laws be faithfully executed' under Article II." (emphasis added) (footnote omitted)); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863, 102 S.Ct. 3440, 3444, 73 L.Ed.2d 1193 (1982) ("The Constitution imposes on the President the *duty* to 'take Care that the Laws be faithfully executed." (emphasis added) (quoting U.S. Const. art. II, § 3)); *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926) ("Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his *duty expressly declared* in the third section of the article to 'take care that the laws be faithfully executed.' " (emphasis added)); *see also* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, ____ U.S. ____, ____, 140 S.Ct. 2183, 2228, 207 L.Ed.2d 494 (2020) (Kagan, J., concurring in part) ("To begin with, the provision—'he shall take Care that the Laws be faithfully executed'—speaks of *duty*, not power." (emphasis added) (quoting U.S. Const. art. II, § 3)); Letter from George Washington to Alexander Hamilton[45] (Sept. 7, 1792) (on file with the National Archives) ("It is my *duty* to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it; nor can the Government longer remain a passive spectator of the contempt with which they are treated." (emphasis added)); Letter from John Adams to Roger Sherman[46] (July 18, 1789) *reprinted in* 6 *The Works of John Adams, Second President of The United States* 427, 429–30 (Charles Francis Adams ed., 1851) (stating that it is the President's "*duty* to take Care that the Laws be faithfully executed" (emphasis added)); Saikrishna B. Prakash, *Faithless Execution*, 133 Harv. L. Rev. F. 94, 97 (2020) ("The *duty* to see the laws faithfully executed implies that the President has the power—the executive power—to see the laws faithfully executed." (emphasis added)); Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014) ("To be sure, the President has the *duty* to take care that the laws be faithfully executed." (emphasis added)).

***40** Given this duty to take care that the laws are faithfully executed, the Constitution's system of separation-of-powers, and the treatment of the dispensing power in American history and tradition, the Court is hard pressed, at this early stage of the litigation, to see how the Government can suggest that the Constitution confers upon the Executive the "discretion" to ignore clear congressional commands contained in Sections 1226(c) and 1231(a)(2). *See* *Kendall*, 37 U.S. (12 Pet.) at 612–13 ("It was urged at the bar, that the postmaster general was alone subject to the

AMERICAN OVERSIGHT

direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a *dispensing power*, which has no countenance for its support in any part of the constitution .... To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." (emphasis added)); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (stating that, because the President has the "high duty ... to 'take care that the laws be faithfully executed,' " he must enforce a law in accordance with congressional commands where Congress has "prescribed ... the manner in which [the] law shall be carried into execution"); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, *nor dispense with its execution*, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government." (emphasis added)); *see also* *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435, 110 S.Ct. 2465, 2477, 110 L.Ed.2d 387 (1990) (White, J., concurring) ("The Executive Branch *does not have the dispensing power* on its own[.]" (emphasis added) (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 505, 35 S.Ct. 309, 325, 59 L.Ed. 673 (1915) (Day, J., dissenting) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); McConnell, *supra*, at 119 ("The Dispensing Power must not be confused with the exercise of prosecutorial discretion. The executive decision not to prosecute a particular person or class of persons for actions in violation of the law does not give them the legal right to violate the law."); Paulsen, Calabresi, McConnell & Bray, *supra*, at 317; Joseph Story, *Commentaries on the Constitution of the United States* 316 (Quid Pro Brooks 2013) (1833) ("[T]he duty imposed upon [the President] to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will 'preserve, protect, and defend the constitution.' The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people."); Kavanaugh, *supra*, at 1911 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch —at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws *regulating the executive branch.*" (emphasis added)); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 620 (1994) (noting that the "Committee of Detail [may have] added the requirement that the President 'take care' that the laws be 'faithfully' executed" out of a "desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it"); Delahunty & Yoo, *supra*, at 797–98 & n.95, 804–09; Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873–74 (1994) ("The duty to execute the laws faithfully means that the President may not —whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection." (footnotes omitted)); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 18 n.80 (1993) (quoting William Rawle, *A View of the Constitution of the United States of America* 148–49 (2d ed. 1829), for the proposition that the Take Care Clause "declares what is [the President's] *duty*" and that "[h]e is *bound* to enforce" the laws (first alteration in original) (emphases added)); William P. Marshall & Saikrishna B. Prakash, *Common Interpretation: Article II, Section 3*, National Constitution Center[47] ("At a minimum, the [Take Care] Clause means that the President may neither breach federal law *nor order his or her subordinates to do so*, for defiance cannot be considered faithful execution. *The Constitution also incorporates the English bars on dispensing or suspending the law*, with some supposing that the Clause itself prohibits both." (emphases added)).

Instead, the Executive—and thus, the Attorney General or the Secretary of DHS—must exercise any discretion accorded to it by statute in the manner which Congress has prescribed. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Vigil*, 508 U.S. at 193, 113 S.Ct. at 2032

AMERICAN OVERSIGHT

("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."); *Heckler*, 470 U.S. at 832–34, 105 S.Ct. at 1656–57; *see also* *Regents*, ____ U.S. at ____, 140 S.Ct. at 1926 (Thomas, J., concurring in part) ("It is axiomatic that an administrative agency's power ... is limited to the authority granted by Congress." (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988))). Accordingly, the Executive Branch, including its agencies, may not dispense with a clear congressional mandate under the guise of exercising "discretion."

d. The Memoranda are not Committed to Agency Discretion

In sum, the Court finds that Sections 1226(c) and 1231(a)(2) impose mandatory detention at specific points in time for certain aliens. The Executive Branch may neither alter these statutory obligations through reprioritization nor dispense with them. Accordingly, the Court concludes that the detention of certain aliens subject to Sections 1226(c) and 1231(a)(2) is not committed to agency discretion.

4. Zone of Interests

The States must next show that their injuries are within the "zones of interest" the two laws were intended to protect. Congress has placed limits on *how* the Executive may be sued for violating the law and *who* can do it. Congress, through the APA, has provided a cause of action for those seeking redress against the federal government for violating other federal laws. *See* 5 U.S.C. §§ 702, 706. But Congress has limited the availability of an APA cause of action to those who allege an injury that is "arguably" within the "zone of interests" to be protected or regulated by the relevant statutes. *Collins v. Mnuchin*, 938 F.3d 553, 573–74 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, ____ U.S. ____, 141 S.Ct. 1761 (2021); *see also* *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (hereinafter "*Match-E*") (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)).

***41** The zone of interests test is not "especially demanding" in the APA context. *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389). Indeed, the Supreme Court has "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389 (quoting *Match-E*, 567 U.S. at 225, 132 S.Ct. at 2210). The zone of interests 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 authorized that plaintiff to sue." *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389).

Importantly, the relevant statute in whose zone of interests the plaintiff's injury must reside "is to be determined not by reference to the overall purpose of the Act in question," but rather, "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–76, 117 S.Ct. at 1167. In other words, a court must review those "substantive provisions" of law that the plaintiff relies on for "the gravamen" of its complaint. *Id.*

In this case, the States essentially bring three APA claims asserting that the Government violated federal law: (1) the Memoranda are contrary to Sections 1226(c) and 1231(a)(2) of the INA, (Dkt. No. 1 at ¶¶ 94–107); (2) the policy set forth in the Memoranda is arbitrary and capricious, (*id.* at ¶¶ 108–17); and (3) the Government was required but failed to follow notice and comment procedures in issuing the Memoranda, (*id.* at ¶¶ 118–121).

As in *Texas I*, the Government solely—and narrowly—maintains that "the States do not come within the relevant zone-of-interests" because "no entity can enforce § 1231" because Subsection (h) bars any party from enforcing Section 1231 against the Government.[48] (Dkt. No. 42 at 35–36); *see* (6:21-cv-3, Dkt. No. 83 at 30–32); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *22–23. For their part, the States briefly address the Government's suppositions, arguing they "fit within the zone of interests both because [the Government is] wrong about Section 1231(h) and for the

AMERICAN OVERSIGHT

reasons this Court has already explained" in *Texas I*. (Dkt. No. 51 at 29) (citing *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–29). The Court agrees with the States.

For starters, the Government cannot refute the States' position that their injuries are within the zones of interests of Sections 1226(c) and 1231(a)(2), particularly in light of this Court's discussions of *Demore* and *Zadvydas* concerning the development and purpose of Sections 1226 and 1231. *See supra* I.A, II.B.1 & II.B.3. This discussion makes clear that Sections 1226(c) and 1231(a)(2)—and indeed the INA itself, *see* *Texas DAPA*, 809 F.3d at 163 & n.80—were enacted to protect and benefit the states, the citizens of this country, and the legal immigrants of the United States. *See supra* I.A, II.B.1 & II.B.3. As such, the injuries the States suffer due to the Memoranda, *see supra* II.A.1–4, fall within the relevant statutes' zones of interests. *See* *Texas DAPA*, 809 F.3d at 163 (finding that Texas satisfies the zone-of-interest test as a result of the same injuries that give Texas Article III standing).

***42** The Government, indeed, does not dispute that the States' injuries fall within Sections 1226(c) and 1231(a)(2)'s zones of interests. Rather, the Government focuses its attention on Section 1231(h), in essence arguing that because Subsection (h) bars parties from enforcing Section 1231, any injury stemming from violations of the section does not fall within the statute's zone of interests. *See* (Dkt. No. 42 at 35–36). But, as explained earlier, Section 1231(h) does not bar the States' claims. *See supra* II.B.1; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42. Thus, the Government's lone contention fails. The Court finds that the States' injuries fall within the zones of interest of Sections 1226(c) and 1231(a)(2).

III. DISCUSSION OF PRELIMINARY INJUNCTION

Having determined the Court has jurisdiction over the action and nothing precludes judicial review under the APA, the Court now turns to the merits of the States' Motion for Preliminary Injunction.

A. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, ____ U.S. ____, ____, 138 S.Ct. 1942, 1943, 201 L.Ed.2d 398 (2018) (quotation omitted). Indeed, the decision to grant a preliminary injunction is "to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Thus, "[i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008) (quotation omitted). And in determining whether injunctive relief is proper, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*

A preliminary injunction "issue[s] only where (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). As such, "[t]he party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated" in order for a preliminary injunction to be granted. *Id.*

Note, however, that "none of the four prerequisites has a fixed quantitative value." *Texas v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975). "Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id.* (citing *Siff v. State Democratic Exec. Comm.*, 500 F.2d 1307 (5th Cir. 1974)). For instance, "a preliminary injunction does *not* follow as a matter of course from a plaintiff's showing" of the first element, "a likelihood of success on the merits." *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1943–44 (emphasis added). Thus, federal courts must consider whether the movant has established the three other elements as well for a preliminary injunction to issue. *Id.* at ____, 138 S.Ct. at 1944.

B. APPLICATION

AMERICAN OVERSIGHT

1. Substantial Likelihood of Success on the Merits

a. Counts I & II: Contrary to Law

As described above, the Court determined that "shall" in Sections 1226(c) and 1231(a)(2) means "must." *See supra* II.B.3.a. This conclusion means that the Attorney General must detain certain aliens subject to those sections. The Court also found that both statutes mandate detention of certain aliens at specific points in time: for Section 1226(c), the Attorney General is required to detain certain aliens "when the alien is released from custody," while for Section 1231(a)(2), the Attorney General is obligated to detain certain aliens "during the removal period." The policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur. This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2). Thus, the States have demonstrated a substantial likelihood of success on Counts I & II.

b. Count III: Arbitrary and Capricious

***43** The States argue that the Government's Memoranda establishing new guidelines and priorities for the detention of certain aliens are arbitrary and capricious because they "failed to consider important aspects of a problem." (Dkt. No. 18 at 28). Specifically, the States allege that the Memoranda: (1) "failed to consider the risks of recidivism among criminal aliens who are not detained;" (2) "ignore the effects non-detention will have on future removal efforts," especially on the costs that delays in deportation often produce and the rate of abscondment of released aliens; (3) "do not discuss the costs that [the new guidance] will impose on [the] States;" (4) "did not consider more limited policies that would have retained congressionally mandated detention of criminal aliens and those with final orders of removal;" and (5) "do[ ] not explain Defendants' choice[ ]"of prioritizing the detention of aliens who have aggravated felonies over others who have committed drug offenses and crimes of moral turpitude or those with final orders of removal. (*Id.* at 27–29). The Government disagrees with the States' contentions. Countering the States point-by-point, the Government argues that it "considered the relevant factors and reached a reasonable decision." (Dkt. No. 42 at 42–47). Reviewing these assertions, the Court finds the States have demonstrated a substantial likelihood of success in establishing that the policy set forth in the Memoranda is arbitrary and capricious as alleged in Count III.

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). With that in mind, federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 826, 139 L.Ed.2d 797 (1998) (internal quotation omitted). This necessarily means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be *logical and rational*." *Id.* (emphasis added). More specifically, "the 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.*' " *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)) (emphasis added).

When final agency action is challenged as arbitrary and capricious, "[t]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989) (internal quotations omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. If a court finds that an administrative agency failed to engage in reasoned decision-making, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

AMERICAN OVERSIGHT

"Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.' " *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) (quoting *State Farm*, 463 U.S. at 50, 103 S.Ct. at 2870). As such, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[49] *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). The administrative record need only "indicate[ ] the determinative reason for the final action taken," *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973), and courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974).

***44** Finally, the Court is mindful that the arbitrary and capricious standard is "highly deferential." *Garner*, 767 F.2d at 116. Courts must "accord the agency's decision a presumption of regularity" and "are prohibited from substituting [the courts'] judgment for that of the agency." *Id.* (citation omitted). But "while the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *Id.* Based on the following, the Memoranda fail to indicate that the Government engaged in reasoned decision-making, thereby rendering them arbitrary and capricious.

At their core, the Memoranda reprioritize certain classes of aliens for immigration enforcement action. In the February 18 Memorandum specifically, the Government states that it is establishing enforcement and removal guidelines with respect to immigration enforcement and removal priorities pursuant to the January 20 Memorandum.[50] *See* (Dkt. No. 19-2 at 5). As discussed above, if a criminal illegal alien falls under a category deemed to be a priority, no preapproval is required for an enforcement or removal action. On the other hand, if the criminal illegal alien does not fall under any of the categories, an enforcement or removal action "will require preapproval." (*Id.* at 7). The Memorandum states that "ICE operates in an environment of limited resources," and thus, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." (*Id.* at 3). In addition to "resource constraints," "several other factors," according to the Memorandum, "render ICE's mission particularly complex." These factors include "ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal." (*Id.*). Given these considerations, the Memorandum states that the Government "must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission." (*Id.* at 4).

As described here, the February 18 Memorandum indeed enumerates quite a few factors that make the Government's "mission particularly complex" in this field. But the Memorandum itself does not directly state whether these factors were considered while the Government was actually formulating the guidance in question. Assuming they were considered and were the bases for the new guidance, *see* *Pitts*, 411 U.S. at 143, 93 S.Ct. at 1244, the February 18 Memorandum (along with its predecessor, the January 20 Memorandum) still does not demonstrate reasoned decision-making. The February 18 Memorandum does not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued. In short, both Memoranda fail to establish any rational connection or logical link between any of these factors and the new guidance. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866.

***45** First, the February 18 Memorandum does not offer even a brief explanation of how "ongoing litigation in various fora" affected the Government's decision-making in promulgating the new guidance. It is simply a vague and conclusory statement. Did the Government mean to say that *Texas I* or other pending cases were considered when crafting the new guidance? If so, how did the disposition of *Texas I* or other cases affect the reprioritization? Those questions have yet to be answered.

Second, the Government's stated responsibility and desire to ensure that eligible aliens may be afforded relief from removal is commendable but likewise lacks any rational connection with the new guidance. The new guidance reprioritizes the detention and deportation of criminal illegal

AMERICAN OVERSIGHT

aliens. But the February 18 Memorandum does not explain how or why prioritizing, for instance, the detention or deportation of "border security risks" (aliens who entered the country on or after November 1, 2020) over aliens who have drug offenses or crimes of moral turpitude would ensure that eligible noncitizens will obtain relief in their own removal proceedings. There does not seem to be any connection between reprioritizing the detention and removal of certain aliens to whether other aliens may be afforded legally authorized relief from deportation. The February 18 Memorandum does not shed light on this disconnect.

Third, although the Court acknowledges as a general matter that interactions and relationships with other sovereign nations "may place constraints" on the Government's ability to "execute final orders of removal," *see* (Dkt. No. 19-2 at 4), there is no rational link between any of these factual constraints to the reprioritization scheme the Government has chosen to pursue. For example, do these international relationships make it more inefficient to deport aliens with drug offenses over so-called "national security risks" or "border security risks"? If so, what are the facts that justify such conclusions? Those questions are also unanswered. Like the considerations described above, the Memorandum does not state any facts or findings with respect to why international relations apparently factored in the Government's decision-making.

Lastly, the Government's written concern for the health and safety of ICE workers in the midst of the COVID-19 pandemic is not rationally relevant to the new guidance. Will COVID-19 infections among the ICE workforce be substantially reduced if the Government prioritizes the deportation of one category of criminal illegal aliens over another? How does reprioritization alleviate those health concerns, if any? On these points the February 18 Memorandum is, unfortunately, silent.

The Court further notes that, out of all these considerations, the cursory use of the COVID-19 pandemic to justify the new guidance comes across as implausible. Throughout the last year, institutions, including federal and state governments, have used the pandemic to rationalize policies found to be unlawful or unconstitutional. *See, e.g., Chrysafis v. Marks*, ____ U.S. ____, 2021 WL 3560766 (U.S. Aug. 12, 2021) (enjoining the part of New York's COVID Emergency Eviction and Foreclosure Prevention Act that precluded landlords from contesting a tenant's self-certification of financial hardship on the grounds that "no man can be a judge in his own case" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955))); *Tandon v. Newsom*, ____ U.S. ____, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (enjoining California officials from enforcing occupancy limits on at-home religious exercise in response to COVID-19 when other policies treated comparable secular activities that did not pose a lesser risk of transmission more favorably); *Roman Cath. Diocese v. Cuomo*, ____ U.S. ____, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam) (enjoining the Governor of New York from enforcing occupancy limits on religious services in response to COVID-19 that would have violated the Free Exercise Clause of the First Amendment); *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 289 (D.D.C. 2020) (finding that the District's COVID-19-related prohibition of religious gatherings of more than 100 people, even those with appropriate precautions, substantially burdens the plaintiff's exercise of religion in violation of the Religious Freedom Restoration Act). And now the Government has added immigration to the mix.

***46** The Government used the pandemic to reason that the January 20 Memorandum's 100-day pause on removals—the precursor to the February 18 Memorandum—was borne out of reasoned decision-making. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40. But, as the Court noted in *Texas I*, the U.S. Department of Health and Human Services Centers for Disease Control and Prevention ("CDC"), on October 13, 2020, authorized the CDC Director "to suspend the right to introduce persons into the United States" because of the COVID-19 pandemic. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40 & n.46 (citing CDC, *Order Suspending Introduction of Certain Persons Where a Communicable Disease Exists*, (Mar. 20, 2020), available at https://bit.ly/3736Lue (updated Oct. 2020)). The relevant CDC Order "applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to [certain] exceptions." *Id.* Considering the CDC Order, the Government's new guidance is puzzling. The new guidance effectively introduces and keeps more people—specifically, criminal illegal aliens—in the Nation's communities. But, per the CDC Order, the COVID-19 pandemic would likely justify a different course of action. Throughout this time, the Government has not introduced any further papers or discussed anything in the February 18 Memorandum that

AMERICAN OVERSIGHT

show it is following different health guidelines related to COVID-19 that speak to the safety of introducing aliens into the country and its communities. The February 18 Memorandum likewise does not grapple with or otherwise explain how the new guidelines are consistent with these CDC policies. Thus, like in *Texas I*, the Government's consideration of the COVID-19 pandemic not only is implausibly connected to the new guidance, it also "runs counter to the evidence before the agency." *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. In other words, the Government cannot use the pandemic as a blanket reason—devoid of explanation—to justify its choices, especially when these choices run afoul of another agency's published health directives. [51]

"[A]gency action must be based on *non-arbitrary, relevant* factors." *Judulang v. Holder*, 565 U.S. 42, 55, 132 S.Ct. 476, 485, 181 L.Ed.2d 449 (2011) (internal quotation omitted) (emphasis added). In this case, the factors apparently considered in the February 18 Memorandum and its predecessor, the January 20 Memorandum, are, after a thorough review, arbitrary and irrelevant to the new guidance. The link between the new guidance and the factors enumerated are so contradictory to the evidence and "implausible" that the States' challenge cannot be said to be differing policy preferences or views. *See* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009) (explaining that when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account, [i]t would be arbitrary or capricious to ignore such matters," and "[i]n such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" (internal citation omitted)); *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.' " (quoting *Chenery*, 332 U.S. at 196, 67 S.Ct. at 1577)); *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n*, 2 F.4th 421, 452 (5th Cir. 2021) (explaining that, when considering an agency's cost-benefit analysis in the scope of the arbitrary and capricious standard, the Court's "job 'is not to undertake [its] own economic study, but to determine whether the [agency] 'has established in the record a reasonable basis for its decision' " (quoting *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 251 (5th Cir. 1989))); *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) ("The agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866)); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (noting the Court must "ensure that the agency examined the relevant data and articulated a satisfactory explanation for its action, and assess whether the agency's decision was based on a consideration of the relevant factors" (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (cleaned up)). Thus, the Court finds that the Government failed to engage in the reasoned decision-making required by law.

***47** What's more, while the Government argues it actually did consider certain relevant factors in crafting the new guidelines (thus engaging in reasoned decision-making), the Court finds that the Government's briefs actually establish that it *did not* consider those factors. To begin with, "*[p]ost 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, 103 S.Ct. [at 2870]). Therefore, this Court finds it inappropriate to consider each of the Government's arguments in their briefing that were not included in the Memoranda. Even assuming they were relevant, however, the Government's in-brief explanations are meritless.

First, the Government states that it considered the prospect of recidivism when crafting the new guidance found in the February 18 Memorandum. (Dkt. No. 42 at 44). Specifically, the Government alleges that "DHS weighed the threat to public safety from criminal noncitizens reoffending in prioritizing certain noncitizens for removal." (*Id.*). In support, the Government cites to passages from the February 18 Memorandum that, according to the Government, (a) "focused on the degree of threat to public safety" the "different criminal noncitizens presented," which, apparently, is akin to considering the risk of recidivism; and (b)

AMERICAN OVERSIGHT

allowed immigration officers, in making "individualized determinations" for enforcement and removal, to "consider public interest factors, which include the risk of recidivism." *See* (*Id.* at 44). These points miss the mark entirely.

With respect to the first, the Government's decision to "focus[ ] on the degree of threat to public safety" establishes that the Government either did not consider the risk of recidivism or created a policy contrary to the evidence before it. In their claim, the States argue that, in choosing which policy to pursue, the Government did not consider the risks of recidivism of *all* criminal aliens. *See* (Dkt. No. 18 at 44). Indeed, the Supreme Court has stated that "*deportable* criminal aliens who remained in the United States"—notably *not* a certain subset or category of such aliens—"often committed more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (emphasis added); *see also* *Zadvydas*, 533 U.S. at 713–714, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (discussing rates of recidivism for released criminal aliens and their threat to public safety, noting the "high recidivism rates for released aliens"). Despite the Supreme Court's recognition of the risks deportable criminal aliens pose, the February 18 Memorandum requires prioritization of criminal aliens who *both* pose a threat to public safety *and* have had a prior aggravated felony conviction or criminal gang affiliation. *See* (Dkt. No. 19-2 at 5–6). The States correctly point out that by prioritizing certain aliens, the Memorandum "omit[s] aliens" who are solely "threats to public safety," in other words, potential recidivists. (Dkt. No. 51 at 14). Nothing in the February 18 Memorandum explains that criminal illegal aliens who are only "threats to public safety" are at a much lower risk of recidivism compared to criminal aliens who have had prior felonies or criminal gang convictions. Put differently, the new guidelines do not establish that the Government considered recidivism since the reprioritization leaves so many other "deprioritized" criminal illegal aliens free to recidivate—to harm the public. And crucially, the Government has not rebutted or clarified the well-established concept that *all* criminal illegal aliens or "deportable aliens pose high risks of recidivism." *See* *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715. Instead, the February 18 Memorandum, without any support or evidence, implements new guidelines stemming from an idea that it is merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations—who have a much higher risk of recidivism. Such a *conclusion* is without any foundation in the record and shows that the Government either failed to consider recidivism as a factor in its decision-making or it explained its decision in a manner which contradicts the evidence before it. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867.

***48** Moreover, it is irrelevant whether immigration officers have the capability, pursuant to the February 18 Memorandum, to "consider public interest factors" that "could" include the risk of recidivism. *See* (Dkt. No. 42 at 44). Arbitrary and capricious review calls for the Court to examine the rationality of agency decision-making and not the actual decision. *Garner*, 767 F.2d 104 at 116. Even if the new guidelines give some leeway to immigration officers to consider "public interest factors," this does not establish that the Government considered the risk of recidivism when crafting the new guidelines. As the Government frankly admits, the Memoranda "do not use the term 'recidivism' " anywhere. (Dkt. No. 42 at 44). The February 18 Memorandum is, thus, devoid of any references to recidivism or other statements tending to show that the risk of recidivism that criminal illegal aliens pose was considered when drafting the new policy.

Second, the Government asserts that it has limited resources and must prioritize certain enforcement and removal actions under Section 1226(c). (*Id.* at 45). But, as the States point out, this contention "dodges the key issue" of whether the Government actually considered the effects of the new guidelines to costs of delaying deportations and the overall rate of abscondment of criminal illegal aliens. (Dkt. No. 51 at 15); (Dkt. No. 18 at 27–28). The costs of the non-detainment of criminal aliens are substantial. For instance, in the past, "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." *Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14. Even "[c]ourt ordered release" itself "cannot help but encourage dilatory and obstructive tactics by aliens." *Zadvydas*, 533 U.S. at 713, 121 S.Ct. 2491 (Kennedy, J., dissenting). "An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility." *Id.* And following this line, a Senate Report from 1995 noted that "[d]elays" in deportation "can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U.S. citizenship." S. Rep. No. 104–48, at 2 (1995). The costs from non-detainment rival the costs of abscondment. The same Senate Report found that "[o]ver

AMERICAN OVERSIGHT

20 percent of nondetained criminal aliens fail to appear for deportation proceedings." *Id.* This Court, as well, found the rate of abscondment to be substantial even for aliens who have been "thoroughly vetted" in order for them to be placed in an "alternative to detention program." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *19. Even in light of these effects and costs, the February 18 Memorandum is silent on whether these were considered while crafting the new guidelines. The Court, therefore, finds that the Government failed to consider this relevant factor.

Third, the Government argues that, with regard to the additional costs the States will incur, "the States are wrong to argue that DHS was required to expressly evaluate the costs to each State," and, regardless, the Government "did consider how the Priority Framework would impact public safety ... which should reduce the costs from crime to the States." (Dkt. No. 42 at 45–46). Rephrased, the Government argues that state costs and expenses are not relevant factors, but, nevertheless, the February 18 Memorandum indirectly considered them since it factored in the new guidelines' impact to public safety. The Government is incorrect on both issues.

State costs and expenses are, indeed, relevant factors. That was the case in *Texas I, see* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *41, and the Government takes issue with the Court's prior holding, *see* (Dkt. No. 42 at 46 & n.16). Thus, to be clear, a more descriptive analysis of the caselaw is in order.

***49** As stated earlier, an "agency rule would be arbitrary and capricious" if the relevant agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. The Supreme Court has noted that immigration "ha[s] a discernable impact on traditional state concerns," owing to the fact that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Plyler*, 457 U.S. at 228, n.23, 102 S.Ct. at 2400, n.23 (citing *DeCanas v. Bica*, 424 U.S. 351, 354–56, 96 S.Ct. 933, 935–36, 47 L.Ed.2d 43 (1976)). Indeed, immigration policy is important to the states since they "bear[ ] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500. Obviously, as *Plyler* noted, some of those problematic consequences stem from a newly promulgated immigration policy's effect on the state's economy and its services; in other words, state costs and expenses. *See* *Texas DAPA*, 809 F.3d at 153 (holding that Texas had standing to challenge the federal government's DAPA policy in part because the policy "would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone" and "would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury"). In *Regents*, for instance, the Supreme Court held that the federal government's recission of its DACA policy was arbitrary and capricious in part because the government failed to consider the loss of state and local tax revenue stemming from the policy's rescission. ____ U.S. at ____, 140 S.Ct. at 1914. Along with a few other concerns, the Supreme Court characterized the loss of local and state tax revenue as "noteworthy," but "not necessarily dispositive." *Id.* Nevertheless, the Supreme Court found that the federal government needed to *consider* that factor—along with many others—and weigh them all together to ultimately decide whether to retain DACA or not. *Id.* As in this case, "[m]aking that difficult decision was the agency's job, but the agency failed to do it." *Id.*

Further, the Supreme Court has indicated that, in the context of immigration policy, an agency's approach to decision-making "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55, 132 S.Ct. at 485. One broad purpose of immigration law and policy is to minimize the costs and expenses related to the presence of illegal aliens in the country. *See* *Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14 (noting that "prior to the enactment of 8 U.S.C. § 1226(c)," a vast majority of deportable criminal aliens were free during their deportation proceedings and many filed frivolous appeals to delay deportation); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. 1995) (noting 8 U.S.C. § 1252(i) (1986) was enacted "to ease financial burdens on federal, state and local prisons resulting from lengthy detention of aliens awaiting deportation"); *Giddings v. Chandler*, 979 F.2d 1104, 1109 (5th Cir. 1992) (noting that the main purpose of Section 1252(i) was to "reduc[e] prison overcrowding and cost to the government"); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990) (explaining that Section 1252(i) was enacted because there was a concern in Congress with prison overcrowding in "local and State jails"). While the Government is correct that immigration policy "affect[s]

AMERICAN OVERSIGHT

trade, investment, tourism, and diplomatic relations," among other things, *see* (Dkt. No. 42 at 46, n.16) and *Arizona*, 567 U.S. 387 at 395, 132 S.Ct. at 2498, that list of considerations is not exhaustive. Therefore, the Court finds the Government's argument that it need not consider the States' costs and expenses stemming from the new guidelines to be without merit.

Likewise, the Court finds that the Memoranda did not consider the States' costs and expenses even though, according to the Government, DHS considered the new guidelines' impact to public safety. In fact, the Memoranda did not consider or failed to substantially consider the new guidelines' effects on public safety. Indeed, both Memoranda are devoid of explanation as to how or why prioritizing the detention or deportation of some criminal illegal aliens, while effectively delaying the detention or deportation of and releasing so many other criminal illegal aliens, positively impact public safety. Moreover, the Memoranda provide no indication that any relevant data or facts were considered in ultimately concluding that the public will be safer by releasing more criminal illegal aliens into communities from detention while fewer are detained or deported. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866 (explaining that an agency "must examine the relevant data" in order to explain its policy choices).

***50** Additionally, even if the Government did consider public safety, the Memoranda—and the February 18 Memorandum most crucially—do not state or explain how that consideration connects with concerns regarding state costs and expenses. The Government in its brief argues that, by focusing its "limited resources" on enforcement actions against "the most significant threats to public safety," the Memoranda "should reduce the costs from crime to the States." (Dkt. No. 42 at 46). Leaving aside that the new guidelines practically provide for the non-detention of many criminal illegal aliens who are not within the ambit of any of the prioritized categories, the Government's assertion still fails. "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87, 63 S.Ct. at 459. And the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime.

Next, the Government argues that, contrary to the States' allegations, DHS "need not 'consider all policy alternatives in reaching [its] decision.' " (Dkt. No. 42 at 46) (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2870). Instead, the Government states that "it need only 'consider the alternative[s] that are within the ambit of the existing [policy].' " (*Id.*) (quoting *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913). In this case, per the Government, "the States fail to identify a single policy alternative" that would be "within the ambit of existing policy," or would otherwise be "obvious," "significant and viable." (*Id.*) (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013)). The Court disagrees with the Government's contentions.

The States do propose that, instead of the prioritization scheme found in the February 18 Memorandum, the Government should have considered policies "that would have retained congressionally mandated detention of criminal aliens and aliens with final orders of removal." (Dkt. No. 18 at 28). The foregoing is simply asking that the Government follow the law.[52] Of course, such policies are "within the ambit of existing policy." After all, the February 18 Memorandum states that its reprioritization scheme "covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning," (Dkt. No. 19-2 at 2), and congressional statutes mandating the detention of aliens go to the explicit focus of the Memorandum. *See* *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2871. But despite all this, the February 18 Memorandum never considered the limited policies the States proposed. It failed to discuss how a policy enabling the Government to detain all criminal illegal aliens subject to congressional mandates compares with the opted-for guidelines. It did not even state whether the new guidelines even considered *any* other policy. In short, the Government did not grapple with or provide any alternatives when it was required to do so. *See* *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913 ("*State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis *must* consider the 'alternative[s]' that are 'within the ambit of the existing [policy].' " (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856) (emphasis added)). "That omission alone" makes the new guidelines arbitrary and capricious. *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913.

***51** Lastly, the States argue that the February 18 Memorandum failed to rationally explain why criminal

AMERICAN OVERSIGHT

illegal aliens who have committed aggravated felonies or who are affiliated with criminal gangs are prioritized over other criminal illegal aliens and aliens with final orders of removal. (Dkt. No. 18 at 29). The Government responds that the Memorandum "provides a clear, rational justification for prioritizing" such aliens. (Dkt. No. 42 at 43–44). As the Government writes, "the former category presumptively presents a more significant threat to public safety." (*Id.*). In mandating the detention of criminal aliens convicted of serious drug offenses, crimes of moral turpitude, and some other specified offenses, *see* 8 U.S.C. § 1226(c), as well as aliens with final orders of removal during the removal period, *see* 8 U.S.C. § 1231(a)(2), Congress did not differentiate among certain "types" or "categories" of deportable and detainable persons. These laws plainly mandate the detention of *all* the deportable criminal aliens subject to the relevant statutes. The new guidelines directly go against these congressional mandates, opting instead to prioritize certain criminal illegal aliens' detention and deportation over others because of an assertion that such aliens "presumptively present[ ] a more significant threat to public safety" than "one million noncitizens with final orders of removal," (Dkt. No. 42 at 44), and—necessarily—other criminal aliens with convictions for drug offenses or crimes of moral turpitude. But the February 18 Memorandum does not ground this otherwise unsupported assertion. It does not even explain or state how it considered, compared, and ultimately concluded that criminal illegal aliens of a certain category must be prioritized over others. Despite Sections 1226(c) and 1231(a)(2), nowhere in the February 18 Memorandum do the new guidelines even contemplate the prioritization of these "other" criminal illegal aliens. As the States correctly surmise, "[t]he very reason the February 18 Memorandum provides for prioritizing aggravated felonies also supports prioritizing drug offenses, crimes of moral turpitude, and final orders of removal." (Dkt. No. 18 at 29). Without more explanation grounded on relevant data and facts, it is unknown why the priorities were implemented in that way. The new guidance, therefore, indeed appears to be the product of arbitrary and capricious decision-making.

In sum, the Government's failure to rationally explain and connect the basis for the new guidance, along with the Government's failure to consider certain relevant factors and alternative policies, establish that there is a substantial likelihood that the reprioritization is an arbitrary and capricious policy. As the above discussion shows, the Government certainly did not engage in reasoned decision-making as required by the APA. The Court therefore finds that the States have established a substantial likelihood of success on this claim.

c. Count IV: Notice and Comment Rulemaking

The States' next claim is similar to one Texas raised in *Texas I*. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *42–47. In *Texas I*, this Court enjoined Section C of the January 20 Memorandum, in part, because Section C did not undergo notice and comment as required by the APA. *See id.* In this case, the States ask this Court to enjoin Section B of the January 20 Memorandum and the February 18 Memorandum for the same reason. The States argue that "[t]he January 20 and February 18 Memoranda are subject to notice and comment rulemaking because they are substantive or legislative rules." (Dkt. No. 18 at 30). The Government disagrees, raising nearly identical arguments to those it raised in *Texas I*. *See* (Dkt. No. 42 at 47). Namely, the Government contends that the Memoranda are exempt from the APA's notice and comment requirement as "general statement[s] of policy" or, alternatively, as "procedural rules." (*Id.*). For the following reasons, the Court disagrees with the Government's characterizations of the Memoranda and finds that the States have a substantial likelihood of success on the merits of their procedural APA claim.

Rulemaking under 5 U.S.C. § 553

As in *Texas I*, no Party disputes that the Memoranda are rules of some kind and, therefore, that the rulemaking provisions of the APA apply.[53] *See* (Dkt. No. 18); (Dkt. No. 42); *see also* ___ F. Supp. 3d at ____, 2021 WL 2096669, at *42. Nor does any Party contend that the Memoranda underwent any notice and comment. (*Id.*). The question, then, is whether the Memoranda are the type of rules that *should* have undergone notice and comment but did not.

The Court begins with an overview of the APA's notice and comment requirement and the exceptions thereto. The APA requires rules to undergo notice and comment unless they are exempt. *See* 5 U.S.C. § 553.[54] Section 553 sets forth two such categories of exemptions to the notice and comment requirement, one of which is relevant to this case. *Id.* § 553(b). That category exempts "interpretative rules,

AMERICAN OVERSIGHT

general statements of policy, or *rules of* agency organization, *procedure*, or practice" from notice and comment. *Id.* § 553(b)(A) (emphases added). Thus, if an agency proposes a rule that is either a general statement of policy or a procedural rule, the agency is not required to conduct notice and comment on the proposed rule. *See id.*

***52** The Fifth Circuit has made clear that exemptions to the notice and comment requirement "must be narrowly construed." *Texas DAPA*, 809 F.3d at 171. A narrow reading of the exemptions safeguards the vital interests notice and comment is intended to protect. *See* *Dep't of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984) ("Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." (quotations omitted)). Indeed, notice and comment ensures that those affected by a proposed rule have a voice in the rule-making process and assist the agency in crafting rules that better account for the costs and benefits of agency action. *See* *id.* at 1153. *But see id.* ("Inevitably, in determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension.").

In harmony with the Fifth Circuit's warning to narrowly construe exemptions to APA's procedural strictures, the Supreme Court has recognized that states like Louisiana and Texas offer important perspectives on illegal immigration issues. *See* *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."); *see also* *Texas DAPA*, 809 F.3d at 163. States can assist an agency in crafting rules addressing important immigration issues. Mindful of the importance of notice and comment in this context, the Court now considers whether the reprioritization scheme contained within the Memoranda is exempt from the notice and comment requirement as either a general statement of policy or as a procedural rule.

General Statement of Policy

The Court first considers whether the Memoranda are general statements of policy. If so, notice and comment is not required. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see also* 5 U.S.C. § 553(b)(A). "In analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point is the agency's characterization of the rule." *Shalala*, at 596. As in *Texas I*, the Court would likely be convinced that the Memoranda are general statements of policy if it could rely on the Government's characterization of the Memoranda alone. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *43. Both the Government in its brief and the Memoranda themselves declare that the Memoranda are mere statements of policy. (Dkt. No. 42 at 47–49); (Dkt. No. 19-1); (Dkt. No. 19-2). Indeed, the January 20 Memorandum explicitly declares that it "should be considered Department-wide *guidance*[.]" (Dkt. No. 19-1 at 2) (emphasis added). The January 20 Memorandum also states that the "guidelines and priorities" contained therein "are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party[.]" (*Id.* at 5).

The February 18 Memorandum contains similar language. It begins by declaring that it "establishes interim *guidance*[.]" (Dkt. No. 19-2 at 2) (emphasis added). The February 18 Memorandum goes on to say that "[t]hese guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 8).

But an agency's characterization of its rule is just that—its *own* characterization. Indeed, "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. 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." *Azar v. Allina Health Servs.*, ____ U.S. ____, ____, 139 S.Ct. 1804, 1812, 204 L.Ed.2d 139 (2019) (emphasis in original). The Fifth Circuit, too, cautions courts to be "mindful but suspicious of the agency's own characterization." *Texas DAPA*, 809 F.3d at 171 (quotation omitted). The Fifth Circuit therefore demands more of a district court than simply taking an agency at its word when determining whether the challenged rule is a general statement of policy or a substantive rule requiring notice and comment. *See* *Shalala*, 56 F.3d at 596 ("The label that the particular agency puts upon its given exercise

AMERICAN OVERSIGHT

of administrative power is not, for [this court's] purposes, conclusive; rather, it is what the agency does in fact.").

***53** Specifically, the Fifth Circuit instructs district courts to also "evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (quotation omitted).[55] The Fifth Circuit has acknowledged that "[t]here is some overlap in the analysis of those prongs because if a statement denies the decisionmaker discretion in the area of its coverage ... then the statement is binding and creates rights or obligations." *Id.* (cleaned up). Moreover, these "criteria" are merely intended to guide a court in "fathom[ing] the interpretative/legislative distinction." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). In other words, "[t]hese 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*, 328 F. Supp. at 730 (citing *Am. Bus Ass'n v. United States*, 627 F.2d 525, 530 (D.C. Cir. 1980)).[56] The Court now weighs these criteria to determine whether the Memoranda are general statements of policy or substantive rules requiring notice and comment.

The Court first considers whether the Memoranda impose any rights or obligations. *See* *Texas DAPA*, 809 F.3d at 171. In doing so, the Court is mindful that "a substantive rule—or a legislative-type rule, is one that affects individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979) (citation and quotation omitted) (cleaned up). "This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' " *Id.* (citation omitted).

At the outset, it is worth noting that the Court has extensively described how the Memoranda affect rights and obligations in its analysis on whether the Memoranda constitute final agency action. *See supra* II.B.2. As a review, the Memoranda affect rights and obligations in at least three ways. First, the February 18 Memorandum commands that DHS abdicate its obligations under Sections 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. *Compare* §§ 1226(c) and 1231(a)(2) *with* (Dkt. No. 19-2 at 4–7).

Second, the Memoranda also create financial obligations for Texas that would not have existed but for the Memoranda. Based on the record, Texas will be required *by law* to bear some of the cost of providing Emergency Medicaid to eligible aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2). *See supra* II.B.2.b. The legal obligation to provide these aliens with these services would not exist if deprioritized aliens were taken into federal custody at the time of their release from state custody as mandated by Section 1226(c), or if they were detained during the removal period, as required by Section 1231(a)(2).

***54** Finally, as described above, the Memoranda affect the rights of some aliens already in detention. *See supra* II.B.2.b. As another court has already found, the Memoranda make a nonpriority alien's removal "unlikely to be imminent." *See Hussein S.M.*, 2021 WL 1986125, at *3. This status, in turn, entitles certain aliens to release from detention. *See id.*; *see also* *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. That is an effect on rights.

For these reasons, the Court finds that the Memoranda affect the rights and obligations of those within the Memoranda's regulatory sphere—DHS, the states, and certain aliens. This consideration weighs against finding that the Memoranda are general statements of policy.

Next, the Court considers whether the Memoranda give the agency and its decisionmakers sufficient discretion to be considered a general statement of policy. They do not.

"General statements of policy" are those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197, 113 S.Ct. at 2034 (quotations omitted). The Fifth Circuit has described the inquiry for determining whether a rule gives an agency and its decisionmakers sufficient discretion to be classified as a general statement of policy:

> The key inquiry ... is the extent to which the challenged policy leaves the

AMERICAN OVERSIGHT

> agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Shalala, 56 F.3d at 596–97 (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, 466 U.S. 927, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984)). Applying this inquiry to the Memoranda, the Court is of the opinion that the amount of discretion they afford is insufficient for them to be classified as general statements of policy.

The core feature of the Memoranda is their prioritization of immigration enforcement actions for some classes of aliens to the exclusion of others. The Memoranda state explicitly that "[e]nforcement and removal actions [against aliens who fall within] the [priority groups] described ... are *presumed* to be a justified allocation of ICE's limited resources." *See, e.g.*, (Dkt. No. 19-2 at 4–6) (alterations added) (emphasis added). And although the February 18 Memorandum purports to say that actions against nonprioritized aliens "may also be justified" and that "the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen," an agent's discretion in this regard appears so constrained as to be illusory. (*Id.* at 4). Specifically, the February 18 Memorandum stipulates that "[*a*]*ny* civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases *will require* preapproval from the [Field Office Director (FOD)] or [Special Agent in Charge (SAC)]." (*Id.* at 7) (emphasis added). The preapproval constraint *greatly* constricts the normal discretion ICE agents enjoy while exercising their statutory and regulatory duties on behalf of the agency. *See* (Dkt. No. 19-4 at ¶ 29) ("This policy requires field agents to obtain special permission before engaging in routine enforcement."); *cf.* 8 U.S.C. § 1357; 8 C.F.R. § 287.5. Put differently, agents now need the approval of a FOD or SAC to conduct otherwise routine enforcement operations. (Dkt. No. 19-2 at 7); (Dkt. No. 19-4 at ¶ 29).

***55** Moreover, the Memorandum details a mandatory process for receiving such preapproval. Indeed, "[i]n deciding to undertake an enforcement action or removal, the agent or officer *must* consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors." (Dkt. No. 19-2 at 7) (emphasis added). "In requesting ... preapproval, the officer or agent *must* raise a written justification *through the chain of command*, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place." (*Id.*) (emphases added). In other words, 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. *See* (*Id.*); (Dkt. No. 19-4 at ¶ 29).

If this cumbersome preapproval requirement and process were not enough in general to limit the agents' usual discretion, the February 18 Memorandum goes even further by expressly describing two specific scenarios in which an agent's decision-making power is greatly reduced. First, the February 18 Memorandum states that "[t]he approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other [nonprioritized] noncitizens encountered during an operation."[57] (Dkt. No. 19-2 at 7). Simply put, the February 18 Memorandum flatly denies agents the ability to exercise discretion over non-preapproved, nonprioritized aliens "during an operation." Second, the February 18 Memorandum limits agency discretion in detaining and conducting other enforcement actions against nonpriority aliens where exigent circumstances exist. *See* (Dkt. No. 19-2 at 7). To be sure, the Memorandum allows for detention of, and other enforcement actions against, nonpriority aliens without preapproval when obtaining such preapproval would be "impracticable." (*Id.*). And while the Memorandum acknowledges that "it is impossible to preconceive all such circumstances" in which obtaining preapproval may be impracticable, it nevertheless states that circumstances where obtaining preapproval is impracticable "generally

AMERICAN OVERSIGHT

will be *limited* to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*) (emphasis added). Yet, even in these circumstances, the February 18 Memorandum requires approval, albeit after the enforcement action is conducted. (*Id.*). Specifically, the agent is *required*, within 24 hours of the enforcement action having been conducted, to "explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained." (*Id.* at 7 n.7).[58] Once again, in a situation in which the agent's discretion is likely at its zenith—where exigent circumstances exist—the February 18 Memorandum severely restricts the agent's ability to exercise it.

In light of these policies, it is perhaps no surprise that the States provide evidence suggesting that ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance. *See* (Dkt. No. 19-4 at ¶ 36). Specifically, a former Acting Director of ICE with more than 32 years of service in the agency testified that, "[a]s 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." (*Id.* at ¶ 29). Also unsurprisingly, there is evidence in the record tending to show that these "categorical rules" in the February 18 Memorandum are already hampering enforcement actions and will continue to deter agents and officers from exercising their discretion in determining whether to conduct enforcement actions in the future. *See* (Dkt. No. 19-3 at 3–8); (Dkt. No. 46 at ¶ 17); *cf.* *Texas DAPA*, 809 F.3d at 173 (assessing how DAPA has been applied in practice in determining whether it conferred sufficient discretion to be considered a general policy statement).

***56** In addition to limiting the discretion of individual ICE agents and officers, the Memoranda also restrict the discretion of entire ICE field offices. *See* (Dkt. No. 19-2 at 6); (Dkt. No. 42-2 at 6). Specifically, the February 18 Memorandum states that "ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases." (*Id.*). In other words, the Memoranda not only require individual agents and officers to receive preapproval before conducting enforcement actions against aliens falling outside the three priority groups; they also appear to bind *the field offices themselves* to the preapproval process delineated in the February 18 Memorandum.

For these reasons, the Court finds that the amount of discretion that the February 18 Memorandum confers to the agency and its decisionmakers in conducting routine enforcement actions weighs against classifying the Memorandum as a general statement of policy. Weighing this factor along with the rights and obligations affected, the Court concludes that the Memoranda do not constitute a general statement of policy.

Procedural Rule

Even if the February 18 Memorandum is not a general statement of policy, it may nevertheless be exempt from notice and comment if it is a rule "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also* *Texas DAPA*, 809 F.3d at 176. The Government does not assert that the February 18 Memorandum is a rule of DHS organization or practice; rather, the Government contends that it is one of agency procedure. (Dkt. No. 42 at 47–50). The Fifth Circuit employs two tests to determine whether a rule is one of agency procedure. *See* *Texas DAPA*, 809 F.3d at 176–77; *see also Texas*, 328 F. Supp. 3d at 728. Here, both tests yield the same conclusion: the Memoranda do not constitute a procedural rule that is exempt from the APA's notice and comment requirement.

The first test used by the Fifth Circuit to determine whether a rule is procedural is the "substantial impact test." *See* *Texas DAPA*, 809 F.3d at 176. This test "is the primary means by which [the court] look[s] beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *Id.* (citing *Kast Metals*, 744 F.2d at 1153). "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Texas DAPA*, 809 F.3d at 176 (quoting *Kast Metals Corp.*, 744 F.2d at 1153).

In making this determination, the question is not "whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir.), *modified on reh'g*, 36 F.3d 89 (5th Cir. 1994), for text, *see* No. 93-1377, 1994 WL 484506 (5th Cir. Sept.

AMERICAN OVERSIGHT

7, 1994). This distinction makes good sense, as "the notice and comment provisions 'were designed to assure fairness and mature consideration of rules of general application,' " *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969)), and to "afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.' " *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)).

In determining whether the rule will have a "substantial impact" on those regulated, the Court may consider whether the rule creates legal or financial obligations for the plaintiff and whether the rule restricts the discretion of agency officials. *See* *Texas DAPA*, 809 F.3d at 176 (concluding DAPA "undoubtedly [satisfies the substantial impact] test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes"); *Phillips Petroleum Co.*, 22 F.3d at 620 (concluding the rule at issue was not procedural because, in part, "[t]he rule narrowly restrict[ed] the discretion of MMS officials in determining the value of NGLP's" and "[i]t foreclose[d] other valuation methods by prescribing binding valuation criteria"); *see also Texas*, 328 F. Supp. 3d at 728 (concluding DACA is not a procedural rule, having found it "undoubtedly satisfies [the substantial impact] test because it has forced the states to spend money on various social services costs, which are clearly modif[ications] of substantive rights" (quotation omitted)). If the rule has a substantial impact on "the regulated industry, or an important class of the members or the products of that industry," then "notice and opportunity for comment should first be provided" because "[t]he exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated." *Phillips Petroleum Co.*, 22 F.3d at 620.

***57** Considering these criteria, the Memoranda satisfy the substantial impact test. First, as discussed above, the Memoranda affect at least one of Texas's legal obligations. *See supra* II.B.2.b. Specifically, they affect Texas's legal and financial obligations to partially fund Emergency Medicaid to aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2) but, pursuant to the Memoranda, are not detained by ICE when they are released from state custody or during the removal period. The Memoranda also have a substantial impact because, as just described, they limit the discretion exercised by ICE field offices, agents, and officers. In sum, the February 18 Memorandum mandates a process for ICE field offices and agents to follow for obtaining preapproval to detain aliens the Memoranda deem to be nonpriorities. This mandatory policy restricts DHS from exercising discretion and conducting routine enforcement actions against aliens the Memoranda classify as nonpriorities. This curtailment of agency discretion in conducting routine civil immigration enforcement actions is yet another substantial impact the Memoranda have on those they regulate.

Finally, the Memoranda have a substantial impact on certain aliens already in detention. As discussed above, *see supra* II.B.2.b, and as another district court's ruling demonstrates, the Memoranda make certain nonpriority aliens' removal "unlikely to be imminent," thus entitling some of those aliens to be released from detention. *Hussein S.M.*, 2021 WL 1986125, at *3; *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. Considering the many ways the Memoranda affect rights and obligations, it is clear that the Memoranda have a substantial impact and, therefore, the substantial impact test weighs against classifying the Memoranda as procedural rules.

The second test for determining whether a rule is procedural asks the Court to weigh two considerations. First, the Court must consider the "effect on those interests ultimately at stake in the agency proceeding." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013)) (quotation omitted). "Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns.*, 931 F. Supp. 2d at 107). This consideration clearly weighs against characterizing the Memoranda as procedural rules, given that the Court has already found that the Memoranda affect the rights and obligations of Texas, DHS, and certain aliens. *See supra* II.B.2.b.

AMERICAN OVERSIGHT

Second, the Court must assess whether the Memoranda affect the substantive standards by which DHS determines whether to detain certain aliens. *See* *Texas DAPA*, 809 F.3d at 176–77 ("[R]ules are generally considered procedural so long as they do not 'change the substantive standards by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide." (quotation omitted)). Here, the Memoranda alter the substantive standards by which DHS determines whether and when to detain certain aliens by departing from the plain statutory requirements in Sections 1226(c) and 1231(a)(2) and effectively replacing them with new standards for making such determinations. As discussed above, Section 1226(c) requires DHS to detain aliens falling within the ambit of that provision when they are released from state custody. *See supra* II.B.3.a. Section 1231(a)(2) requires DHS to detain an alien with a final order of removal during the removal period. *See supra* II.B.3.a. The Memoranda, however, require DHS to do something different, setting forth a prioritization scheme that declares some aliens falling within the ambit of Section 1226(c) and 1231(a)(2) as enforcement "priorities" and others also falling within those same statutory categories as "nonpriorities." *See* (Dkt. No. 19-2 at 4–7). And to detain nonpriorities, the February 18 Memorandum *requires* ICE agents to obtain preapproval. *See* (*Id.* at 7). No such prioritization scheme or preapproval process exists in Sections 1226(c) and 1231(a)(2). Rather, these provisions plainly require DHS to detain *all* aliens who meet the enumerated statutory criteria and that DHS detain them at or during the time stated in the provisions. *See* 8 U.S.C. §§ 1226(c), 1231(a)(2). Thus, the Memoranda change the "substantive standards by which [DHS] evaluates" whether or not to detain an alien who falls within the ambit of Section 1226(c) and 1231(a)(2). *See* *Texas DAPA*, 809 F.3d at 177 ("DAPA establishes the substantive standards by which the agency evaluates applications which seek a benefit that the agency purportedly has the power to provide—a critical fact requiring notice and comment." (cleaned up)). Therefore, this test also weighs against classifying the Memoranda as procedural rules.

Texas Has Met Its Burden on Its Procedural APA Claim

***58** In sum, the Court finds that the Memoranda do not constitute a rule that is exempt from the notice and comment requirements of Section 553. The 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. Likewise, the Memoranda are not procedural rules because they have a significant impact on DHS, the states, and certain aliens. Therefore, the Court finds Texas has shown a substantial likelihood of success on the merits of its procedural APA claim.

2. Irreparable Harm

In addition to demonstrating a substantial likelihood of success on the merits, the States must demonstrate "a substantial threat of irreparable injury if the injunction is not issued." *Texas DAPA*, 809 F.3d at 150. Put another way, the States must show they are "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20, 129 S.Ct. at 374 (emphasis added). For an injury to be sufficiently "irreparable," the States need only show 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 States argue their injuries are irreparable because they will incur financial costs that are unrecoverable. (Dkt. No. 18 at 40–41); (Dkt. No. 51 at 31). The States also argue they will suffer irreparable harm because non-detention will result in increased crime. (*Id.*). In response, the Government contends there is no irreparable harm because "there is not a significant impact on the States." (Dkt. No. 42 at 50). The Court concludes the States have demonstrated they are likely to suffer irreparable harm for the following reasons.

As discussed in this Court's standing analysis, the States have presented evidence demonstrating the Memoranda cause financial harm in the form of increased costs for detention facilities. *See supra* II.A.1.a. The States have also demonstrated the Memoranda harm their interests as *parens patriae* because of an increase in criminal activity resulting from the Memoranda's implementation. *See supra* II.A.1.b. The Court found these two injuries were concrete, imminent, and traceable to the Memoranda. The Court also concludes

AMERICAN OVERSIGHT

the threat of injuries to the States is "likely" as that term is used by the Supreme Court. *See* *Winter*, 555 U.S. at 20, 129 S.Ct. at 374.

There is also no indication the States can recover for their injuries. Indeed, there is no immediately discernable theory under which a state can "pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm." *Texas I*, ____F. Supp. 3d at ____, 2021 WL 2096669, at *47. To that point, no Party has suggested the States can recover any of their likely financial injuries here. And the Fifth Circuit rebuffed an attempt by Texas in the late 1990s to force the federal government to pay medical, educational, and criminal justice expenditures caused by immigration. *See* *Texas*, 106 F.3d at 663–64 ("The State of Texas and its political subdivisions ... appeal a Fed.R.Civ.P. 12(b)(6) dismissal of their complaint seeking declaratory and injunctive relief which would require that the United States pay the educational, medical, and criminal justice expenses allegedly incurred as a result of the presence of undocumented or illegal aliens in Texas. Concluding that the complaint raises questions of policy rather than colorable claims of constitutional or statutory violations, we affirm."). Thus, any financial injury is irreparable. *See* *Burgess*, 871 F.3d at 304.

***59** As for injuries to the States' interests as *parens patriae*, the Supreme Court has determined that "law enforcement and public safety interests" can constitute irreparable harm. *See* *Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (granting a stay of a judgment after finding Maryland experienced ongoing irreparable harm because it was enjoined from effectuating a statute that assisted government officials in investigating crimes and arresting violent offenders). Here, law-enforcement and public-safety interests underlie the States' *parens patriae* injuries. Accordingly, the States have demonstrated they are "likely to suffer irreparable harm in the absence of preliminary relief." *See* *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1944.

3. The Balance of Equities and the Public's Interest

Having concluded the States have satisfied the first two elements for obtaining a preliminary injunction, the Court must now determine whether "the threatened injury outweighs any harm that may result from the injunction to the non-movant" and whether "the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051, 1056 (5th Cir. 1997); *accord* *Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294 (5th Cir. 2020). Federal courts have considered the balance-of-equities and public-interest elements together as they overlap considerably. *Texas DAPA*, 809 F.3d at 187; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 n.36 (N.D. Tex. 2016). And because the Government is the nonmoving party, these two elements "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 1762, 173 L.Ed.2d 550 (2009); *accord* *Texas DAPA*, 809 F.3d at 187.

In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376. As for determining whether an injunction will undermine the public interest, a court should consider the public interests that may be injured and those that may be served by granting or denying a preliminary injunction. *See* *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997–98 (8th Cir. 2011) (citing *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *abrogated on other grounds by* *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)).

The States argue the Government has no interest in the implementation and enforcement of the unlawful policy contained in the Memoranda. (Dkt. No. 18 at 41–42). The States contend the public interest is furthered when the Executive Branch follows congressional mandates. *See* (*Id.* at 42); (Dkt. No. 51 at 31–32). In response, the Government characterizes any injunction as a restraint on "core Article II authority" which "outweighs any harm to the States and undermines the public interest." (Dkt. No. 42 at 55). In the Government's view, an injunction would inhibit its ability to prioritize limited resources, cause confusion within the Executive Branch, and impede any effort to draft final guidance. (*Id.* at 55–56). The Government also contends the public interest is served when it has the ability "to prioritize national security, border security, and public

AMERICAN OVERSIGHT

safety." (*Id.* at 57). Considering these arguments, the Court finds the States have the upper hand.

Notably, without a preliminary injunction, the States will be "threatened with substantial harm" to their state budgets and interests as *parens patriae*. *See* *Burwell*, 227 F. Supp. 3d at 694. As discussed earlier, the Court is unpersuaded by the Government's claim that the States' injuries are "speculative." *See* (Dkt. No. 42 at 22–23). Instead, the Court has found the States' injuries from costs relating to detention facilities and increased criminal activity are traceable to the implementation of the Memoranda. *See supra* II.A.2.

***60** Although the States face substantial harm from the implementation of the Memoranda, the Government nevertheless attempts to show that the harm it faces is worse. The Government, however, postulates harms "that are less substantial" and "vague." *See* *Texas DAPA*, 809 F.3d at 186. Specifically, the Government makes much of an injunction's supposed harm to the Executive Branch's authority. *See* (Dkt. No. 42 at 55–56). Although it is true that the Executive Branch retains vast discretion in immigration enforcement, *see* *Arizona*, 567 U.S. at 396, 132 S.Ct. at 2499; *Reno*, 525 U.S. at 490, 119 S.Ct. at 946, that discretion ebbs when Congress sets forth a statutory mandate. Indeed, "[i]t is undisputed that Congress may *mandate* that the Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring) (emphasis added). Sections 1226(c) and 1231(a)(2) do just that: they *require* the Executive Branch to detain certain aliens at or for a specified time.[59] Any harm to the Government is therefore exaggerated and should be addressed to Congress.

The Government next complains that an injunction would create inefficiency because it would inhibit the Executive Branch's ability to prioritize limited resources.[60] (Dkt. No. 42 at 55–56). The Court is unpersuaded. First, in at least one case, the Fifth Circuit has concluded that any inefficiency resulting from an injunction inhibiting the Executive's ability to prioritize certain immigration-enforcement actions is "outweighed by the major financial losses [that] states face." *See* *Texas DAPA*, 809 F.3d at 187. Here, the Court, in its standing analysis, has already found the Memoranda will result in significant financial losses for the States. *See supra* II.A.1.a. Second, the Government overestimates the effect of an injunction on the Executive's limited resources. Rather than dictate the use of resources, the injunction precludes the Executive Branch from instructing officials to act in a manner contrary to a clear congressional mandate. In other words, the Government remains free to expend its resources in a *lawful* manner.

To this point, "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), 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. *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."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases) ("[T]he public interest in enforcement of the immigration laws is significant."); *cf.* *Nken*, 556 U.S. at 436, 129 S.Ct. at 1762 ("There is always a public interest in prompt execution of removal orders[.]"). The public interest is particularly strong here because, as fully described earlier, Sections 1226(c) and 1231(a)(2) are statutes that Congress enacted for the benefit of the United States, its citizens, and its legal immigrants. *See supra* I.A.; *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; *Zadvydas*, 533 U.S. at 697, 121 S.Ct. at 2502.

***61** Finally, the Government argues an injunction would result in confusion inside the Executive Branch because immigration officials will be left with little to no guidance on how to exercise their enforcement discretion. (Dkt. No. 42 at 56). Relatedly, the Government also theorizes that injunctive relief would impede its effort to draft final guidance. (*Id.* at 56–57). These arguments are puzzling because, with or without an injunction in place, the Government is free to craft new guidance or instruct Executive Branch officials to act in a certain manner *so long as such guidance and instructions comport with the law* (*i.e.*, congressional mandates).

Given the discussion above, the Court concludes the potential harms to the States arising out of the Memoranda outweigh any potential harms to the Government. The Court also concludes the public interest is served, rather than undermined, by an injunction. Thus, the States have satisfied all four elements for a preliminary injunction.

AMERICAN OVERSIGHT

C. SCOPE OF RELIEF

The States have satisfied the standard for a preliminary injunction. This conclusion raises two additional inquiries: the geographic scope of the injunction as well as the nature of the injunctive remedy. The Court addresses each in turn.

1. Geographic Scope

The States request a nationwide injunction. (Dkt. No. 18 at 42–43). The Court has expressed its substantial skepticism of nationwide injunctions. *Texas*, ____ F. Supp. 3d at ____, 2021 WL 247877, at *6–7; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51. Indeed, nationwide injunctions of executive actions are an area of fierce disagreement in the courts and in legal academia. *See id.* But, as with any case, this Court is bound by applicable Fifth Circuit precedent in determining whether a nationwide scope for an injunction is appropriate. That precedent explains that a federal district court, under "appropriate circumstances," has authority "to issue a nationwide injunction." *Texas DAPA*, 809 F.3d at 188. One such appropriate circumstance is when a nationwide injunction is necessary is to ensure uniformity in immigration policies as prescribed by federal law. *Id.* at 187–88; *see also E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("[C]ases implicating immigration policy have a particularly strong claim for uniform, nationwide relief." (citation omitted)). Another such circumstance is when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries [of the unlawful policy] would be free to move among states." *Texas DAPA*, 809 F.3d at 188.

The Court finds both circumstances exist here. First, the Memoranda affect national immigration policy, which is designed to be uniform. *See id.* at 187–88. Second, given what has been detailed in the Court's standing analysis, 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. *See supra* II.A.2 & II.A.3; *see also Texas DAPA*, 809 F.3d at 188. The States submitted evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Accordingly, a nationwide injunction is appropriate. *See Texas DAPA*, 809 F.3d at 187–88; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51.

The Government offers a handful of arguments in opposition to issuing a nationwide injunction. None carry the day.

***62** First, the Government argues nationwide relief is inappropriate because lawsuits concerning the Memoranda in other jurisdictions have been unsuccessful. (Dkt. No. 42 at 60). This misses the point. In determining the appropriate scope of an injunction, the Court's task is to fashion a remedy that prevents the plaintiffs *in this case* from suffering irreparable harm. *See ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) ("When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.' " (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979)); *see also Dep't of Homeland Sec. v. New York*, ____ U.S. ____, ____, 140 S.Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring in the grant of a stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a *particular plaintiff in a particular lawsuit.* When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place." (emphasis added)); *ODonnell v. Goodhart*, 900 F.3d 220, 224 (5th Cir. 2018) ("The district court must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order." (emphasis added) (quoting *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004))). In concluding the States are entitled to injunctive relief, this Court has determined, based on Fifth Circuit precedent and the record before it, that a nationwide injunction is appropriate to prevent the States from suffering irreparable harm.

Next, the Government argues nationwide relief is generally ill-advised because, in effect, any attempt by the Government to create a new federal policy is thwarted by "a single successful challenge" to the policy, even if other challenges to the policy are unsuccessful. (Dkt. No. 42 at 60) (quoting *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct.

AMERICAN OVERSIGHT

at 601 (Gorsuch, J., concurring in the grant of a stay)). Frankly, the Court shares these concerns. Nonetheless, the Court, in fashioning a proper remedy, is bound by precedent, *see* *Texas DAPA*, 809 F.3d at 187–88, and "must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order," *Goodhart*, 900 F.3d at 224 (emphasis added) (quoting *Veneman*, 380 F.3d at 818); *see also* *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of a stay). The Court therefore finds the Government's argument unpersuasive.

Third, the Government attempts to distinguish this case from *Texas DAPA* and *Texas I* by asserting that this case involves *individual* detention decisions rather than a blanket policy pausing enforcement actions against aliens. (Dkt. No. 42 at 60). To be sure, individual enforcement decisions are "inherently discretionary and non-uniform," *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *51, but the States are not challenging individual enforcement decisions. Rather, the States, like the plaintiffs in *Texas DAPA* and *Texas I*, are challenging a blanket policy. *See* *Texas DAPA*, 809 F.3d at 146–49; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *30. Specifically, the States are challenging the Memoranda, which implement and enforce a blanket policy regarding the detention of certain aliens—a policy that contravenes congressional mandates. Accordingly, the Government's argument that this case is distinguishable from *Texas I* and *Texas DAPA* falls short.

Finally, the Government argues that, because the States' injuries are supposedly premised on detainers in Texas and Louisiana, an injunction limited in geographic scope to the boundaries of those two states will sufficiently protect them from any irreparable harm they may suffer due to the Memoranda. (Dkt. No. 42 at 60–61). The Court disagrees for two reasons. First, the Government incorrectly asserts that the States' injuries are premised on detainers when the States' injuries are, in fact, premised on the increased costs to their detention systems and their interests as *parens patriae*. *See* (Dkt. No. 1 at 15–16); (Dkt. No. 18 at 15–16, 18, 35–37). Second, in arguing that the geographic scope of the injunction should be limited to the boundaries of Texas and Louisiana, the Government ignores that, if aliens are not detained in other states, those aliens can migrate to Texas and Louisiana thus causing them harm. *See* *Texas DAPA*, 809 F.3d at 188 (recognizing that "there is a substantial likelihood that a geographically-limited injunction would be ineffective because" the beneficiaries of the unlawful policies "would be free to move among states"). Indeed, the evidence produced in this case regarding the migration patterns of aliens to Texas and from other states buttresses this point. *See supra* II.A.2 & II.A.3; (Dkt. No. 19-21 at 5–7); (Dkt. No. 19-22 at 5–7, 14); (Dkt. No. 19-23 at 2). The Government's argument is therefore meritless.

***63** Thus, for the foregoing reasons, the States are entitled to a nationwide injunction.

2. Remedy

As stated above, "the scope of injunctive relief is dictated by the extent of the violation established." *ODonnell*, 892 F.3d at 163 (quoting *Califano*, 442 U.S. at 702, 99 S.Ct. at 2558); *see also* *Goodhart*, 900 F.3d at 224 ("The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." (quoting *Veneman*, 380 F.3d at 818)). Since the States have satisfied the four elements required for a preliminary injunction, the Court finds that it is appropriate to enjoin the Executive Branch from implementing and enforcing the Memoranda. Specifically, the Court enjoins (1) Section B of the January 20 Memorandum, and (2) the sections from the February 18 Memorandum entitled "Civil Immigration Enforcement and Removal Priorities" and "Enforcement and Removal Actions: Approval, Coordination, and Data Collection." (Dkt. No. 1-2 at 4–8). These sections implement and enforce a policy that directly contravenes congressional mandates. As stressed above, agency policies that contravene congressional mandates are unlawful—plain and simple. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Barnhart*, 534 U.S. at 462, 122 S.Ct. at 956. Moreover, the States have met their burden to show a substantial likelihood that the Memoranda's policy prioritizing the detention of certain aliens over others is arbitrary and capricious and fails to comply with the APA's notice and comment requirement. The Court therefore enjoins the implementation and enforcement of these sections. [61]

IV. CONCLUSION

Although this case involves many issues of administrative and immigration law, its core concerns whether the Executive Branch may implement a policy that directly conflicts with

AMERICAN OVERSIGHT

laws that Congress enacted. The answer is no. In the end, through all their detailed explanations of the Executive's seemingly unending discretion, the Government substantially undervalues the People's grant of "legislative Powers" to Congress.

Because the States have demonstrated that there is a substantial likelihood that portions of the Memoranda direct Executive Branch officials to act in a way that is contrary to Sections 1226(c) and 1231(a)(2), those sections of the Memoranda cannot stand and are hereby enjoined. Additionally, the Court enjoins the sections of the Memoranda described above because the States have demonstrated a substantial likelihood that the policy concerning detention of certain aliens set forth in the Memoranda is arbitrary and capricious under the APA and the Memoranda fail to comply with the APA's notice and comment requirement.

***64** For the foregoing reasons, the Court **GRANTS** the States' Motion for Preliminary Injunction. (Dkt. No. 18). Therefore, it is hereby **ORDERED** that:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from enforcing and implementing the policies described in:

   a. Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4);

   b. The section entitled "Civil Immigration Enforcement and Removal Priorities" in the February 18 Memorandum. (Dkt. No. 1-2 at 4–6); and

   c. The section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the February 18 Memorandum.[62] (Dkt. No. 1-2 at 6–8).

2. This Preliminary Injunction is granted on a nationwide basis and prohibits enforcement and implementation in every place the Government has jurisdiction to enforce and implement the January 20 and February 18 Memoranda.

3. This Preliminary Injunction shall remain in effect pending a final resolution of the merits of this case or until a further Order from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

To ensure compliance with this Preliminary Injunction, the Court further **ORDERS** the following:

1. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of these aliens in light of the fact that the Memoranda have been enjoined.

2. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1231(a)(2) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of aliens in light of the fact that the Memoranda have been enjoined.

3. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens known to the Government, who are covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release. For each of these aliens, provide under seal the alien's last known residence or address and the offense for which the alien had been incarcerated.

   Additionally, for each alien not detained, the Government shall make and retain a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

***65** 4. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens in their removal period as defined in 8 U.S.C. § 1231(a)(1). Of those, provide the number who were not detained pursuant to 8 U.S.C. § 1231(a)(2).

AMERICAN OVERSIGHT

> For each of these aliens not detained, provide under seal the alien's last known residence or address.
>
> Additionally, for each alien not detained, the Government shall make a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the January 20 Memorandum's sections entitled "A. Comprehensive Review of Enforcement Policies and Priorities" and "D. No Private Right Statement."[63] This Memorandum Opinion and Order also does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's sections entitled "Purpose," "Background," "Questions," and "No Private Right Statement."

No security bond is required under Federal Rule of Civil Procedure 65(c).

It is SO ORDERED.

Signed on August 19, 2021.

All Citations

Slip Copy, 2021 WL 3683913

Footnotes

1 The term "Government" used throughout this Memorandum Opinion and Order refers to the United States, the agencies, and the individuals sued in their official capacity.

2 Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

3 The States also seek an injunction compelling the Government to comply with the detention mandates in Sections 1226(c) and 1231(a)(2). (Dkt. No. 18).

4 In this Memorandum Opinion and Order, the Court does not address the States' likelihood of success on claims that the Memoranda are unlawful because they violate: (1) the Agreements between Texas and Louisiana and the Department of Homeland Security ("DHS"); and (2) the Constitution's requirement that the President "take Care that the Laws be faithfully executed." (Dkt. No. 1 at ¶¶ 122–31). In withholding a ruling on these claims, the Court is mindful that to succeed on their Motion, the States need only demonstrate a substantial likelihood of success on "at least one" claim, which they have. *See* *Texas v. United States*, 86 F. Supp. 3d 591, 672 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*). Moreover, given the significance of the substantial interests at stake in this case, the Court finds it to be in the interest of justice to rule after all Parties have an opportunity to make a complete presentation on the merits of these claims. *See id.* at 677. Similarly, the Court defers ruling on the States' request for an injunction to compel agency action unlawfully withheld pursuant to Section 706(1) of the Administrative Procedure Act. *See* footnote 61; *see also* (Dkt. No. 1 at 28); (Dkt. No. 18 at 26).

5 In outlining the extensive background and history involved in this case, the factual statements made herein (except where the Court is discussing a factual dispute) should be considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions, except where the Court discusses the various competing legal theories and positions, should be taken as conclusions of law regardless of any label or lack thereof.

AMERICAN OVERSIGHT

6 *See generally* John F. Kennedy, *A Nation of Immigrants* (1958); Andrea Barton, *Sitting on Ellis Island: The Fate of Disparate Immigration Policies in the Wake of the Guantanamo Bay Cases*, 23 Notre Dame J.L. Ethics & Pub. Pol'y 233, 237 (2009).

7 The text of the statute says "sentence;" however, the Court notes it should probably be "sentenced."

8 Federal regulations permit the temporary detention of certain incarcerated aliens at DHS's request for a period not to exceed 48 hours "in order to permit assumption of custody" of the detainee by DHS. 8 C.F.R. § 287.7(d). Note at least one state court determined that beyond the 48-hour mark, state authorities must release the incarcerated aliens "[i]f the federal government *fails to apply* federal law and take custody of [the criminal aliens] within the time limit set by federal regulations." *Ochoa v. Bass*, 2008 OK CR 11, ¶ 19, 181 P.3d 727, 733 (emphasis added).

9 The importance of detainers aside, note that "[t]here are certainly other mechanisms available to assist in implementing the federal apprehension of criminal aliens." *Id.* at 175. For instance, written agreements between the Executive Branch and states and local governments pursuant to 8 U.S.C. § 1357(g) may permit state and local law enforcement "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)." 8 U.S.C. § 1357(g). In another example, the Executive Branch may also enter an "inter-governmental service agreement" with local and state jails to authorize such detention centers to house prisoners on behalf of DHS. Lasch, *supra*, at 175.

10 The January 20 Memorandum excludes from the 100-day pause any alien with a final removal order who:

> 1) According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
> 2) Was not physically present in the United States before November 1, 2020; or
> 3) Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver and has been given a meaningful opportunity to access counsel prior to signing the waiver; or
> 4) For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

(Dkt. No. 1-1 at 4–5) (footnote omitted).

11 The January 20 Memorandum provides that "the Acting Director of ICE shall issue operational guidance on the implementation of these priorities." (Dkt. No. 1-1 at 4).

12 5 U.S.C. § 706(2)(A), (C).

13 5 U.S.C. § 706(2)(A).

14 5 U.S.C. § 553.

15 As this Court noted in *Texas I*, DHS, "U.S. Customs and Border Protection ..., U.S. Immigration and Customs Enforcement ..., and U.S. Citizenship and Immigration Services ... entered into a Memorandum of Understanding Between Texas and DHS concerning certain aspects of the nation's immigration laws." ___ F. Supp. 3d at ____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). "The Agreement was finalized on January 8, 2021—just 12 twelve days before the transition from the Trump Administration to the Biden Administration." *Texas I*, ___ F. Supp. 3d at____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). DHS and the Louisiana Department of Justice entered into a nearly identical agreement, which was also finalized on January 8, 2021. (Dkt. No. 1-4).

16 This statement comes directly from the Chief of Staff of the Texas Department of Criminal Justice. (Dkt. No. 46 at 2). It is unclear whether the "ICE officials" quoted by the Chief of Staff made this statement in a capacity excluding the statement from the rule against hearsay. *See* Fed. R. Evid. 801(d)(2). But even if hearsay, this Court may rely on the statement at the preliminary injunction phase. *See* *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including

AMERICAN OVERSIGHT

hearsay evidence."). The Government has made no showing that this testimony is otherwise unreliable, and the Court finds none itself. Rather, the sworn affidavit from the Chief of Staff under penalty of perjury possesses sufficient indicia of reliability as to the statement of the ICE officials. The Court therefore accepts as fact, at the preliminary injunction phase, the testimony of the Chief of Staff regarding the statement of current ICE officials.

17 As the Court discusses *infra*, the federal government reimbursed Texas for a miniscule fraction of its costs for detaining criminal aliens as part of a statutorily mandated program that seeks to help states with the burden of incarcerating criminal aliens. *See* 8 U.S.C. § 1231(a)(1)(A).

18 Because the States have put forth sufficient evidence to demonstrate a concrete and imminent injury regarding Texas's detention costs and *parens patriae, see infra* II.A.1., the Court need not address the States' alleged financial injuries arising from unanticipated education and healthcare-related expenses.

19 The fact that an expansion of *parens patriae* to citizens-at-large in *Louisiana v. Texas* was determined in a case involving the Supreme Court's original jurisdiction does not restrict the scope of quasi-sovereign interests in non-original jurisdiction cases. If anything, the opposite is true. *See* *Snapp*, 458 U.S. at 603 n.12, 102 S.Ct. at 3267 n.12; *id.* at 611–12, 102 S.Ct. at 3270–71 (Brennan, J., concurring) (explaining on constitutional grounds that the Court might be more "restrictive" as to the types of interests a state can assert in a *parens patriae* action when the Court's original jurisdiction is invoked as compared to typical federal suits).

20 Notably, the statutory basis for SCAAP resides near one of the detention statutes at issue in this case, 8 U.S.C. § 1231(i).

21 In sum, having concluded that the States have standing, the Court must exercise jurisdiction. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) (noting that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"); *see also* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014) (resolving doctrinal tension that had developed with a federal court's "virtually unflagging" obligation to "hear and decide cases within its jurisdiction" (internal quotation omitted)).

22 Section 1252(a)(5) provides in relevant part: "Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." 8 U.S.C. § 1252(a)(5).

Section 1252(b)(9) states in part: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

23 The Court in *Texas I* held that Section 1231(h) was unambiguous. ___ F. Supp. 3d at ____, 2021 WL 2096669, at *26 & n.4. Hence, the Court did not find *Chevron* deference applied to the Government's preferred interpretation of Section 1231(h). *Id.* The Court adopts that reasoning by reference here. The Court additionally notes that the Government, like in *Texas I*, fails to invoke any claim to *Chevron* deference with respect to Section 1231(h) in its Response to this Motion.

24 Indeed, even the Executive Branch in a website has stated that incarcerated individuals may apply for Medicaid coverage in their respective states and thereafter be eligible for benefits after release from custody. *See* HealthCare.gov, *Health coverage for incarcerated people*, https://www.healthcare.gov/incarcerated-people/.

AMERICAN OVERSIGHT

25 The Court is also concerned that the Memoranda affect the States' legal obligation to provide a public-school education to certain noncitizens following their release from juvenile detention. For example, Texas is required by both federal and state law to provide noncitizen children with a public-school education. *See generally* *Plyler*, 457 U.S. 202, 102 S.Ct. 2382 (holding that a Texas statute that withheld state funds for educating children who were not "legally admitted" was unconstitutional); *see also* *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005) ("In ... *Plyler*, the [Supreme] Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens."); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) ("[T]he State's public education expenditures for the children of undocumented aliens are required by the equal protection clause[.]" (citing *Plyler*, 457 U.S. 202, 102 S.Ct. 2382)). This obligation would necessarily include juveniles released from the custody of the Texas Juvenile Justice Department ("TJJD") who are not detained by ICE because of the Memoranda. *See* (Dkt. No. 19-9 at ¶ 7) ("As Chapter 25, Texas Education Code, requires a child to attend school and as *Plyler* ... prohibits denying undocumented children of illegal immigrants the right to attend public school, to the extent ICE does not take custody of non-citizen juveniles set to be released from TJJD custody, it is my understanding that those non-citizen juveniles who have not already received their General Educational Development or high school diploma attend Texas public schools after being released."). The Court is interested in further briefing on this issue at the next stage of this litigation.

26 A district court in Florida concluded the February 18 Memorandum is unreviewable under the APA because it did not constitute final agency action. *Florida. v.* *United States*, No. 8:21-CV-541-CEH-SPF, 2021 WL 1985058, at *9 (M.D. Fla. May 18, 2021). The Court respectfully disagrees with this conclusion for the reasons set forth herein.

27 As another Texas court said of a similar change in litigation position, "[b]ut that was then, and this is now." *Texas v. United States*, 340 F. Supp. 3d 579, 611 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded*, 945 F.3d 355 (5th Cir. 2019), *rev'd and remanded sub nom.* *California v. Texas*, 141 S.Ct. 2104 (2021).

28 Likewise, the Eleventh Circuit concluded, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (collecting cases with similar findings) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)). Indeed, "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold," so this Court cannot "blandly shrug them off because they were not a holding." *See* *United States v. Montero-Camargo*, 208 F.3d 1122, n.17 (9th Cir. 2000) (en banc) (citations omitted). Other circuits agree. *See* *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (considering that dicta "must be given considerable weight and cannot be ignored in the resolution of [a] close question"); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's 'considered dicta.' " (quoting *McCoy*, 950 F.2d at 19)); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[A]s we and our sister circuits have frequently noted, ... carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (internal quotation marks omitted) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003))); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (noting that lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" (citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)));

AMERICAN OVERSIGHT

Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that lower courts "should respect considered Supreme Court dicta"); *McDonough v. Anoka County*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts ... are not 'free to limit Supreme Court opinions precisely to the facts of each case.' Instead, federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings[.]' " (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993))); *Bangor Hydro–Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-particularly when expressed so unequivocally.").

29 The Court also notes that its decision in *Texas I* did not rely entirely on the protection of "public or private interests" rationale explained in *Richbourg Motor Co.* and *Escoe* to support its finding of a "stronger indication" that the "shall" in 8 U.S.C. § 1231(a)(1)(A) connoted a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34–35. Instead, the Court performed a full statutory interpretation of the word "shall" in Section 1231(a)(1)(A) and relied on numerous precedents in the Fifth Circuit and sister circuits demonstrating the mandatory nature of that word. *Id.* at *33–38 (noting the Court had examined "the text, context, statutory history, and precedent demonstrating that 'shall' means *must* in section 1231(a)(1)(A)" (emphasis in original)). In contrast to that comprehensive analysis, the Government's current lone attack on the Court's prior synthesis of the rules from *Hecht, Castle Rock, Richbourg Motor Co.*, and *Escoe* is lacking. Nevertheless, despite the in-depth analysis the Court undertook in *Texas I*, a district court in Arizona arrived at a different conclusion, holding that "shall" does not mean "must" in 8 U.S.C. § 1231(a)(1)(A). *Arizona*, 2021 WL 2787930, at *9–10. That court's rationale was that the legislative intent required for Section 1231(a)(1)(A) to be mandatory—per *Castle Rock*—was not present. *Id.* The court based its holding on (a) the statutory scheme which apparently contemplated removals of aliens outside the 90-day period, (b) the Government's broad discretion to remove aliens at any stage of the removal process, and (c) some legislative history showing that the 90-day period contemplated in the section was intended to be "merely" a "target" date "rather than a statutory mandate." *Id.* Therefore, according to the *Arizona* court, "shall" did not mean "must" in Section 1231(a)(1)(A). *Id.* Like the Government in this case, the district court neither cited to nor discussed *Richbourg Motor Co.* and *Escoe*. This Court respectfully disagrees with the court in *Arizona* and the Government, having thoroughly probed the statutory text, the purpose of the statutes, and legislative history of Sections 1231(a)(1)(A) in *Texas I*, and Sections 1226(c) and 1231(a)(2) in this Memorandum Opinion and Order.

30 In *Texas I*, the Government argued that Section 1231(a)(1)(A)'s use of the word "shall" could not have meant "must" because at least one other "shall" in Section 1231 is not mandatory (at least according to the Government). *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35. That other "shall" is apparently in Section 1231(a)(2) which reads, as stated earlier: "During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under [certain circumstances]." *Id.* The Government contended that reading "shall" as mandatory in the first sentence of Section 1231(a)(2) would make the second sentence superfluous. *Id.*; *see also* (6:21-cv-3, Dkt. No. 82 at 21); (6:21-cv-3, Dkt. No. 83 at 34). The Court found the argument unpersuasive, finding that there was a distinction between the two clauses. *Id.* As the Court held, the first clause of Section 1231(a)(2) mandates the act of detaining. *Id.* (citing *Rodney*, 340 F. App'x at 764). The second clause, on the other hand, prohibits the release of certain individuals. *Id.* Thus, the Attorney General may in some circumstances "release" those whom he has "detain[ed]." *See* 8 U.S.C. § 1231(a)(2). Section 1231 itself prescribes the conditions through which an alien—who is presumably presently

AMERICAN OVERSIGHT

detained—may pursue a "stay" and a "release." *Id.* § 1231(c)(2)(A), (C). In fact, it could easily be said that the prohibition on releasing certain aliens demonstrates that Congress assumed *all* aliens would be detained —because they "shall" be. Thus, the Court concluded in *Texas I* that the Government's "textual" argument failed. In this case, the Government briefly restates its argument from *Texas I* in an attempt to persuade the Court to change its disposition. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35; *see also* (Dkt. No. 42 at 39). The Court remains unpersuaded and adopts its prior conclusions from *Texas I* as discussed in this footnote.

31 For criminal aliens in state custody, the 90-day period does not start until they are released from state confinement. *See* 8 U.S.C. § 1231(a)(1)(B)(iii).

32 This proposition does not include circumstances in which the President is asked to enforce a law that is unconstitutional or, more specifically, a law that usurps Executive authority. *See* Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 621–22 (1994). After all, the Constitution commands that, "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, *and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.' " U.S. Const. art. II, § 1, cl. 8 (emphasis added). The Government, however, does not assert that Sections 1226(c) or 1231(a)(2) are unconstitutional. *See* (Dkt. No. 42).

33 Specifically, the First Test Act, enacted in 1673, "was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation and receive the Anglican sacrament. Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily." Delahunty & Yoo, *supra*, at 805–06. The Second Test Act, enacted in 1678, "made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy." *Id.* at 806.

34 This ire towards James II's use of the dispensing power is best captured in the English Bill of Rights, which says:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;
>
> By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament[.]

The Bill of Rights, 1 W. & M., c. 1 (1689).

35 Specifically, the English Bill of Rights of 1689 provides: "[T]he pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal" and that "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal." The Bill of Rights, 1 W. & M., c. 2 (1689).

36 These grievances are as follows:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good; He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Declaration of Independence ¶¶ 3–4.

37 Not all states ratified constitutions at the time of the founding. Indeed, "two states, Connecticut and Rhode Island, retained their Colonial Charters issued by King Charles II and did not try to write new state constitutions or declarations of rights" at this time. Calabresi, Agudo, & Dore, *supra*, at 1543; *see also* *Narragansett Indian Tribe of R.I. v. State*, 667 A.2d 280, 280 (R.I. 1995) ("Rhode Island's first constitution was adopted in

AMERICAN OVERSIGHT

1842 ...."); *Moore v. Ganim*, 660 A.2d 742, 772 (Conn. 1995) (Peters, C.J., concurring) ("Of the thirteen original states, Connecticut was the second to last to adopt a written state constitution, failing to do so until 1818.").

38 In fact, "[a]t the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority." *See* Price, *supra*, at 693. The First Congress did, however, have an opportunity to bar the President from possessing such power in the Bill of Rights but failed to do so, "despite proposals from several state ratifying conventions that the Constitution be amended to include such a provision." *Id.* at 694. But "any negative inference from Congress's failure to act on these proposals seems weak." *Id.* Instead, "[i]t seems more likely that James Madison and other members of the First Congress failed to include an antisuspension provision in the Bill of Rights precisely because they thought the Constitution already made it clear enough that the President lacked such powers." *Id.*

39 "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

40 "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3.

41 "*Care*: Regard; charge; heed in order to protection and preservation." Samuel Johnson, *A Dictionary of the English Language* (1755).
https://johnsonsdictionaryonline.com/1755/care_ns.
"*Care*: Charge or oversight, implying concern for safety and prosperity." Noah Webster, *American Dictionary of the English Language* (1828). http://webstersdictionary1828.com/Dictionary/care.

42 "*Faithfully*: Without failure of performance; honestly; exactly." Johnson, *supra*. https://johnsonsdictionaryonline.com/1755/faithfully_adv.
"*Faithfully*: With strict adherence to allegiance and duty." Webster, *supra*. http://webstersdictionary1828.com/Dictionary/faithfully.

43 "*Execute*: To put in act; to do what is planned or determined." Johnson, *supra*. https://johnsonsdictionaryonline.com/1755/execute_va.
"*Execute*: To carry into effect; as, to execute law or justice." Webster, *supra*. http://webstersdictionary1828.com/Dictionary/execute.

44 As stated above, the Court, at this time, declines to weigh in on the merits of the States' separate claim that the Memoranda violate the Take Care Clause. *See* footnote 4. However, the Court is interested in further briefing on this claim at the next stage of this litigation. In addition to any issues the Parties would like to bring to the Court's attention, the Parties should focus part of their briefing on whether the States can bring a Take Care Clause claim independent of or in conjunction with their APA claims.

45 https://founders.archives.gov/documents/Washington/05-11-02-0040.

46 https:// https://founders.archives.gov/documents/Adams/99-02-02-0682.

47 https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/348?aff_id=1000.

48 In so doing, the Government essentially foregoes any zone-of-interest challenge on the States' other APA claims, that is, those based on Section 1226(c) and those which are arguably not based on any of the statutes in question (*i.e.*, the arbitrary and capricious and notice and comment claims).

49 In a status conference with the Parties on July 2, 2021, the Court asked whether the Government intended to file the administrative record for review. The Government declined stating that it was unnecessary at this stage of the litigation. (July 2, 2021, Status Conference, 10:00–10:15 A.M.). For their part, the States did not oppose the Government's position, and, instead, told the Court that it could dispose of the pending Motion for Preliminary Injunction without the full administrative record in hand. *Id.* In effect, the Parties agreed that the full administrative record is not necessary for the Court to rule on the arbitrary and capricious claim at this time.

AMERICAN OVERSIGHT

"A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2556 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). As such, the Court will limit its inquiry to the findings, conclusions, and explanations provided in the February 18 Memorandum for its review. In addition, because the Court is ruling on a motion for preliminary injunction, the Court merely needs to determine "if there is a substantial likelihood that" the States "will prevail on the merits" of their arbitrary and capricious claim. *Prichard*, 812 F.2d at 993. It follows, therefore, that the disposition of the arbitrary and capricious claim, at this stage, is not final. Indeed, for at least one other district court, the lack of an administrative record was not a barrier for that court to rule on an arbitrary and capricious claim at this stage. *See* *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *23 & n.8, 28–29 (N.D. Tex. June 27, 2016).

50 To the extent the January 20 Memorandum's 100-day pause on removals and that Memorandum's corresponding administrative record are implicated in this action, the Court adopts its reasoning in *Texas I* and finds that the Government failed to engage in reasoned decision-making. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *38–42. Thus, the Court adopts and incorporates by reference its prior decision that the January 20 Memorandum's 100-day pause is arbitrary and capricious.

51 The Court acknowledges it could be argued that, considering the transmissibility of COVID-19, the Executive Branch has chosen to detain fewer aliens to minimize the spread of the virus in detention facilities where it could not ensure proper safety precautions. But it could also be argued (and the CDC Report the Court describes above strongly suggests) that allowing certain aliens—those who would be detained but for the Memoranda—to be released within communities during the pandemic would exacerbate COVID-19's community spread. Regardless, the Memoranda fail to logically link the Executive Branch's bare COVID-19 justifications to the new guidance such that the Court can conclude the Memoranda were borne of reasoned decision making.

52 Not only that, the States' proposed limited policies are "obvious," "significant," and "viable" to this Court. *See* *Jones*, 716 F.3d at 215. It is incredibly obvious that a "reprioritization policy" that still effectuates and follows the law on detention and removals is more limited than the new guidelines. And surely, following laws should be significantly viable for the Executive Branch given it is *required* by the Constitution to enforce such laws. U.S. Const. art. II, §§ 1, 3.

53 " '[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4).

54 Specifically, the APA requires that "[g]eneral notice of proposed rule making *shall* be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." *Id.* § 553(b) (emphasis added). And that notice *shall* contain "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The APA also requires an agency to "give interested persons an opportunity to participate in the rule making," *id.* § 553(c), and that the "publication or service of a substantive rule shall be made not less than 30 days." *Id.* § 553(d).

55 The Fifth Circuit and the D.C. Circuit have emphasized that "unless a pronouncement acts prospectively, it is a binding norm. Thus ... a statement of policy may not have a present effect[.]" *Shalala*, 56 F.3d at 595; *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). Here, the February 18 Memorandum states that "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added).
The Fifth Circuit cautions, however, that the "binding effect, *not the timing*, ... is the essence of criterion one." *Shalala*, 56 F.3d at 595 (emphasis added). Thus, the "[m]ere pronouncements of what the agency

AMERICAN OVERSIGHT

intends, whether for the present or for the future, which do not have a binding effect, are properly classified as interpretative rules." *Cmty. Nutrition Inst.*, 818 F.2d at 946 n.4. This caveat is of no consequence here because the Court finds that the Memoranda have a binding effect due to their effect on the rights and obligations described.

56 In describing the criteria for determining whether a rule is a general statement of policy or a substantive rule requiring notice and comment, the Fifth Circuit has relied on the D.C. Circuit. *See* *Shalala*, 56 F.3d at 595 nn.15–16 (citing *Cmty. Nutrition Inst.*, 818 F.2d at 943, and *Am. Bus Ass'n*, 627 F.2d at 529).

57 Specifically, the February 18 Memorandum states: "The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above." (Dkt. No. 19-2 at 7). In such circumstances, "[a]n approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above." (*Id.*).

58 And "when the location of a proposed or completed enforcement action is a courthouse, ... or a sensitive location, ... that should be explicitly highlighted in the request." (*Id.* at 7 n.7) (citations omitted).

59 The Government implicitly invokes prosecutorial discretion with respect to any harm an injunction may cause its Article II authority. *See* (Dkt. No. 42 at 55). This argument does not warrant much discussion. Indeed, the Court has already extensively discussed the extent of the Executive's discretion in enforcing a law when a clear congressional mandate is in place. *See supra* II.B.3.

60 Relatedly, the Government argues that an injunction would harm it by dismantling the two-step process ICE currently undergoes to determine whether to detain an alien in state custody. *See* (Dkt. No. 42 at 56). Sections 1226(c) and 1231(a)(2) already mandate which aliens must be detained and the time at or for which the Government must detain the alien.

61 The States also request that the Court issue a positive injunction to compel agency action unlawfully withheld. (Dkt. No. 18 at 25–26); (Dkt. No. 51 at 33). The Government is opposed. (Dkt. No. 42 at 57–61). Under the APA, a "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Court reserves ruling on this issue until later in the litigation.

62 This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's subsections entitled "Notice of At-Large Enforcement Actions" and "Weekly Reporting of All Enforcement and Removal Actions."

63 This Court previously enjoined Section C of the January 20 Memorandum. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52.

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AMERICAN OVERSIGHT

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Contents

Table of Authorities 3

Jurisdictional Statement 6

Statement of Facts and Procedural Background 7

Points Relied On 9

Argument 11

Point I. 14

A. Standard of Review and Preservation of Error 14

B. Argument 15

Point II 18

A. Standard of Review and Preservation of Error 18

B. Argument 19

Point III 21

A. Standard of Review and Preservation of Error 21

B. Argument 21

Conclusion 24

Certification of Service and of Compliance with Rule 84.06(b) and (c) 26

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004230

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Authorities

Cases

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 11

Asberry v. Bannes-Shaughnessy,
734 S.W.2d 250 (Mo. App. E.D. 1987) 11

B.S. v. State,
966 S.W.2d 343 (Mo. App. E.D. 1998) 10, 12, 19

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 9, 16

Boyd v. Boone Mgmt., Inc.,
676 S.W.2d 24 (Mo. App. W.D. 1984) 14, 19, 21

Brinson v. Whittico, M.D.,
793 S.W.2d 632 (Mo. App. E.D. 1990) 10, 23

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 17

Charron v. State,
257 S.W.3d 147 (Mo. App. W.D. 2008) 11, 20

Chastain v. Geary,
539 S.W.3d 841 (Mo. App. W.D. 2017) 15

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 17

Doss v. Brown,
419 S.W.3d 784 (Mo. App. W.D. 2012) 15

Eaton v. Doe,
563 S.W.3d 745 (Mo. App. E.D. 2018) 17

AMERICAN OVERSIGHT

Empire Dist. Elec. Co. v. Coverdell,
588 S.W.3d 225 (Mo. App. S.D. 2019) 11

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 20

Healthcare Servs. of the Ozarks, Inc. v. Copeland,
198 S.W.3d 604 (Mo. banc 2006) 16

Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit,
277 S.W.3d 740 (Mo. App. W.D. 2008) 19

Mo. Coal. for Env't v. State,
579 S.W.3d 924 (Mo. banc 2019) 17

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 17

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) ..... Passim

Peachtree Apartments v. Pallo,
317 S.W.3d 189 (Mo. App. E.D. 2010) 10, 12, 18

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 8

Querry v. State Highway & Transp. Comm'n,
60 S.W.3d 630 (Mo. App. W.D. 2001) 15

Rosenfeld v. Thoele,
28 S.W.3d 446 (Mo. App. E.D. 2000) 10, 19

Schultz v. Warren Cty.,
249 S.W.3d 898 (Mo. App. E.D. 2008) 10, 22

Schweich v. Nixon,
408 S.W.3d 769 (Mo. banc 2013) 10, 22

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004232

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 11, 19

Sexton v. Jenkins & Assocs.,
152 S.W.3d 270 (Mo. banc 2004) 12

State v. West,
548 S.W.3d 406 (Mo. App. W.D. 2018) 14, 18, 21

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D. 1988) 9, 16, 17

Statutes

Section § 115.427, RSMo 7, 8

Section § 510.150, RSMo 9, 10, 15, 19, 22

Other Authorities

35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 21

Missouri Constitution, article 5, section 3 ..... 6, 12

Missouri Supreme Court Rule 67.01 11

Missouri Supreme Court Rule 84.14 ..... 14, 20, 21, 22, 24

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004233

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of Cole County entered on April 20, 2020. Following this Court's order allowing Appellants to file a Notice of Appeal by Special Order pursuant to Rule 81.07(a), the Notice of Appeal was filed on September 23, 2020.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Western District of the Court of Appeals. § 474.050.

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-004234

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Statement of Facts and Procedural Background

On June 8, 2017, Appellants, Missouri State Conference of the National Association for the Advancement of Colored People and the League of Women Voters of Missouri, filed a Petition seeking injunctive and declaratory relief with respect to Missouri Revised Statute § 115.427. That statute, which went into effect on June 1, 2017, drastically reduced voters' options for identifying themselves in order to vote in person. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, 17AC-CC00309 (19th Jud. Cir. Ct.).[1] On December 6, 2017, the trial court granted Respondents' Motion for Judgment on the Pleadings and dismissed Appellants' Petition for failure to state a claim. *Id.*

After this Court reversed that decision, the case was reinstated in November 2018 and proceeded at the trial court in case number 17AC-CC00309-01. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD81484; D83-84. On June 18, 2019, Appellants filed their Third Amended Petition. D98-106. After trial on the merits, the trial court dismissed the Third Amended Petition for lack of standing, mootness, and/or ripeness. The trial court did not address the merits of Plaintiffs' claims, but nonetheless dismissed the Petition *with prejudice.* That jurisdictional, or justiciability, dismissal with prejudice was error and is the issue in this appeal.

In Count I of the Third Amended Petition, Appellants asserted that § 115.427.1 cannot be enforced under § 115.427.6(3) because insufficient state funds were

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[1] On June 30, 2017, Appellant Christine Dragonette was added as a party with the filing of the First Amended Petition.

AMERICAN OVERSIGHT

appropriated from the general revenue to properly implement § 115.427.1. D98 pp. 19-23. In Count II, Appellants asserted that the requirement in § 115.427.5 was violated by the failure to provide the public accurate and non-misleading "Advance Notice" about the law restricting the options for identifying oneself at the polls. D98 pp. 24-26.

The court held a bench trial from August 19 - 23, 2019. Thereafter, on April 20, 2020, the circuit court entered its final judgment, dismissing Count I with prejudice for lack of standing and mootness, and dismissing Count II with prejudice as moot and not ripe in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). D165.

On May 19, 2020, Appellants moved the court to amend its judgment to be a dismissal without prejudice. D166. The trial court did not rule on this post-trial motion. Appellants then filed a notice of appeal on August 26, 2020. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD83987. However, the parties then disputed whether the post-trial motion was *authorized*, which would have delayed the date upon which the judgment became final for appeal. Appellants then filed a motion to file a notice of appeal by special order, which was sustained. Appellants' Notice of Appeal was filed on September 23, 2020.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004236

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Points Relied On

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I WITH PREJUDICE FOR LACK OF STANDING BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR LACK OF STANDING SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT STANDING IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012)**

***W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988)**

Section 510.150, RSMo.

II. THE CIRCUIT COURT ERRED IN DISMISSING COUNTS I AND II WITH PREJUDICE BASED ON MOOTNESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR MOOTNESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT MOOTNESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004237

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***Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010)**

***Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000)**

***B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998)**

Section 510.150, RSMo.

III. THE CIRCUIT COURT ERRED IN DISMISSING COUNT II WITH PREJUDICE BASED ON RIPENESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR RIPENESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT RIPENESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013)**

***Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008)**

***Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990)**

Section 510.150, RSMo.

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MO-AG-22-0644-A-004238

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Argument

This appeal presents a discrete question of law: when a circuit court finds that it lacks subject-matter jurisdiction in a case because of a lack of standing, mootness, or ripeness, should it dismiss with or without prejudice? The answer is clear: when a circuit court lacks subject-matter jurisdiction to resolve a dispute's underlying merits, it should dismiss claims *without* prejudice. *See Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice."); *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986) ("Inasmuch as the trial court did not have jurisdiction … the dismissal is without prejudice to any further action appellant may wish to take"); *see also Asberry v. Bannes-Shaughnessy*, 734 S.W.2d 250, 252 (Mo. App. E.D. 1987) (explaining that the burden of proof on a motion for lack of subject matter jurisdiction "is lower since it is not a decision on the merits, the dismissal is without prejudice and because any action taken by a court lacking subject matter jurisdiction is void").

Whether a trial court dismisses a claim with or without prejudice is significant. "[D]ismissal with prejudice bars the assertion of the same cause of action or claim against the same party." Rule 67.01. *Accord Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d

AMERICAN OVERSIGHT

225, 237 (Mo. App. S.D. 2019). On the other hand, "[d]ismissal without prejudice is usually not an adjudication on the merits of the claim and does not affect the plaintiff's right to refile the action." *Sexton v. Jenkins & Assocs.*, 152 S.W.3d 270, 273 (Mo. banc 2004). In certain circumstances, not applicable here, Appellants acknowledge that "a dismissal without prejudice may be considered a judgment on the merits of issues, such as jurisdiction, that are actually litigated and decided." *Id*. In this appeal, Appellants do not challenge the trial court's factual findings. Instead, Appellants assert only that the trial court erred in dismissing their claims *with prejudice*, thus preventing any chance they may have to vindicate their rights if they gain standing, the case is no longer moot, and the issues become ripe for adjudication.

The Missouri Constitution confers jurisdiction upon the circuit courts over "cases and matters." Mo. Const. art. V, sec. 14(a). "Article V of the Missouri Constitution governs subject-matter jurisdiction, which is the court's authority to render a judgment in a particular category of case." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010); *see also Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) ("Subject-matter jurisdiction concerns 'the nature of the cause of action or the relief sought 'and exists only when the court 'has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.'" (citations omitted)). The Missouri Constitution "requires a case to be justiciable in order for the circuit court to have subject-matter jurisdiction over it." *Id.*; *see also B.S. v. State*, 966 S.W.2d 343, 344 (Mo. App. E.D. 1998).

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Appellants do not dispute that a trial court lacks subject-matter jurisdiction to decide the merits of a case where: (1) the plaintiff lacks standing; (2) the case is moot and no exception applies; or (3) the case is not ripe. But where the circuit court dismisses a case on one or more of these jurisdictional issues, it ought to do so *without* prejudice because any decision on the merits is inappropriate.

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Point I

The circuit court erred in dismissing Count I with prejudice for lack of standing because Missouri law requires that claims dismissed for lack of standing should be dismissed without prejudice, in that standing is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal is purely a question of law. Appellants do not dispute the underlying facts. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*"). The review here is straightforward because Appellants do not dispute the trial court's finding that they lack standing, only the court's act of dismissing the claims *with* prejudice based on that finding.

The error was preserved for appeal. Although no post-trial motion was required to preserve the issue, Appellants tried to resolve it with the trial court before filing this appeal by filing a post-trial motion to amend the judgment to reflect dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment

AMERICAN OVERSIGHT

as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

This Court has routinely found that a dismissal for lack of standing is a dismissal for want of subject matter jurisdiction. *See, e.g.*, *Chastain v. Geary*, 539 S.W.3d 841, 848 (Mo. App. W.D. 2017) ("[T]he court does not have subject matter jurisdiction to decide substantive issues if the party lacks standing."); *Doss v. Brown*, 419 S.W.3d 784, 787 (Mo. App. W.D. 2012) ("A trial court does not have subject matter jurisdiction if a petitioner lacks standing to bring the action."); *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 637 (Mo. App. W.D. 2001) (same).

"Subject-matter jurisdiction concerns the nature of the cause of action or the relief sought and exists only when the court has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." *Mo. Soybean Ass'n,* 102 S.W.3d at 21 (internal quotation omitted). "A dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Here, there should have been no adjudication on the merits where dismissal was for a lack of standing because "[w]hether considered a claim for lack of subject matter jurisdiction or lack of authority, a court, in disposing of a case for lack of standing, cannot reach the merits."[2]

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[2] In *Borges*, this Court noted that "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." 358 S.W.3d at 183. Like *Borges*, that issue need not be decided here; the solution in the present case is simply to dismiss the claim without prejudice because the

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Borges v. Mo. Pub. Entity Risk Mgmt. Fund, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012); *see also W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent].").

"Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. banc 2006). Consequently, a dismissal for lack of standing should be without prejudice. *See*, *e.g.*, *Borges*, 358 S.W.3d at 183-84 ("[O]nce it determined that [Plaintiffs] lacked standing, the trial court was without authority to reach any substantive claim, and, thus, dismissal should have been entered . . . . Therefore, we affirm the circuit court's finding that [Plaintiffs] lacked standing and enter the order the circuit court should have entered, dismissing without prejudice [Plaintiffs'] petition."); *Eaton v. Doe*, 563 S.W.3d 745, 750 (Mo. App. E.D. 2018) ("[B]ecause we have concluded the dismissal is due to a lack of standing, we modify the dismissal to be without prejudice, rather than with prejudice . . . . We affirm the judgment of the trial court as modified.").[3]

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trial court could not reach the merits if its dismissal was because Appellants lacked standing.

[3] The limited exception in which the Missouri Supreme Court has affirmed a dismissal for lack of standing with prejudice is distinguishable. *See Mo. Coal. for Env't v.*

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004244

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The trial court erred in dismissing Count I with prejudice for lack of standing, and this Court should enter judgment dismissing Count I without prejudice.[4]

State, 579 S.W.3d 924, 928 (Mo. banc 2019) (affirming dismissal with prejudice for lack of standing where plaintiffs conceded lack of taxpayer standing and where the Court held standing was not created by a statute). Plaintiffs' standing in that case could not be cured because it was foreclosed as a matter of law. There is no such lack of standing here. Appellants' lack of associational standing under the circuit court's order would be cured if individual Plaintiff members are denied their right to vote upon presenting themselves at the polls without a photo ID. D165 p. 2 ("The potential injured party would have to first, timely present himself to the polls and second, be eligible to vote. One cannot claim to be injured by a photo ID requirement unless they [are] otherwise eligible to vote, actually try to vote…but [are] not allowed to vote for a lack of a photo ID."). *See W. Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 583 (Mo. App. W.D. 1988) (holding plaintiff was entitled to amend petition to cure defects with regard to standing).

[4] Appellants also acknowledge other cases include an unchallenged dismissal with prejudice on the basis of standing. Those cases, however, do not provide guidance because the issue of the denial being with (as opposed to without) prejudice was not raised or discussed. *See Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Point II

The circuit court erred in dismissing Counts I and II with prejudice based on mootness because Missouri law requires that claims dismissed for mootness should be dismissed without prejudice, in that mootness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

As noted *supra*, although the Court defers "to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). "A circuit court does not have subject-matter jurisdiction under [a]rticle V, section 14(a) to adjudicate a case that is not justiciable because it has become moot." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010). The issue before this Court is purely a question of law and thus subject to *de novo* review. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*").

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v.*

AMERICAN OVERSIGHT

Boone Mgmt., Inc., 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

A dismissal for mootness is a dismissal for want of subject-matter jurisdiction and as such should be without prejudice. *See*, *e.g.*, *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000) ("Moot cases should generally be dismissed, as the circuit court lacks subject matter jurisdiction."); *B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998) ("Because plaintiffs 'cause of action was moot, it was not justiciable and the trial court did not have subject matter jurisdiction over it."); *see also Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. W.D. 2008) (raising mootness sua sponte after explaining that "[p]arties cannot . . . confer subject matter jurisdiction upon a court"). When courts lack subject matter jurisdiction to resolve the merits of a dispute, the claims should be dismissed without prejudice. *Compare* § 510.150 ("A dismissal with prejudice operates as an adjudication upon the merits."), *with Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of

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subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice.").

Accordingly, because the law is clear that dismissal for mootness cannot be on the merits and thus must be without prejudice, appellate courts routinely modify such judgments. *See Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476, 485 (Mo. App. E.D. 2010) ("We remand the cause to the circuit court with instructions to vacate its judgment and to dismiss [Plaintiffs'] petition without prejudice due to the mootness of the controversy"); Defenses, 35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 ("Moot cases should be dismissed without prejudice.").

The trial court erred in dismissing Counts I and II with prejudice for mootness, and this Court should enter judgment dismissing Counts I and II without prejudice.

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AMERICAN OVERSIGHT

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Point III

The circuit court erred in dismissing Count II with prejudice based on ripeness because Missouri law requires that claims dismissed for ripeness should be dismissed without prejudice, in that ripeness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal—whether a claim that is not ripe should be dismissed with or without prejudice—is purely a question of law and is subject to *de novo* review.

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

Ripeness implicates the justiciability of a claim and therefore any dismissal should not reach the merits of the case. As noted, however, "[a] dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Because the trial court cannot reach the

AMERICAN OVERSIGHT

merits if it determines a claim is not ripe for adjudication, dismissals on ripeness grounds have been modified by appellate courts, including the Missouri Supreme Court, to dismissals without prejudice. *See Mo. Soybean Ass'n*, 102 S.W.3d at 29 ("[B]ecause the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice."); *Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013) ("While the lack of standing and ripeness does not implicate the merits of the Auditor's claims as to his own appropriation, it does preclude relief in this action. Accordingly, pursuant to Rule 84.14, this Court will issue the ruling that the trial court should have entered. The Auditor's claims are dismissed without prejudice."); *see also Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008) ("[B]ecause the controversy was not ripe for judicial review, the circuit court's judgment is one without prejudice . . . . The circuit court's judgment of dismissal is hereby modified to explicitly state that the dismissal is due to lack of ripeness and is one without prejudice.").

In addition, modifying the trial court's judgment to dismissal without prejudice on Count II is particularly warranted in this case as a prudential matter. The court made clear that Appellants 'request for mandatory injunctive relief could be cured and would become ripe if the Secretary of State failed to provide adequate advance notice to the public under the terms of the *Priorities USA* injunction:

> The Court finds that the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*. The Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public. The original manner in which he tried to fulfill that obligation was found to be

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> deficient. The question of whether or not the Secretary's subsequent information campaigns avoid this deficiency is not yet ripe.

D165 pp. 5-6.

Should the Secretary of State fail to provide sufficient required advance notice, including by making inaccurate statements regarding the narrowing of identification options for voters in Missouri, Appellants should not be barred from seeking the appropriate mandatory injunctive relief in the future. *Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990) ("The judgment is reversed and the cause remanded. Because the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication.").

Thus, the circuit court erred in dismissing Count II with prejudice based on ripeness, and this Court should enter judgment dismissing Count II without prejudice.

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Conclusion

Because Appellants' claims were dismissed based on jurisdictional grounds of standing and mootness and justiciability grounds of ripeness, the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

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Respectfully submitted,

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MO-AG-22-0644-A-004253

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on February 2, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,762 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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WD84028

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs-Appellants,

v.

STATE OF MISSOURI, et al.,

Defendants-Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

INTRODUCTION 4

STATEMENT OF FACTS 6

ARGUMENT 11

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I). 11

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion. 11

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing. 14

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III). 18

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion. 18

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims. 19

C. The trial court properly dismissed Count II with prejudice as unripe. 22

CONCLUSION 24

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004256

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF AUTHORITIES

Cases

Allen v. City of Greenville, MO,
336 S.W.3d 508 (Mo. App. S.D. 2011) 12

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 13

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 16

Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.,
92 S.W.3d 232 (Mo. App. W.D. 2002) 12

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 16

Eckel v. Eckel,
540 S.W.3d 476 (Mo. App. W.D. 2018) 16

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 21

Gohlston v. Lightfoot,
825 S.W.2d 864 (Mo. App. W.D. 1992) 14, 20

Jennings v. City of Kansas City,
812 S.W.2d 724 (Mo. App. W.D. 1991) 15

Mahoney v. Doerhoff Surgical Servs., Inc.,
807 S.W.2d 503 (Mo. banc 1991) 19

McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.,
339 F.3d 1087 (9th Cir. 2003) 20

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 20

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

AMERICAN OVERSIGHT

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) 4, 12, 18

Osuji v. Missouri Dept. of Social Services, Div. of Family Services,
34 S.W.3d 251 (Mo. App. E.D. 2000) 19

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 11

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 4, 6, 7, 8, 23

Rickmyer v. Browne,
995 F.Supp.2d 989 (D.Minn.2014) 19

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999) 11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 13

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. 1982) 11

State Conference of Nat'l Ass'n for Advancement of Colored People v. State,
563 S.W.3d 138 (Mo. App. W.D. 2018) 6, 8, 9, 10, 16

Timber Point Properties III, LLC v. Bank of Am., N.A.,
2014 WL 7005195 (W.D. Mo. Dec. 10, 2014) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 4, 11, 19

Statutes

Section 115.427, RSMo 6

Rules

Missouri Supreme Court Rule 67.03 13

Mo. Sup. Ct. R. 81.05(a)(1) 15

Mo. Sup. Ct. R. 84.04(d) 16

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004258

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

INTRODUCTION

The circuit court correctly issued a final judgment ruling that Plaintiffs lack standing to bring an insufficient-appropriations claim under Missouri's voter-identification law, that all of their claims are moot in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448, 461 (Mo. banc 2020), and that their statutory claims about insufficient advance notice of Missouri's voter identification requirements are not ripe. On appeal, Plaintiffs do not argue the merits of any of those determinations. Rather, they contend only that the trial court erred in dismissing their claims *with prejudice*. For three principal reasons, this Court should affirm the trial court's with-prejudice dismissals and thereby reinforce the prevailing rule that trial courts have discretion to dismiss claims with or without prejudice based on the circumstances present in a case.

First, Plaintiffs apply the wrong standard of review of a trial court's decision to dismiss cases with or without prejudice; this Court should review for abuse of discretion and not exercise *de novo* review. *See Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) ("This court will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court."); *cf. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (*de novo* review of the merits of the dismissal may be appropriate where "the facts are uncontested.").

AMERICAN OVERSIGHT

Second, under the correct standard of review, the trial court properly exercised its discretion in dismissing Count I with prejudice for lack of standing. The trial court issued its judgment after a weeklong trial on Plaintiffs' third amended petition, the judgment references evidence elicited at trial, and the parties contested the facts of Plaintiffs' standing to bring the case. It would be futile, and it would prejudice Respondents, to transform the trial court's judgment into a mere dismissal without prejudice and allow Plaintiffs to bring the same suit again.

Third, the trial court correctly dismissed, with prejudice, Counts I and II as moot and Count II as unripe because there is no realistic probability that Plaintiffs can cure those problems in light of the Supreme Court's permanent injunctions in *Priorities USA*. Plaintiffs have not appealed the merits of the mootness question, and thus they have conceded that issue. It would be futile to allow them to bring their suit again, and nothing in Missouri law mandates that dismissals for mootness be without prejudice. The trial court also correctly dismissed Count II as unripe. Count II is purely a statutory claim where all the relief requested was provided in the *Priorities USA* injunctions based on the facts Plaintiffs pleaded, and Plaintiffs have not identified subsequent Voter ID advertising that violates those injunctions.

For these reasons, this Court should affirm the trial court's judgment dismissing Counts I and II of the Third Amended Petition with prejudice.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

STATEMENT OF FACTS

Backed by a constitutional amendment ("Voter ID Amendment") approved by popular vote, in 2016 the State adopted its current voter identification statute that allows for voting with both photo and non-photo forms of identification. § 115.427, RSMo (the "Voter ID Law"). After a constitutional challenge to certain aspects of the Voter ID Law's requirements, the Missouri Supreme Court largely upheld the statute last year in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). But the Court affirmed a trial court's declaration that the statute's affidavit requirement for some non-photo forms of identification was unconstitutional. And it upheld the lower court's injunctions against disseminating certain advertising materials about the Voter ID Law, including "materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show," *Id.* at 460–61, and "materials which represent that a photo identification card is required to vote," (D165, p.5).

A. The Third Amended Petition's claims and early procedural history.

Plaintiffs in this case are two organizations and one individual Missouri voter. They filed the original Petition in June 2017, and the case has previously been before this Court in an earlier stage of litigation. *See State Conference of Nat'l Ass'n for Advancement of Colored People v. State*, 563 S.W.3d 138 (Mo.

AMERICAN OVERSIGHT

App. W.D. 2018) (hereinafter "*NAACP I*"). After this Court remanded the case to the circuit court for further proceedings, Plaintiffs filed their Third Amended Petition after a lower court's ruling in *Priorities USA* but before the Supreme Court's opinion. (D98).

In Count I, Plaintiffs brought a statutory claim seeking declaratory and injunctive relief that the personal identification requirements in the Voter ID Law may not be enforced due to insufficient legislative appropriations in fiscal years 2017 to 2019. (D98, p.23). In Count II, they sought various prohibitory and mandatory injunctions against advertising materials under § 115.427.5 of the Voter ID Law. (D98, pp.24–26). Specifically, in Count II Plaintiffs asked the trial court to:

> A. Issue an injunction barring the Secretary of State from telling the public that there is a photo ID requirement and/or from instructing poll workers to ask for photo IDs when voters come to the polls;
>
> B. Issue an injunction directing the Secretary of State to provide public notice that there is no photo ID required for voting in Missouri;
>
> C. Issue an injunction directing the Secretary of State to provide correct information to the public about the non-photo options;
>
> D. Issue an injunction directing the Secretary of State to take down misleading advertisements that are still being used or made available to the public;
>
> E. Allow such other and further relief as is proper under the circumstances.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-004262

(D98, p.26).

The trial court presided over a weeklong trial in August 2019, where the court heard the testimony of several witnesses and admitted into evidence the parties' joint stipulated facts and exhibits. (D120–121). The parties did not stipulate to Plaintiffs' standing to bring the case. (*Id.*; D117). Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing (D117, ¶¶14–18), raised lack of standing as an affirmative defense (*id.* at p. 7), and argued in their post-trial brief that Plaintiffs lack standing based on the evidence.

B. The parties brief the effect of the Priorities USA *decision.*

On January 14, 2020, the Supreme Court issued its opinion in *Priorities USA*. The next day, the trial court asked the parties to submit memoranda concerning the effect of *Priorities USA* on this case. (D159). For Plaintiffs' appropriations claim in Count I, Respondents argued that it was moot because the Priorities USA decision already provided the only relief sought by Plaintiffs: a declaration and injunction that the Voter ID Law's identification requirements cannot be enforced. (D162, p.3). As to Plaintiffs' statutory claims in Count II regarding insufficient advance notice of the Voter ID Law's personal identification requirements, Respondents argued that *Priorities USA* also mooted these claims. *Priorities USA* upheld permanent injunctions

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

against those very requirements, "any proposed negative relief was already granted," and "[n]either [§ 115.427.5] nor the order require additional notice campaigns or any of the other remedies Plaintiffs propose." (D162, p.4-6).

Plaintiffs responded to Respondents' *Priorities USA* arguments, contending that Count I is not moot because their relief requested—an order "directing that voters cannot be asked to show a Photo ID at the polls"—is not encompassed by *Priorities USA*. (D160 at p.3). For Count II, Plaintiffs agreed that "the *Priorities USA* remedial order prevents further dissemination of such misleading information," but they contended that it "does not affirmatively correct the existing misimpression." (D160, p.2). They asserted that the Voter ID Law's "obligation to provide advance notice necessarily requires the provision of accurate and non-misleading information." (*Id.*). In other words, Plaintiffs disagreed that *Priorities USA* precluded their claims in this case for a mandatory injunction to promote corrective advertisements.

C. The trial court's final judgment and post-judgment developments.

On April 20, 2020, the trial court issued a final judgment holding that Plaintiffs lacked standing to bring their claims in Count I, that Count I is moot under *Priorities USA*, and that Count II is both moot and not ripe under *Priorities USA*. (D165).

As to Count I, the trial court discussed what evidence a plaintiff must show to demonstrate injury under the photo ID requirement: "the potential

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AMERICAN OVERSIGHT

injured party would have to first, timely present himself to the polls and second, be eligible to vote." (*Id.* at p.2). In a footnote, the court highlighted evidence actually introduced at trial regarding the ability of voters to vote with non-photo forms of identification. (*Id.* at n.5). The court held that the two organization plaintiffs lack associational standing and organizational standing, and it further held that taxpayer standing is not a theory on which the individual plaintiff here, Christine Dragonette, can base a claim for insufficient appropriations. (*Id.* at p.3). The court alternatively found that the injunctions upheld in *Priorities USA* render Count I moot, because the case held that the photo identification requirement "may not be enforced." (*Id.*).

As to Count II, the trial court compared the injunctions upheld in *Priorities USA* with the relief requested in this case. (*Id.* at p.4–6). The court held that "the prohibitory injunctions of *Priorities USA* [are] essentially the same as prayed for in this case[.]" (*Id.* at p.5). Referring to Plaintiffs' request for an injunction that the Secretary of State affirmatively issue correct advertisements, the court reasoned that "the specific mandatory injunctions requested are not required given the findings made and instructions provided to the Secretary of State in *Priorities USA*." (*Id.*). The court also held that Count II is not ripe to the extent it is based on advertisements not yet promoted. (*Id.* at p.6).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

On May 19, 2020, Plaintiffs filed a motion to modify the judgment to transform the dismissals with prejudice to dismissals without prejudice. (D166). The trial court did not rule on that motion, and Plaintiffs eventually appealed the trial court's judgment under special order by the Court permitting a late notice of appeal. (D167, D168).

ARGUMENT

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I).

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion.

The correct standard of review is one for abuse of discretion, and not *de novo* review as Plaintiffs contend. Generally, an appellate court "will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court." *Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) (citing *Smith v. City of De Soto*, 634 S.W.2d 204, 205 (Mo. App. 1982)). Application of this standard is universal in every district of the Court of Appeals. *See id.*; *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo. App. E.D. 2003) (reviewing for abuse of discretion trial court's with-prejudice dismissal of a case based on plaintiff's failure to prosecute); *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 505 (Mo. App. E.D. 1999) (holding "[t]here is no absolute right to amend a petition" and finding no

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

abuse of discretion of the lower court's with-prejudice dismissal based on failure to state a claim); *Allen v. City of Greenville, MO*, 336 S.W.3d 508, n.3 (Mo. App. S.D. 2011) (noting the court would have applied abuse of discretion review to the lower court's prejudice determination if the appellant had raised it on appeal).

An exception to that rule may apply when the question on appeal is whether the dismissal itself was proper and "the facts are uncontested." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (applying *de novo* review to the merits of the dismissal decision). But this case does not fall within any known exception to the general rule for several reasons, and Plaintiffs misapply the holding in *Mo. Soybean Ass'n*.

First, Plaintiffs have not appealed the trial court's decision on standing—they appeal only the dismissal being with prejudice. The trial court issued a final judgment after the trial, and the issue of Plaintiffs' standing was a preserved issue for trial. (*See* D117, Respondents' Answer and Affirmative Defenses, pp.15-16). The trial court did not rule on a motion to dismiss where the court would have assumed Plaintiffs' "averments in their petition are true." *Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.*, 92 S.W.3d 232, 234 (Mo. App. W.D. 2002) (reviewing *de novo* the merits of a lower court's grant of a motion to dismiss for lack of standing); *cf. Mo. Soybean Ass'n*,

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

102 S.W.3d at 21 (procedural history indicates the case was decided after a trial or hearing on a combined motion to dismiss and for summary judgment).[1]

Unlike a motion to dismiss, where the facts are uncontested, or a summary judgment motion, where there can be no disputed material facts, Respondents contested Plaintiffs' lack of standing. The issue here is not "purely a question of law" as in *Mo. Soybean Ass'n*. Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing, and Respondents raised lack of standing as an affirmative defense. (D117). Respondents also raised the issue in their post-trial brief, highlighting the lack of evidence Plaintiffs submitted at trial to support their standing. And in its final judgment the trial court referenced evidence introduced at trial as to Plaintiffs' standing. (D165, n.5).

Second, Missouri Supreme Court Rule 67.03 also supports giving the trial court discretion to issue a judgment with prejudice, stating that "Any involuntary dismissal shall be without prejudice *unless the court in its order for dismissal shall otherwise specify*." Mo. Sup. Ct. R. 67.03 (emphasis added).

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[1] In addition to *Mo. Soybean Ass'n*, other cases cited by Plaintiffs in their brief also considered dismissals without prejudice upon a motion to dismiss. *E.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 64 (Mo. App. W.D. 2004). Furthermore, other cases rested on the specific language of a previous version of Rule 67.03 or did not state a standard of review at all. *E.g.*, *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

The plain language of the Rule contemplates a court's discretion to specify the prejudicial effect of its dismissal.

Finally, review for abuse of discretion makes sense because it is the standard that governs review of denials of leave to amend a petition. *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992). In those situations, "the denial of amendment is presumed correct and the burden is on the proponent to show an abuse of discretion." *Id.* Dismissals with prejudice are analogous to denials of leave to amend a petition because both effectively prohibit a party to re-plead claims in a future action. There is no principled distinction between these two conceptually similar determinations for purposes of applying a standard of review.

For all these reasons, this Court should apply the abuse of discretion standard and confirm that Plaintiffs carry the burden to show that the trial court abused its discretion in dismissing each count of the Third Amended Petition with prejudice.

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing.

The argument section of Plaintiffs' first point on appeal is virtually devoid of legal argument, instead consisting almost exclusively of parenthetical quotations from case law. Because they apply the wrong

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

standard of review, Plaintiffs do not argue how the trial court abused its discretion for issuing a final judgment holding that they lack standing.

Under the abuse of discretion standard, "[d]iscretion means the option that the trial judge has in doing or not doing that which a litigant does not have the absolute right to demand." *Jennings v. City of Kansas City*, 812 S.W.2d 724, 735 (Mo. App. W.D. 1991). "Abuse of that discretion means an untenable judicial act that defies reason and works an injustice. . . . [or] [w]hen the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable." *Id.* Under the appropriate standard, the trial court soundly exercised its discretion.

First, because the circuit court held a trial where evidence was presented on Plaintiffs' lack of standing, it was proper for the court to decide the standing question on the merits and issue a final judgment. The trial court's decision was properly denominated a "judgment" and it became final 30 days after it was issued. Mo. Sup. Ct. R. 81.05(a)(1). Nothing about issuing a final judgment after trial is arbitrary and unreasonable, or is an injustice against Plaintiffs. During the multiple years of litigation in this case, including a trip to this Court in *NAACP I*, Plaintiffs amended their original Petition three times and had ample opportunity to develop a case with a party possessing standing.[2]

[2] Plaintiffs do not raise on appeal the merits of the trial court's judgment on standing, mootness, or ripeness. The decision below was a final judgment, the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004270
Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Second, amending the trial court's final judgment to simply a dismissal order without prejudice would undermine the work of the parties and the courts in multi-year litigation, which reached a trial on the merits and resulted in a final judgment.[3] It would reward Plaintiffs the benefit of liberal re-pleading rules that accompany a dismissal without prejudice by allowing them to re-plead the same cause of action while remaining plaintiffs to that case. And it would effectively announce a rule that no Missouri case supports—that courts must always dismiss a case without prejudice due to lack of standing, even if denominated as final judgment after a contested trial. This would destabilize a customary practice in Missouri's appellate courts of affirming dismissals with prejudice, and it is not necessary in this case. *See, e.g.*, *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

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finality of which was addressed in Respondents' opposition to Plaintiffs' filing of a late notice of appeal. The finality of the judgment was necessarily affirmed by this Court's special order allowing Plaintiffs to file a late notice of appeal. Plaintiffs have elected not to appeal the merits of the judgment, and so they have forfeited those claims on appeal. *E.g.*, *Eckel v. Eckel*, 540 S.W.3d 476, n.17 (Mo. App. W.D. 2018) (an issue not presented in a point relied on is not preserved for review); *see also* Mo. Sup. Ct. R. 84.04(d).

[3] This Court's opinion in *NAACP I*, 563 S.W.3d at 142–47, thoroughly discusses the procedural history of this case and the claims Plaintiffs raised in their original, first amended, and second amended petitions.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Third, this Court should reject any argument Plaintiffs make that they can cure their pleading defects regarding standing and therefore a without-prejudice dismissal is appropriate. Plaintiffs do not squarely argue they can or will cure this defect. Instead they allude to it in a footnote in their brief as a possibility if the two organizational plaintiffs identify members who present themselves at the polls without a photo ID and suffer an injury from the Voting ID Law. (App. Br. at n.3). Plaintiffs amended their Petition three times and had over two years of litigation to find at least one member of their organizations who has standing to bring their claims. They failed to do so. But even if the organizational plaintiffs did find such an individual in their ranks, the theory of their case—and likely the factual allegations and evidence—would presumably be the same. The circuit court's judgment below is final and as such has the appropriate preclusive affect under the doctrines of collateral estoppel and res judicata. The extent of that

Lastly, the trial court held that *Priorities USA* mooted any of the pleaded claims for relief in Count I. Because Plaintiffs did not raise the merits of the mootness decision on appeal and the decision below is a final judgment, they have forfeited raising the same claims in the same form again. It would thus be futile for this Court to modify the trial court's judgment to be a dismissal without prejudice.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004272

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

For these reasons, this Court should affirm the trial court's exercise of discretion in issuing a final judgment dismissing Count I with prejudice for lack of standing.

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III).

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion.

As with the trial court's final judgment disposing of Plaintiffs' claims in Count I with prejudice, this Court should review the trial court's with-prejudice dismissals as to mootness and ripeness for abuse of discretion. Plaintiffs again cite the incorrect standard of review in light of the claims they actually raised on appeal. *De novo* review might be appropriate if Plaintiffs had contested the merits of the dismissals themselves, not merely whether the trial erred in dismissing Plaintiffs' claims with prejudice. *De novo* review was applied in *Mo. Soybean Ass'n* because the Court reviewed the substantive question of whether the trial court properly dismissed the underlying claim as unripe and for lack of subject-matter jurisdiction, not whether the trial court erred by doing so with or without prejudice. 102 S.W.3d at 22 ("a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo."). Plaintiffs here have not appealed the trial court's

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

mootness or ripeness determinations. Thus, the general rule of reviewing for abuse of discretion applies. *See Williams*, 841 S.W.2d at 198.

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims.

Plaintiffs have elected not to appeal the merits of the trial court's decision to dismiss Counts I and II as moot in light of *Priorities USA*. They have therefore forfeited that issue on appeal. Assuming, as this Court therefore must, that the trial court did properly dismiss Plaintiffs' claims as moot, the trial court appropriately exercised its discretion by dismissing them with prejudice.

The principal rationale for dismissing cases without prejudice is that it permits a party to bring another action for the same cause, if it is not otherwise barred. *See Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 506 (Mo. banc 1991). "Ordinarily, when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court." *Osuji v. Missouri Dept. of Social Services, Div. of Family Services*, 34 S.W.3d 251, 253 (Mo. App. E.D. 2000). As other courts have held, "where the pleading's deficiencies 'cannot be cured by re-pleading, because [the claims fail] as a matter of law,' dismissal with prejudice may be appropriate." *Timber Point Properties III, LLC v. Bank of Am., N.A.*, 2014 WL 7005195, at *1 (W.D. Mo. Dec. 10, 2014) (quoting *Rickmyer v. Browne*, 995 F.Supp.2d 989, 1019

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

(D.Minn.2014)); *see also McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009) ("Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend.")); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. 2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment").

There is no principled reason why a similar rule does not apply in Missouri for with-prejudice dismissals for mootness. Indeed, this same rationale inspires the analysis of a denial of leave to amend a petition, which is conceptually similar to dismissals with prejudice. *See Gohlston*, 825 S.W.2d at 869; *Bratt v. Cohn*, 969 S.W.2d 277, 284 (Mo. App. W.D. 1998) (denial of plaintiffs' motion to file second amended petition was not an abuse of discretion because it "did not cure the deficiencies of their first amended petition."). Nothing in Missouri law mandates dismissal without prejudice when the court's basis is mootness.

Plaintiffs have not argued on appeal how a subsequent lawsuit could cure the mootness problems found by the trial court in light of *Priorities USA*. And because Plaintiffs have not raised that argument, they have forfeited it. As in their first point on appeal, the argument section of their second point on appeal consists almost exclusively of parenthetical quotations from cases, not

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

substantive legal argument. The Supreme Court's decision in *Priorities USA* affirmed the lower court's permanent injunctions, which—as the trial court below properly found, and which is not contested by Plaintiffs on appeal—encompasses the very relief Plaintiffs sought in this case. (D165, p.5).

The cases Plaintiffs cite in their brief are inapposite. For example, in *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476 (Mo. App. E.D. 2010), the trial court made no determination as to mootness; instead, mootness came *after* the trial court's ruling, and the trial court dismissed the case with prejudice for lack of standing. *Id.* at 477. The parties addressed the merits of the post-decision mootness question on appeal and the appellate court thus considered it on the merits. *Id.* at 483. The appellate court's decision discussed the various public-interest reasons why it vacated the lower court's standing decision and held the controversy should be dismissed without prejudice due to mootness, including because the respondent on appeal did not oppose that remedy. *Id.* at 485. None of those unique circumstances are present here, and *Friends of the San Luis* certainly does not announce a rule that circuit court dismissals due to mootness must always be without prejudice.

Deciding whether a case should be dismissed with or without prejudice is within the sound discretion of the court deciding the mootness question. Plaintiffs have failed to appeal the merits of the trial court's mootness decision. And they have altogether failed to argue in their brief how they might obtain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004276

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

relief in a future, re-pleaded cause of action based on appropriations for Voter ID Law advertising that is not encompassed by the permanent injunctive relief ordered in *Priorities USA*.

This Court should therefore affirm the trials court's decision dismissing as moot Counts I and II with prejudice.

C. The trial court properly dismissed Count II with prejudice as unripe.

The trial court properly exercised its discretion in dismissing Count II with prejudice as unripe. Though this Court can affirm the trial court's dismissal of Count II as moot and therefore avoid ruling on Appellants' third point on appeal, there are independent and sufficient grounds to affirm the trial court's dismissal with prejudice of Count II as unripe.

The Supreme Court in *Priorities USA* affirmed lower-court injunctions concerning the Secretary of State's advertising the Voter ID Law. As the trial court in this case held, "[t]he Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public." (D165, p.5). No party has filed suit complaining of the Secretary's subsequent advertising efforts or compliance with the *Priorities USA* decision.

If a party has any good-faith allegations that the Secretary of State's Office has not complied with the permanent injunctions in *Priorities USA*, those allegations might support a claim for which a party can bring a new

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004277

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

action. But Plaintiffs' claims in Count II rest on an entirely separate theory than that potential cause of action. In Count II, Plaintiffs alleged that expenditures on advertising resulted in incorrect and misleading advertising and that the Secretary of State's Office did not issue appropriate corrective advertising. (D98, pp.24–26). Count II is a strict statutory claim, resting solely on § 115.427.5 of the Voter ID Law. The Supreme Court in *Priorities USA* already analyzed claims for violations of that same statute similar to Plaintiffs' claims in Count II. *Priorities USA*, 591 S.W.3d at 459–61.

As the trial court here found, the permanent injunctions in *Priorities USA* encompass essentially the same relief Plaintiffs sought on their advertising claims and "the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*." (D165, pp. 5–6). In mentioning mandatory injunctions, the trial court was necessarily referring to the relief sought by Plaintiffs in Count II to issue new, corrective advertising (D98, p.26). The trial court was correct in ruling that the *Priorities USA* decision forecloses any relief that Plaintiffs actually requested in Count II of the Third Amended Petition based § 115.427.5, and Plaintiffs do not challenge the correctness of that portion of the judgment below.

To the extent Plaintiffs bring a future cause of action based on similar facts due to advertising of the Voter ID Law, any such allegations likely cannot

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

be premised § 115.425.7. Plaintiffs did not plead claims premised on the *Priorities USA* injunctions even though the trial court's decision in that case was issued prior to the Third Amended Petition's filing. To that end, even though the Third Amended Petition cites *Priorities USA* in Count II, it narrows the Count's focus to a "violation of the statute." (D98, p.26). Claims for relief requested in a future lawsuit based on the same facts alleged in the Third Amended Petition but premised on § 115.427.5 and not the *Priorities USA* permanent injunctions are not yet ripe, nor can they ever be ripe. *Priorities USA* forecloses the relief Plaintiffs requested based on the facts and theory of the case they pleaded. There exists a hypothetical claim based on *Priorities USA*'s permanent injunctions that may eventually be ripe, but that is not the claim in Count II of the Third Amended Petition here.

For these reasons, it would be futile to allow Plaintiffs to re-plead the same cause of action under § 115.427.5, for the same relief, and based on future—but presently unripe—facts. The trial court properly exercised its discretion in dismissing with prejudice Count II as unripe.

CONCLUSION

For the reasons stated, this Court should affirm the circuit court's decision.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004279

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Dated: April 5, 2021

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 5th day of April, 2021, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 5,626 words.

/s/ *Jason K. Lewis*

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

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MO-AG-22-0644-A-004280

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED
10:39 am, May 13, 2021
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Contents

Table of Authorities 3

Argument 5

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003). 5

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits. 13

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdicton or authority to adjudicate the case on the merits after finding the claims to be moot and unripe. 18

Conclusion 23

Certification of Service and of Compliance with Rule 84.06(b) and (c) 25

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Authorities

Abbott Laboratories, Inc. v. Gardner,
387 U.S. 136 (1967) 22

Allen v. City of Greenville,
336 S.W.3d 508 (Mo. App. S.D. 2003) 7

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 12, 13

Brinson v. Whittico,
793 S.W.2d 632 (Mo. App. E.D. 1990) 22

Burnett v. Kansas City Sch. Bd.,
237 S.W.3d 237 (Mo. App.W.D.2007) 10

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 15, 16

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 15, 16

Doe v. Visionaire Corp.,
13 S.W.3d 674 (Mo. App. E.D. 2000) 13, 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 14

Minn. Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 11

Missouri Public Service Commission v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

Missouri Soybean Association v. Missouri Clean Water Commission,
102 S.W.3d 10 (Mo banc. 2003) ..... Passim

Pearson v. Koster,
367 S.W.3d 36 (Mo. banc 2012) 11

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 6, 10

AMERICAN OVERSIGHT

Priorities USA v. State,
591 S.W.3d 448 (Mo banc. 2020) .....Passim

Priorities USA,
591 S.W.3d 21

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999).....7

Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.,
821 F.3d 992 (8th Cir. 2016).....11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 12

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. W.D. 1982) 6

State ex rel. Christian Health Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv.,
229 S.W.3d 270 (Mo. App. W.D.2007) 12

State ex rel. Scherschel v. City of Kansas City,
470 S.W.3d 391 (Mo. App. W.D. 2015) 10

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D.1988) 12

Webb v. Wyciskalla,
275 S.W.3d 249 (Mo banc. 2003) 8, 12

Weinschenk v. State,
203 S.W.3d 201 (Mo. banc 2006) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 5, 6

Mo. Rev. Stat. § 115.427.....Passim

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004284

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Argument

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003).

The issue presented here is purely a question of law, the underlying facts are uncontested, and the correct standard of review in this case is *de novo*. *See* Appellants' Opening Br. at pp. 14–15, 18–19, 21.

The cases relied on by Respondents do not alter the conclusion that review of whether dismissal should have been with prejudice is *de novo*. In *Williams v. City of Kansas City*, 841 S.W.2d 193 (Mo. App. W.D. 1992), the case was dismissed with prejudice on a motion for judgment on the pleadings because the court found that the plaintiff failed to sufficiently plead claims alleging a violation of due process and conversion. *Id.* at 194–97.[1] In upholding the dismissal with prejudice as to the due process claim, this Court noted that "[w]hen a trial court concludes that pleadings do not state a cause of action, and when adequate opportunity to amend has been provided, it is not error for the trial court to dismiss with prejudice." *Id. Williams* does not support abuse-of-discretion review here. In this case, the dismissal was not based upon a finding that Appellants failed to state a claim, nor was the opportunity to amend provided but not utilized. *Williams* did not address a dismissal based on standing, mootness, or ripeness—the grounds for dismissal here. While Respondents note that the *Williams* court relied on

[1] The dismissal of the conversion claim was reversed and that claim was remanded to allow for further development of the facts so that the plaintiff could attempt to prove his claim against the City. *Williams*, 841 S.W.2d at 197; *see also id.* n.3.

AMERICAN OVERSIGHT

Smith v. City of De Soto, 634 S.W.2d 204 (Mo. App. W.D. 1982), *Smith* too is a case where the court dismissed a case with prejudice for failure to state a claim—there because the plaintiff "cite[d] no authority to support his contention a municipal corporation may be held liable in quantum meruit." *Id.* at 204–05 (noting that the law states the contrary). Like in *Williams*, the plaintiff in *Smith* sought a dismissal without prejudice so that he could amend his petition. This Court affirmed the dismissal with prejudice noting that, in the context of that case, the defendant should not have to respond to additional amended petitions because as a legal matter it would be impossible to cure the legal defect that resulted in dismissal. *Smith*, 634 S.W.2d at 205.

In *Peet v. Randolph*, 103 S.W.3d 872, 874 (Mo. App. E.D. 2003), the plaintiff sought specific performance of a real estate contract. After a summary judgment ruling for defendants, followed by an appeal and remand, the case was then ultimately dismissed with prejudice for failure to prosecute. *Id.* There, the trial court believed that the plaintiff failed to reasonably explain his failure to take any action for nearly a year following the remand and noted that it was plaintiff's responsibility to file a motion. *Id.* In finding that the court abused its discretion, the Eastern District noted that, while dismissal for failure to prosecute is typically within the trial court's judicial discretion, because of the "lack of a local rule delineating the plaintiff's responsibilities on remand, the lack of any scheduling conference or schedule on remand, this Court's mandate that a trial be held, and the plaintiff's readiness to proceed to trial, the trial court clearly abused its discretion in dismissing this case." *Id.* at 876–78 (further noting that no dismissal was appropriate, with or without prejudice, reinstating the cause of action, and ordering that it

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

be reassigned to a new trial judge). There, again, the dismissal was not based on standing, mootness, or ripeness. A case with such different facts is not authority to depart from *de novo* review on the question of law presented in this appeal.

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501, 504–05 (Mo. App. E.D. 1999), also involves a motion to dismiss for failure to state a claim. In reversing the dismissal with prejudice of three counts but affirming the dismissal of a fourth count, the Eastern District found that plaintiff had failed to plead sufficient facts to allege the necessary elements of a prima facie tort and noted that "[t]here is no absolute right to amend a petition." *Id.* at 505. In *Allen v. City of Greenville*, 336 S.W.3d 508, 511 (Mo. App. S.D. 2003), the dismissal again followed from a motion to dismiss for failure to state a claim. The Southern District reviewed the underlying decision to dismiss *de novo* and, in a footnote citing *Saidawi* and *Williams*, stated that whether to dismiss with or without prejudice, while not raised as a point on appeal, would be within the discretion of the trial court. *Id.* at 512, 512 n.3. In many cases the decision might be within the court's discretion. In this case, however, the court lacked such discretion and the dismissal should be reviewed *de novo*.

Unlike the cases relied upon by Respondents, there is no dispute here as to whether Appellants' petition stated a claim or whether they prosecuted their case. This case concluded after a week-long trial that included multiple witnesses—including significant expert testimony—and extensive post-trial briefing. Although the trial court did dismiss this case with prejudice, it never reached the merits of Appellants' claims, nor could it have. The dismissal was based only on standing (Count I), mootness (Counts I

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

and II), and ripeness (Count II). Each of these is a requirement for the circuit court's jurisdiction or authority to decide the case or justiciability, not the merits of the case itself.

"[T]he authority to render judgment in a particular case is … the definition of subject matter jurisdiction …." *Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo banc. 2003). This case is simply not like the cases relied on by Respondents. And while *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003), examined whether a declaratory judgment and injunctive relief claim could be brought at all, it is similar to the present case in that the facts were uncontested, it discussed the court's jurisdiction and authority to hear the case, and the issue on appeal was purely one of law. This Court should not depart from *Missouri Soybean Association* by holding that the abuse-of-discretion standard has universal application in all cases involving the review of a lower court's decision to dismiss a case with prejudice.

In *Missouri Soybean Association*, the lower court dismissed the case with prejudice for a lack of subject-matter jurisdiction. *Id.* at 14. There, like here, the parties did not dispute the underlying facts of the case (concerning state inclusion of rivers on a list of impaired waters that is then submitted to the EPA and triggers specific programs designed to improve the water quality), so the appeal centered on whether the plaintiffs could even bring a declaratory judgment action seeking injunctive relief challenging the promulgation of the list as rulemaking. *Id.* at 14–23. Whether the circuit court had the authority to adjudicate the case was a question of subject-matter jurisdiction. More specifically, the issue was whether plaintiffs were properly challenging "the validity of a

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

rule or the threatened application of such a rule" under § 536.050.1 such that the lower court would have the authority (i.e., subject-matter jurisdiction) to hear a declaratory judgment action. *Id.* at 22. If they were, then the court would have the power to render a declaratory judgment. If the promulgation of the list was not rulemaking, the court had no authority over the case—i.e., it lacked subject-matter jurisdiction.

While noting that, "[g]enerally the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of discretion[,]" the court went on to find that "where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Id.* at 22. Ultimately, the Missouri Supreme Court found that the promulgated list was not a rule and therefore "the circuit court lacked subject-matter jurisdiction pursuant to section 536.050.1 to render the sought-after declaratory judgment." *Id.* at 25–26 (noting further that because "the appellants could not even predict the effect such a declaratory judgment would have[,] … it would thus "not have a 'conclusive effect' or 'lay to rest the parties' controversy'" as is required by the general principles underlying declaratory judgment actions). Additionally, the supreme court noted that "the authority of the courts of this State to render declaratory judgments must be used and operate within the limits of the constitutional powers and duties of the courts" and, "[o]ne such limit is the traditional doctrine of ripeness, which, when applied in this case, also commands dismissal of the appellants' actions." *Id.* at 26. In closing, the supreme court concluded that, because the challenged list promulgated by the defendants "is not a rule and the inclusion of the

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Rivers not rulemaking, and because the controversy cannot be resolved by declaratory judgment and is not ripe for adjudication, the judgment of dismissal is affirmed. However, *because the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice*." *Id.* at 29 (emphasis added) (citing Rule 84.14).

Therefore, while dismissals may be reviewed for an abuse of discretion in certain contexts, that standard of review is not appropriate in this particular case, just as it was not appropriate in *Missouri Soybean Association*. This Court is not being asked to determine whether the dismissal itself was appropriate under the circumstances; it is instead being asked to decide a pure question of law: should the dismissal have been with or without prejudice when that dismissal was based solely on standing, mootness, and ripeness—i.e., the jurisdiction or authority of a circuit court and the justiciability of the claims raised.

In any event, even if this Court were to review the dismissal with prejudice for an abuse of discretion, the circuit court erred. Under that standard, this Court must reverse the circuit court's ruling "'if it is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration.'" *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 397 (Mo. App. W.D. 2015) (quoting *Burnett v. Kansas City Sch. Bd.*, 237 S.W.3d 237, 238–39 (Mo. App. W.D. 2007)); *see also Peet*, 103 S.W.3d at 876–77 ("Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to show a lack of careful consideration and shock the sense of justice.").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Moreover, "[a]n abuse of discretion occurs where the [trial] court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc); *see also Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) ("A district court abuses its discretion if, as relevant here, it commits an error of law."). In reviewing questions of law, this Court "reviews the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012) (quotation and citation omitted). As supported by the discussion, *infra*, not only was dismissing the claims with prejudice here unreasonable considering the bases for dismissal were a lack of subject-matter jurisdiction and non-justiciability but dismissing with prejudice under these circumstances was an erroneous legal conclusion because the circuit court had no authority to reach the merits of the case.

Rule 67.03 is irrelevant to the issues in this appeal. Although the rule states that an involuntary dismissal is "without prejudice unless the court in its order for dismissal shall otherwise specify[,]" this does not authorize a court to reach the merits of a case when it otherwise lacks jurisdiction or authority to do so. A circuit court does *not* have the discretion to overstep in this manner. Additionally, a trial court's decision to deny a party's request to amend a petition—a ruling that would be properly reviewed for an abuse of discretion—is, once again, easily distinguishable from a case like this one, where a circuit court improperly reaches the merits of a case despite lacking jurisdiction or authority to do so based upon standing, ripeness, and mootness. And, as discussed,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

infra, standing could be achieved and the circumstances could change in such a way that the claims become ripe and no longer moot.

To obtain judgment on the merits in any case, plaintiffs must have standing, the case must not be moot (or, if moot, it must meet an exception), and the case must be ripe. In other words, standing, mootness, and ripeness are prerequisites for a court to reach the merits of a case.[2] *See, e.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58,

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[2] As this Court has noted, "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012) ("affirm[ing] the circuit court's finding that Borges and Johnson lacked standing and enter[ing] the order the circuit court should have entered, dismissing without prejudice Borges and Johnson's petition" pursuant to Rule 84.14). Presumably, in *Borges*, this Court was alluding to the recent discussion of jurisdiction versus authority in *Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009), where the Missouri Supreme Court noted that "[s]ubject-matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." (noting that, unlike federal courts, the circuit courts in Missouri "have original jurisdiction over *all* cases and matters, civil and criminal"). "[T]he authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction…." *Id.* at 254.

While the law surrounding jurisdiction versus authority continues to evolve in court decisions, the issue need not be reached here. Under either theory, dismissal for standing, mootness, or ripeness should be without prejudice.

In *Borges*, before recognizing that the issue may be one of authority and not jurisdiction, this Court recognized that "[i]n the past, we have found that if a party lacks standing sufficient to maintain an action, the court necessarily does not have jurisdiction over the claims presented." *Id.* (citing *W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D.1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent]."). "Therefore, a claim that a party lacks standing has generally been treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 55.27(a)(1)." *Id.* (citing *State ex rel. Christian Health*

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits.").

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits.

The underlying facts in this case are uncontested. It makes no difference in this appeal that Appellants asserted that they had standing below and maintained that argument through the post-trial filings. In this appeal, Appellants have elected not to dispute the circuit court's ultimate finding that they lack standing to bring Count I. However, it remains true that, "once the circuit court determined that they lacked standing, it was without jurisdiction to reach the merits of their claims." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012). A plaintiff without standing "presents no legally justiciable issue," and therefore, "the trial court should have dismissed the[] petition without prejudice." *Id.* at 184. Thus, while dismissal of a claim where a plaintiff lacks standing is appropriate, what is not appropriate is a dismissal *with prejudice* that, by definition, reaches the merits of the claim.

"A dismissal with prejudice constitutes an adjudication on the merits and 'bars the assertion of the same cause of action or claim against the same party.'" *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000) (quoting Rule 67.01). As such, courts

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Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv., 229 S.W.3d 270, 276 (Mo. App. W.D.2007)).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

do not have any "discretion" to reach the merits of a case where plaintiffs lack standing. Here, the circuit court erred in making a dismissal with prejudice. However, the circuit court did not abuse any discretion, because it had no discretion to abuse under the circumstances.

Amending the dismissal to one without prejudice would not undermine any aspect of this case. While Appellants agree that everyone worked very hard to litigate this case over the span of several years, including a week-long trial and two appeals to this Court, that is simply the nature of litigation. It is not always fast or easy. Moreover, here, standing is curable and could be achieved in the future. The court's determination that these particular plaintiffs did not have standing under the circumstances does not preclude Appellants from ever having standing in the future. This further distinguishes this case from one where a decision related to standing might be based upon undisputed facts but where those facts failed to state a claim at all.

Here, even the circuit court recognized that "[s]tanding is a jurisdictional matter antecedent to the right of relief." D165 p. 2. The circuit court found that, to have standing to challenge the insufficient funding of § 115.427 in a manner that would preclude enforcement, a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification. *Id.* If a member of the organizational plaintiffs suffered this harm, according to the circuit court's order, the organization would have associational standing. Additionally, Missouri courts could—and arguably should—begin to embrace organizational standing, just as federal courts have for decades. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Thus,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004294

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

standing to raise the claims is achievable and plaintiffs, with their thousands of members, should not be forever barred because the circuit court found they lacked standing at the time of the trial.

Amending the judgment to a dismissal without prejudice in this case would not destabilize any purported "customary practice" of appellate courts affirming dismissals with prejudice where the issue involved a party's standing. And, if it is a customary practice of appellate courts in this state to affirm dismissals with prejudice based solely upon a lack of standing then that practice should be revisited given the legal error involved and dangerous precedent it sets and the many decisions indicating that a court should not reach the merits of a case when the plaintiffs lack standing.

The cases relied on by Respondents to support this argument are inapposite. In all three of the cited cases, the dismissals were based upon the pleadings, the review of the dismissal itself was *de novo*, and the plaintiffs argued only that their pleadings were sufficient to demonstrate standing but did not raise the issue of whether the dismissal should be with or without prejudice. Therefore, none of the cases include any discussion or point of error related to the fact that the cases were denied with prejudice. In *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 117 (Mo. App. W.D. 2018), and *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017), the plaintiffs argued that they pleaded sufficient facts to establish standing to challenge violations of the Fair Credit Reporting Act (FCRA) and did not raise any argument related to the petitions being denied with prejudice. In both cases, this Court looked at the sufficiency of the pleadings to determine if the plaintiffs pled injuries establishing standing for an FCRA

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

claim. *Campbell*, 561 S.W.3d at 120–21; *see also Corozzo*, 531 S.W.3d at 572. Likewise, in *Missouri Public Service Commission v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009), the appeal followed a lower court's dismissal for lack of standing based upon the allegations in the petition and no error was asserted relating to the dismissal being with prejudice. This Court should not premise its decision in the present case on previous cases where a dismissal with prejudice based on standing was affirmed but where the "with prejudice" distinction was not raised by a party or discussed by this Court.

Moreover, the decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo banc. 2020), does not change the standing argument or foreclose the possibility that a plaintiff or member of a plaintiff organization could subsequently satisfy standing requirements. Count I of the third amended petition alleged that § 115.427.1 could not be enforced pursuant to § 115.427.6(3). There has been no change to the identification requirements in § 115.427.1 or the funding requirements in § 115.427.6(3), namely that "[a]ll costs associated with the implementation of this section shall be reimbursed from the general revenue of this state by an appropriation for that purpose. If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced." Pursuant to the circuit court's holding, standing could still be achieved regardless of the *Priorities USA* decision (i.e., a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification). The *Priorities USA* decision is limited to § 115.427.2(1) and .3 (i.e., the affidavit requirement). At any future election, even though

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004296

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

the *Priorities USA* decision requires the acceptance of non-photo forms of identification without a signed affidavit, a poll worker could still require a voter to present photo identification and turn them away if they do not. Section 115.427.1 still states that voters "shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification to elected officials." As long as that subsection remains in effect, poll workers could ask voters to present those types of photo identifications at the polls and this incorrect request could be based on the State's insufficient funding to implement the law.[3]

It is not futile to do as the law requires and amend the dismissal here to one without prejudice when the circuit court had no jurisdiction or authority to enter a dismissal *with* prejudice. If the dismissal with prejudice was to be affirmed, Appellant organizations and their members who do achieve standing would be forever barred from challenging the enforcement of § 115.427.1 pursuant to § 115.427.6(3)—relief that was *not* granted in *Priorities USA*.

[3] *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his over registration card – an acceptable form of non-photo identification under option two").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdiction or authority to adjudicate the case on the merits after finding the claims to be moot and unripe.

Like a case where there is no standing, a moot or unripe case is not justiciable. In other words, the circuit court should not have reached the merits by dismissing Counts I and II with prejudice for mootness (Counts I and II) and being unripe (Count II). Appellants could be eligible to bring a claim at a future date if the issues were no longer moot and ripe for a lawsuit, but Appellants will be forever barred if this Court affirms the dismissal with prejudice.

Count I challenged the enforcement of § 115.427.1 pursuant to § 115.427.6(3). Those specific identification (§ 115.427.1) and funding (§ 115.427.6(3)) requirements have never changed. *Priorities USA* held only that the affidavit requirement found in § 115.427.2(1) and .3 is an unconstitutional burden on the fundamental right to vote. While the *Priorities USA* court enjoined portions of § 115.427 relating specifically to the affidavit requirement, including "the dissemination of materials indicating photo identification is required to vote[,]" 591 S.W.3d at 451, Appellants' potentially broader challenge to the enforcement of § 115.427.1 pursuant to § 115.427.6(3) should not be forever barred on this basis.

Regarding mootness, the circuit court seemed to hold that by eliminating the affidavit requirement, the circuit court in *Priorities USA* also enjoined the strict photo-identification requirements of § 115.427.1 "as a practical matter," D165 pp. 3–4, thus mooting any sufficient funding argument related to the enforcement of § 115.427.1 in this

AMERICAN OVERSIGHT

case. However, a mootness finding could change regardless of the affidavit requirement. In fact, *Priorities USA* supports a finding that it is likely a poll worker will not be properly informed as to how to implement the law and may require specific § 115.427.1 photo identification and then turn away a voter who does not have it, despite the injunction in that case. *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his voter registration card – an acceptable form of non-photo identification under option two"). Thus, if an eligible voter were to go to a polling place to cast a ballot and a poll worker required that voter to present a specific form of photo identification and turned them away if they did not (i.e., they achieved standing), and if that voter (or the Appellant organization of which they are a member) alleged that the funding requirements of § 115.427.6(3) were not being met and therefore § 115.427.1 could not be enforced, a claim for relief would be stated and would not be mooted by *Priorities USA*. The funding requirements of § 115.427.6(3) continue to exist and it is well-established law that "requiring individuals to present photo identification to vote is unconstitutional." *Priorities USA*, 591 S.W.3d at 458 (citing *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006)). Although Appellants do not challenge the circuit court determination that this case was mooted under the circumstances, the *Priorities USA* decision as to affidavits should not preclude Appellants from all such future claims.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004299

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Priorities USA was tried in late September and early October 2018 (first decision entered by the circuit court on October 23, 2018) and a final decision of the Missouri Supreme Court was issued on January 14, 2020 (rehearing denied January 30, 2020). This case was tried in August 2019 and a judgment dismissing Appellants' claims was signed April 20, 2020. Given the unique circumstances of the 2020 elections during the COVID-19 pandemic and the significant increase in voting absentee and by mail in Missouri, some of the scenarios that would present a live controversy may yet play out in future elections.

Count II of Appellant's petition alleged that the failure to provide correct information to the public, i.e., the "advance notice" requirement, resulted in a violation of § 115.427.5. Count II was not dismissed on standing grounds but only as being moot and unripe. In dismissing Count II, the circuit court found that the injunctive relief in *Priorities USA* mooted the need for the specific injunctive relief—albeit not precisely the same relief—requested in this case. *See* D165 pp. 5–6 (comparing the relief requested here and the injunction ordered in *Priorities USA*).[4] In making its ruling here, the circuit court noted that "the original manner in which [the State] tried to fulfill [the advance-notice] obligation was found to be deficient" in *Priorities USA* and then found that whether the State's "subsequent information campaigns avoid this deficiency is not yet ripe." D165 pp. 5–6. So, while the mootness determination at the time the circuit court

[4] For example, Appellants asked for a broader injunction regarding multiple materials that had been and were being disseminated and sought an order requiring the State to correct the existing misrepresentations they created.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

ruled in April 2020 is not challenged here, as the circuit court acknowledged in its ripeness finding, Appellants' claim related to advance notice may resurface in the future if the Secretary of State continues to provide incorrect information to voters about all of § 115.427's requirements. In other words, while the *Priorities USA* court did enjoin the State from disseminating materials representing to the public that a photo identification card is required to vote, including materials with a specific graphic indicating voters will be asked for a photo identification card without specifying the other acceptable forms of identification that can be used to vote, that injunction in a case in which Appellants were not parties should not bar them from bringing a claim in the future if the advance notice provision of § 115.427.5 is violated. *See Priorities USA*, 591 S.W.3d at 559–61; D165 p. 5.[5] As such, subsequent information campaigns by the State could make this issue ripe, in which case Appellants should be entitled to bring a suit.

The possibility of a future claim is further supported by the fact that, in *Priorities USA*, the prohibition on the dissemination of materials focused on a single advertisement—one of many used by the State—and the injunction was "limited in scope, as it enjoined the State from disseminating only those 'materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show.'" 591 S.W.3d 460–61. Thus, while it is *possible* that this limited-in-scope injunction will stop the State from disseminating

[5] As noted by the supreme court in *Priorities USA*, a political science expert "testified that materials that are incomplete and fail to describe all the forms of identification permitted by section 115.427 cause voter confusion and decrease voter turnout." 591 S.W.3d at 460.

AMERICAN OVERSIGHT

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incorrect information about the requirements of § 115.427, it in no way guarantees that will be the case. Just because no party has yet brought a lawsuit does not mean that the claim will not become ripe. However, Appellants could not currently bring this claim even if it were to become ripe because they have been barred by the circuit court's dismissal with prejudice. The advance-notice requirement found in § 115.427.5 is ongoing and the State must comply with both the law's requirements *and* the injunction issued in *Priorities USA*. The *Priorities USA* decision should not be read to mean that the claim raised in this case would never become ripe in the future.

"The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Mo. Soybean Ass'n*, 102 S.W.3d at 26 (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148–49 (1967) (overruled on other grounds)). "Filing a suit prematurely should not prevent a plaintiff from proceeding with an action when it becomes ripe." *Brinson v. Whittico*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990). "Thus, if an action is deemed premature and a trial court dismisses it for that reason, the action should be dismissed without prejudice." *Id.* (holding that, "[b]ecause the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication."). Although *an* injunction was issued in *Priorities USA*, Appellants should not be forever barred from raising any claim related to advance notice under § 115.427.5, consistent with the trial

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MO-AG-22-0644-A-004302

court's acknowledgement that this issue could subsequently become ripe.

Conclusion

Because Appellants' claims were dismissed based on jurisdictional and justiciability grounds (standing, mootness, and ripeness), the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on May 4, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,948 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

/s/ Anthony E. Rothert

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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Table of Contents

Table of Authorities 3

Jurisdictional Statement 6

Statement of Facts and Procedural Background 7

Points Relied On 9

Argument 11

Point I. 14

A. Standard of Review and Preservation of Error 14

B. Argument 15

Point II 18

A. Standard of Review and Preservation of Error 18

B. Argument 19

Point III 21

A. Standard of Review and Preservation of Error 21

B. Argument 21

Conclusion 24

Certification of Service and of Compliance with Rule 84.06(b) and (c) 26

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004307

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Authorities

Cases

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 11

Asberry v. Bannes-Shaughnessy,
734 S.W.2d 250 (Mo. App. E.D. 1987) 11

B.S. v. State,
966 S.W.2d 343 (Mo. App. E.D. 1998) 10, 12, 19

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 9, 16

Boyd v. Boone Mgmt., Inc.,
676 S.W.2d 24 (Mo. App. W.D. 1984) 14, 19, 21

Brinson v. Whittico, M.D.,
793 S.W.2d 632 (Mo. App. E.D. 1990) 10, 23

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 17

Charron v. State,
257 S.W.3d 147 (Mo. App. W.D. 2008) 11, 20

Chastain v. Geary,
539 S.W.3d 841 (Mo. App. W.D. 2017) 15

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 17

Doss v. Brown,
419 S.W.3d 784 (Mo. App. W.D. 2012) 15

Eaton v. Doe,
563 S.W.3d 745 (Mo. App. E.D. 2018) 17

AMERICAN OVERSIGHT

Empire Dist. Elec. Co. v. Coverdell,
588 S.W.3d 225 (Mo. App. S.D. 2019) 11

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 20

Healthcare Servs. of the Ozarks, Inc. v. Copeland,
198 S.W.3d 604 (Mo. banc 2006) 16

Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit,
277 S.W.3d 740 (Mo. App. W.D. 2008) 19

Mo. Coal. for Env't v. State,
579 S.W.3d 924 (Mo. banc 2019) 17

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 17

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) ..... Passim

Peachtree Apartments v. Pallo,
317 S.W.3d 189 (Mo. App. E.D. 2010) 10, 12, 18

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 8

Querry v. State Highway & Transp. Comm'n,
60 S.W.3d 630 (Mo. App. W.D. 2001) 15

Rosenfeld v. Thoele,
28 S.W.3d 446 (Mo. App. E.D. 2000) 10, 19

Schultz v. Warren Cty.,
249 S.W.3d 898 (Mo. App. E.D. 2008) 10, 22

Schweich v. Nixon,
408 S.W.3d 769 (Mo. banc 2013) 10, 22

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004309

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 11, 19

Sexton v. Jenkins & Assocs.,
152 S.W.3d 270 (Mo. banc 2004) 12

State v. West,
548 S.W.3d 406 (Mo. App. W.D. 2018) 14, 18, 21

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D. 1988) 9, 16, 17

Statutes

Section § 115.427, RSMo 7, 8

Section § 510.150, RSMo 9, 10, 15, 19, 22

Other Authorities

35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 21

Missouri Constitution, article 5, section 3 ..... 6, 12

Missouri Supreme Court Rule 67.01 11

Missouri Supreme Court Rule 84.14 ..... 14, 20, 21, 22, 24

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004310

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of Cole County entered on April 20, 2020. Following this Court's order allowing Appellants to file a Notice of Appeal by Special Order pursuant to Rule 81.07(a), the Notice of Appeal was filed on September 23, 2020.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Western District of the Court of Appeals. § 474.050.

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AMERICAN OVERSIGHT

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Statement of Facts and Procedural Background

On June 8, 2017, Appellants, Missouri State Conference of the National Association for the Advancement of Colored People and the League of Women Voters of Missouri, filed a Petition seeking injunctive and declaratory relief with respect to Missouri Revised Statute § 115.427. That statute, which went into effect on June 1, 2017, drastically reduced voters' options for identifying themselves in order to vote in person. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, 17AC-CC00309 (19th Jud. Cir. Ct.).[1] On December 6, 2017, the trial court granted Respondents' Motion for Judgment on the Pleadings and dismissed Appellants' Petition for failure to state a claim. *Id.*

After this Court reversed that decision, the case was reinstated in November 2018 and proceeded at the trial court in case number 17AC-CC00309-01. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD81484; D83-84. On June 18, 2019, Appellants filed their Third Amended Petition. D98-106. After trial on the merits, the trial court dismissed the Third Amended Petition for lack of standing, mootness, and/or ripeness. The trial court did not address the merits of Plaintiffs' claims, but nonetheless dismissed the Petition *with prejudice.* That jurisdictional, or justiciability, dismissal with prejudice was error and is the issue in this appeal.

In Count I of the Third Amended Petition, Appellants asserted that § 115.427.1 cannot be enforced under § 115.427.6(3) because insufficient state funds were

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[1] On June 30, 2017, Appellant Christine Dragonette was added as a party with the filing of the First Amended Petition.

AMERICAN OVERSIGHT

appropriated from the general revenue to properly implement § 115.427.1. D98 pp. 19-23. In Count II, Appellants asserted that the requirement in § 115.427.5 was violated by the failure to provide the public accurate and non-misleading "Advance Notice" about the law restricting the options for identifying oneself at the polls. D98 pp. 24-26.

The court held a bench trial from August 19 - 23, 2019. Thereafter, on April 20, 2020, the circuit court entered its final judgment, dismissing Count I with prejudice for lack of standing and mootness, and dismissing Count II with prejudice as moot and not ripe in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). D165.

On May 19, 2020, Appellants moved the court to amend its judgment to be a dismissal without prejudice. D166. The trial court did not rule on this post-trial motion. Appellants then filed a notice of appeal on August 26, 2020. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD83987. However, the parties then disputed whether the post-trial motion was *authorized*, which would have delayed the date upon which the judgment became final for appeal. Appellants then filed a motion to file a notice of appeal by special order, which was sustained. Appellants' Notice of Appeal was filed on September 23, 2020.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004313

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Points Relied On

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I WITH PREJUDICE FOR LACK OF STANDING BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR LACK OF STANDING SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT STANDING IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012)**

***W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988)**

Section 510.150, RSMo.

II. THE CIRCUIT COURT ERRED IN DISMISSING COUNTS I AND II WITH PREJUDICE BASED ON MOOTNESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR MOOTNESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT MOOTNESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004314

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

***Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010)**

***Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000)**

***B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998)**

Section 510.150, RSMo.

III. THE CIRCUIT COURT ERRED IN DISMISSING COUNT II WITH PREJUDICE BASED ON RIPENESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR RIPENESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT RIPENESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013)**

***Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008)**

***Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990)**

Section 510.150, RSMo.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004315

Argument

This appeal presents a discrete question of law: when a circuit court finds that it lacks subject-matter jurisdiction in a case because of a lack of standing, mootness, or ripeness, should it dismiss with or without prejudice? The answer is clear: when a circuit court lacks subject-matter jurisdiction to resolve a dispute's underlying merits, it should dismiss claims *without* prejudice. *See Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice."); *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986) ("Inasmuch as the trial court did not have jurisdiction … the dismissal is without prejudice to any further action appellant may wish to take"); *see also Asberry v. Bannes-Shaughnessy*, 734 S.W.2d 250, 252 (Mo. App. E.D. 1987) (explaining that the burden of proof on a motion for lack of subject matter jurisdiction "is lower since it is not a decision on the merits, the dismissal is without prejudice and because any action taken by a court lacking subject matter jurisdiction is void").

Whether a trial court dismisses a claim with or without prejudice is significant. "[D]ismissal with prejudice bars the assertion of the same cause of action or claim against the same party." Rule 67.01. *Accord Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d

AMERICAN OVERSIGHT

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225, 237 (Mo. App. S.D. 2019). On the other hand, "[d]ismissal without prejudice is usually not an adjudication on the merits of the claim and does not affect the plaintiff's right to refile the action." *Sexton v. Jenkins & Assocs.*, 152 S.W.3d 270, 273 (Mo. banc 2004). In certain circumstances, not applicable here, Appellants acknowledge that "a dismissal without prejudice may be considered a judgment on the merits of issues, such as jurisdiction, that are actually litigated and decided." *Id*. In this appeal, Appellants do not challenge the trial court's factual findings. Instead, Appellants assert only that the trial court erred in dismissing their claims *with prejudice*, thus preventing any chance they may have to vindicate their rights if they gain standing, the case is no longer moot, and the issues become ripe for adjudication.

The Missouri Constitution confers jurisdiction upon the circuit courts over "cases and matters." Mo. Const. art. V, sec. 14(a). "Article V of the Missouri Constitution governs subject-matter jurisdiction, which is the court's authority to render a judgment in a particular category of case." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010); *see also Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) ("Subject-matter jurisdiction concerns 'the nature of the cause of action or the relief sought 'and exists only when the court 'has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.'" (citations omitted)). The Missouri Constitution "requires a case to be justiciable in order for the circuit court to have subject-matter jurisdiction over it." *Id.*; *see also B.S. v. State*, 966 S.W.2d 343, 344 (Mo. App. E.D. 1998).

AMERICAN OVERSIGHT

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Appellants do not dispute that a trial court lacks subject-matter jurisdiction to decide the merits of a case where: (1) the plaintiff lacks standing; (2) the case is moot and no exception applies; or (3) the case is not ripe. But where the circuit court dismisses a case on one or more of these jurisdictional issues, it ought to do so *without* prejudice because any decision on the merits is inappropriate.

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AMERICAN OVERSIGHT

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Point I

The circuit court erred in dismissing Count I with prejudice for lack of standing because Missouri law requires that claims dismissed for lack of standing should be dismissed without prejudice, in that standing is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal is purely a question of law. Appellants do not dispute the underlying facts. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*"). The review here is straightforward because Appellants do not dispute the trial court's finding that they lack standing, only the court's act of dismissing the claims *with* prejudice based on that finding.

The error was preserved for appeal. Although no post-trial motion was required to preserve the issue, Appellants tried to resolve it with the trial court before filing this appeal by filing a post-trial motion to amend the judgment to reflect dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment

AMERICAN OVERSIGHT

as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

This Court has routinely found that a dismissal for lack of standing is a dismissal for want of subject matter jurisdiction. *See, e.g.*, *Chastain v. Geary*, 539 S.W.3d 841, 848 (Mo. App. W.D. 2017) ("[T]he court does not have subject matter jurisdiction to decide substantive issues if the party lacks standing."); *Doss v. Brown*, 419 S.W.3d 784, 787 (Mo. App. W.D. 2012) ("A trial court does not have subject matter jurisdiction if a petitioner lacks standing to bring the action."); *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 637 (Mo. App. W.D. 2001) (same).

"Subject-matter jurisdiction concerns the nature of the cause of action or the relief sought and exists only when the court has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." *Mo. Soybean Ass'n,* 102 S.W.3d at 21 (internal quotation omitted). "A dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Here, there should have been no adjudication on the merits where dismissal was for a lack of standing because "[w]hether considered a claim for lack of subject matter jurisdiction or lack of authority, a court, in disposing of a case for lack of standing, cannot reach the merits."[2]

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[2] In *Borges*, this Court noted that "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." 358 S.W.3d at 183. Like *Borges*, that issue need not be decided here; the solution in the present case is simply to dismiss the claim without prejudice because the

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Borges v. Mo. Pub. Entity Risk Mgmt. Fund, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012); *see also W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent].").

"Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. banc 2006). Consequently, a dismissal for lack of standing should be without prejudice. *See*, *e.g.*, *Borges*, 358 S.W.3d at 183-84 ("[O]nce it determined that [Plaintiffs] lacked standing, the trial court was without authority to reach any substantive claim, and, thus, dismissal should have been entered . . . . Therefore, we affirm the circuit court's finding that [Plaintiffs] lacked standing and enter the order the circuit court should have entered, dismissing without prejudice [Plaintiffs'] petition."); *Eaton v. Doe*, 563 S.W.3d 745, 750 (Mo. App. E.D. 2018) ("[B]ecause we have concluded the dismissal is due to a lack of standing, we modify the dismissal to be without prejudice, rather than with prejudice . . . . We affirm the judgment of the trial court as modified.").[3]

---

trial court could not reach the merits if its dismissal was because Appellants lacked standing.

[3] The limited exception in which the Missouri Supreme Court has affirmed a dismissal for lack of standing with prejudice is distinguishable. *See Mo. Coal. for Env't v.*

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The trial court erred in dismissing Count I with prejudice for lack of standing, and this Court should enter judgment dismissing Count I without prejudice.[4]

State, 579 S.W.3d 924, 928 (Mo. banc 2019) (affirming dismissal with prejudice for lack of standing where plaintiffs conceded lack of taxpayer standing and where the Court held standing was not created by a statute). Plaintiffs' standing in that case could not be cured because it was foreclosed as a matter of law. There is no such lack of standing here. Appellants' lack of associational standing under the circuit court's order would be cured if individual Plaintiff members are denied their right to vote upon presenting themselves at the polls without a photo ID. D165 p. 2 ("The potential injured party would have to first, timely present himself to the polls and second, be eligible to vote. One cannot claim to be injured by a photo ID requirement unless they [are] otherwise eligible to vote, actually try to vote…but [are] not allowed to vote for a lack of a photo ID."). *See W. Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 583 (Mo. App. W.D. 1988) (holding plaintiff was entitled to amend petition to cure defects with regard to standing).

[4] Appellants also acknowledge other cases include an unchallenged dismissal with prejudice on the basis of standing. Those cases, however, do not provide guidance because the issue of the denial being with (as opposed to without) prejudice was not raised or discussed. *See Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

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Point II

The circuit court erred in dismissing Counts I and II with prejudice based on mootness because Missouri law requires that claims dismissed for mootness should be dismissed without prejudice, in that mootness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

As noted *supra*, although the Court defers "to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). "A circuit court does not have subject-matter jurisdiction under [a]rticle V, section 14(a) to adjudicate a case that is not justiciable because it has become moot." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010). The issue before this Court is purely a question of law and thus subject to *de novo* review. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*").

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v.*

AMERICAN OVERSIGHT

Boone Mgmt., Inc., 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

A dismissal for mootness is a dismissal for want of subject-matter jurisdiction and as such should be without prejudice. *See*, *e.g.*, *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000) ("Moot cases should generally be dismissed, as the circuit court lacks subject matter jurisdiction."); *B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998) ("Because plaintiffs 'cause of action was moot, it was not justiciable and the trial court did not have subject matter jurisdiction over it."); *see also Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. W.D. 2008) (raising mootness sua sponte after explaining that "[p]arties cannot . . . confer subject matter jurisdiction upon a court"). When courts lack subject matter jurisdiction to resolve the merits of a dispute, the claims should be dismissed without prejudice. *Compare* § 510.150 ("A dismissal with prejudice operates as an adjudication upon the merits."), *with Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of

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subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice.").

Accordingly, because the law is clear that dismissal for mootness cannot be on the merits and thus must be without prejudice, appellate courts routinely modify such judgments. *See Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476, 485 (Mo. App. E.D. 2010) ("We remand the cause to the circuit court with instructions to vacate its judgment and to dismiss [Plaintiffs'] petition without prejudice due to the mootness of the controversy"); Defenses, 35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 ("Moot cases should be dismissed without prejudice.").

The trial court erred in dismissing Counts I and II with prejudice for mootness, and this Court should enter judgment dismissing Counts I and II without prejudice.

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Point III

The circuit court erred in dismissing Count II with prejudice based on ripeness because Missouri law requires that claims dismissed for ripeness should be dismissed without prejudice, in that ripeness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal—whether a claim that is not ripe should be dismissed with or without prejudice—is purely a question of law and is subject to *de novo* review.

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

Ripeness implicates the justiciability of a claim and therefore any dismissal should not reach the merits of the case. As noted, however, "[a] dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Because the trial court cannot reach the

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merits if it determines a claim is not ripe for adjudication, dismissals on ripeness grounds have been modified by appellate courts, including the Missouri Supreme Court, to dismissals without prejudice. *See Mo. Soybean Ass'n*, 102 S.W.3d at 29 ("[B]ecause the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice."); *Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013) ("While the lack of standing and ripeness does not implicate the merits of the Auditor's claims as to his own appropriation, it does preclude relief in this action. Accordingly, pursuant to Rule 84.14, this Court will issue the ruling that the trial court should have entered. The Auditor's claims are dismissed without prejudice."); *see also Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008) ("[B]ecause the controversy was not ripe for judicial review, the circuit court's judgment is one without prejudice . . . . The circuit court's judgment of dismissal is hereby modified to explicitly state that the dismissal is due to lack of ripeness and is one without prejudice.").

In addition, modifying the trial court's judgment to dismissal without prejudice on Count II is particularly warranted in this case as a prudential matter. The court made clear that Appellants 'request for mandatory injunctive relief could be cured and would become ripe if the Secretary of State failed to provide adequate advance notice to the public under the terms of the *Priorities USA* injunction:

> The Court finds that the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*. The Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public. The original manner in which he tried to fulfill that obligation was found to be

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> deficient. The question of whether or not the Secretary's subsequent information campaigns avoid this deficiency is not yet ripe.

D165 pp. 5-6.

Should the Secretary of State fail to provide sufficient required advance notice, including by making inaccurate statements regarding the narrowing of identification options for voters in Missouri, Appellants should not be barred from seeking the appropriate mandatory injunctive relief in the future. *Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990) ("The judgment is reversed and the cause remanded. Because the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication.").

Thus, the circuit court erred in dismissing Count II with prejudice based on ripeness, and this Court should enter judgment dismissing Count II without prejudice.

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Conclusion

Because Appellants' claims were dismissed based on jurisdictional grounds of standing and mootness and justiciability grounds of ripeness, the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on February 2, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,762 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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MO-AG-22-0644-A-004331

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WD84028

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs-Appellants,

v.

STATE OF MISSOURI, et al.,

Defendants-Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

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AMERICAN OVERSIGHT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1
TABLE OF AUTHORITIES 2
INTRODUCTION 4
STATEMENT OF FACTS 6
ARGUMENT 11
I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I). 11
A. This Court should review the trial court's dismissal with prejudice for abuse of discretion. 11
B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing. 14
II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III). 18
A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion. 18
B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims. 19
C. The trial court properly dismissed Count II with prejudice as unripe. 22
CONCLUSION 24

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF AUTHORITIES

Cases

Allen v. City of Greenville, MO,
336 S.W.3d 508 (Mo. App. S.D. 2011) 12

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 13

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 16

Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.,
92 S.W.3d 232 (Mo. App. W.D. 2002) 12

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 16

Eckel v. Eckel,
540 S.W.3d 476 (Mo. App. W.D. 2018) 16

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 21

Gohlston v. Lightfoot,
825 S.W.2d 864 (Mo. App. W.D. 1992) 14, 20

Jennings v. City of Kansas City,
812 S.W.2d 724 (Mo. App. W.D. 1991) 15

Mahoney v. Doerhoff Surgical Servs., Inc.,
807 S.W.2d 503 (Mo. banc 1991) 19

McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.,
339 F.3d 1087 (9th Cir. 2003) 20

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 20

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

AMERICAN OVERSIGHT

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) 4, 12, 18

Osuji v. Missouri Dept. of Social Services, Div. of Family Services,
34 S.W.3d 251 (Mo. App. E.D. 2000) 19

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 11

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 4, 6, 7, 8, 23

Rickmyer v. Browne,
995 F.Supp.2d 989 (D.Minn.2014) 19

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999) 11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 13

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. 1982) 11

State Conference of Nat'l Ass'n for Advancement of Colored People v. State,
563 S.W.3d 138 (Mo. App. W.D. 2018) 6, 8, 9, 10, 16

Timber Point Properties III, LLC v. Bank of Am., N.A.,
2014 WL 7005195 (W.D. Mo. Dec. 10, 2014) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 4, 11, 19

Statutes

Section 115.427, RSMo 6

Rules

Missouri Supreme Court Rule 67.03 13

Mo. Sup. Ct. R. 81.05(a)(1) 15

Mo. Sup. Ct. R. 84.04(d) 16

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004335

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

INTRODUCTION

The circuit court correctly issued a final judgment ruling that Plaintiffs lack standing to bring an insufficient-appropriations claim under Missouri's voter-identification law, that all of their claims are moot in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448, 461 (Mo. banc 2020), and that their statutory claims about insufficient advance notice of Missouri's voter identification requirements are not ripe. On appeal, Plaintiffs do not argue the merits of any of those determinations. Rather, they contend only that the trial court erred in dismissing their claims *with prejudice*. For three principal reasons, this Court should affirm the trial court's with-prejudice dismissals and thereby reinforce the prevailing rule that trial courts have discretion to dismiss claims with or without prejudice based on the circumstances present in a case.

First, Plaintiffs apply the wrong standard of review of a trial court's decision to dismiss cases with or without prejudice; this Court should review for abuse of discretion and not exercise *de novo* review. *See Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) ("This court will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court."); *cf. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (*de novo* review of the merits of the dismissal may be appropriate where "the facts are uncontested.").

AMERICAN OVERSIGHT

Second, under the correct standard of review, the trial court properly exercised its discretion in dismissing Count I with prejudice for lack of standing. The trial court issued its judgment after a weeklong trial on Plaintiffs' third amended petition, the judgment references evidence elicited at trial, and the parties contested the facts of Plaintiffs' standing to bring the case. It would be futile, and it would prejudice Respondents, to transform the trial court's judgment into a mere dismissal without prejudice and allow Plaintiffs to bring the same suit again.

Third, the trial court correctly dismissed, with prejudice, Counts I and II as moot and Count II as unripe because there is no realistic probability that Plaintiffs can cure those problems in light of the Supreme Court's permanent injunctions in *Priorities USA*. Plaintiffs have not appealed the merits of the mootness question, and thus they have conceded that issue. It would be futile to allow them to bring their suit again, and nothing in Missouri law mandates that dismissals for mootness be without prejudice. The trial court also correctly dismissed Count II as unripe. Count II is purely a statutory claim where all the relief requested was provided in the *Priorities USA* injunctions based on the facts Plaintiffs pleaded, and Plaintiffs have not identified subsequent Voter ID advertising that violates those injunctions.

For these reasons, this Court should affirm the trial court's judgment dismissing Counts I and II of the Third Amended Petition with prejudice.

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STATEMENT OF FACTS

Backed by a constitutional amendment ("Voter ID Amendment") approved by popular vote, in 2016 the State adopted its current voter identification statute that allows for voting with both photo and non-photo forms of identification. § 115.427, RSMo (the "Voter ID Law"). After a constitutional challenge to certain aspects of the Voter ID Law's requirements, the Missouri Supreme Court largely upheld the statute last year in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). But the Court affirmed a trial court's declaration that the statute's affidavit requirement for some non-photo forms of identification was unconstitutional. And it upheld the lower court's injunctions against disseminating certain advertising materials about the Voter ID Law, including "materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show," *Id.* at 460–61, and "materials which represent that a photo identification card is required to vote," (D165, p.5).

A. The Third Amended Petition's claims and early procedural history.

Plaintiffs in this case are two organizations and one individual Missouri voter. They filed the original Petition in June 2017, and the case has previously been before this Court in an earlier stage of litigation. *See State Conference of Nat'l Ass'n for Advancement of Colored People v. State*, 563 S.W.3d 138 (Mo.

AMERICAN OVERSIGHT

App. W.D. 2018) (hereinafter "*NAACP I*"). After this Court remanded the case to the circuit court for further proceedings, Plaintiffs filed their Third Amended Petition after a lower court's ruling in *Priorities USA* but before the Supreme Court's opinion. (D98).

In Count I, Plaintiffs brought a statutory claim seeking declaratory and injunctive relief that the personal identification requirements in the Voter ID Law may not be enforced due to insufficient legislative appropriations in fiscal years 2017 to 2019. (D98, p.23). In Count II, they sought various prohibitory and mandatory injunctions against advertising materials under § 115.427.5 of the Voter ID Law. (D98, pp.24–26). Specifically, in Count II Plaintiffs asked the trial court to:

> A. Issue an injunction barring the Secretary of State from telling the public that there is a photo ID requirement and/or from instructing poll workers to ask for photo IDs when voters come to the polls;
>
> B. Issue an injunction directing the Secretary of State to provide public notice that there is no photo ID required for voting in Missouri;
>
> C. Issue an injunction directing the Secretary of State to provide correct information to the public about the non-photo options;
>
> D. Issue an injunction directing the Secretary of State to take down misleading advertisements that are still being used or made available to the public;
>
> E. Allow such other and further relief as is proper under the circumstances.

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AMERICAN OVERSIGHT

(D98, p.26).

The trial court presided over a weeklong trial in August 2019, where the court heard the testimony of several witnesses and admitted into evidence the parties' joint stipulated facts and exhibits. (D120–121). The parties did not stipulate to Plaintiffs' standing to bring the case. (*Id.*; D117). Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing (D117, ¶¶14–18), raised lack of standing as an affirmative defense (*id.* at p. 7), and argued in their post-trial brief that Plaintiffs lack standing based on the evidence.

B. The parties brief the effect of the Priorities USA *decision.*

On January 14, 2020, the Supreme Court issued its opinion in *Priorities USA*. The next day, the trial court asked the parties to submit memoranda concerning the effect of *Priorities USA* on this case. (D159). For Plaintiffs' appropriations claim in Count I, Respondents argued that it was moot because the Priorities USA decision already provided the only relief sought by Plaintiffs: a declaration and injunction that the Voter ID Law's identification requirements cannot be enforced. (D162, p.3). As to Plaintiffs' statutory claims in Count II regarding insufficient advance notice of the Voter ID Law's personal identification requirements, Respondents argued that *Priorities USA* also mooted these claims. *Priorities USA* upheld permanent injunctions

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

against those very requirements, "any proposed negative relief was already granted," and "[n]either [§ 115.427.5] nor the order require additional notice campaigns or any of the other remedies Plaintiffs propose." (D162, p.4-6).

Plaintiffs responded to Respondents' *Priorities USA* arguments, contending that Count I is not moot because their relief requested—an order "directing that voters cannot be asked to show a Photo ID at the polls"—is not encompassed by *Priorities USA*. (D160 at p.3). For Count II, Plaintiffs agreed that "the *Priorities USA* remedial order prevents further dissemination of such misleading information," but they contended that it "does not affirmatively correct the existing misimpression." (D160, p.2). They asserted that the Voter ID Law's "obligation to provide advance notice necessarily requires the provision of accurate and non-misleading information." (*Id.*). In other words, Plaintiffs disagreed that *Priorities USA* precluded their claims in this case for a mandatory injunction to promote corrective advertisements.

C. The trial court's final judgment and post-judgment developments.

On April 20, 2020, the trial court issued a final judgment holding that Plaintiffs lacked standing to bring their claims in Count I, that Count I is moot under *Priorities USA*, and that Count II is both moot and not ripe under *Priorities USA*. (D165).

As to Count I, the trial court discussed what evidence a plaintiff must show to demonstrate injury under the photo ID requirement: "the potential

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

injured party would have to first, timely present himself to the polls and second, be eligible to vote." (*Id.* at p.2). In a footnote, the court highlighted evidence actually introduced at trial regarding the ability of voters to vote with non-photo forms of identification. (*Id.* at n.5). The court held that the two organization plaintiffs lack associational standing and organizational standing, and it further held that taxpayer standing is not a theory on which the individual plaintiff here, Christine Dragonette, can base a claim for insufficient appropriations. (*Id.* at p.3). The court alternatively found that the injunctions upheld in *Priorities USA* render Count I moot, because the case held that the photo identification requirement "may not be enforced." (*Id.*).

As to Count II, the trial court compared the injunctions upheld in *Priorities USA* with the relief requested in this case. (*Id.* at p.4–6). The court held that "the prohibitory injunctions of *Priorities USA* [are] essentially the same as prayed for in this case[.]" (*Id.* at p.5). Referring to Plaintiffs' request for an injunction that the Secretary of State affirmatively issue correct advertisements, the court reasoned that "the specific mandatory injunctions requested are not required given the findings made and instructions provided to the Secretary of State in *Priorities USA*." (*Id.*). The court also held that Count II is not ripe to the extent it is based on advertisements not yet promoted. (*Id.* at p.6).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

On May 19, 2020, Plaintiffs filed a motion to modify the judgment to transform the dismissals with prejudice to dismissals without prejudice. (D166). The trial court did not rule on that motion, and Plaintiffs eventually appealed the trial court's judgment under special order by the Court permitting a late notice of appeal. (D167, D168).

ARGUMENT

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I).

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion.

The correct standard of review is one for abuse of discretion, and not *de novo* review as Plaintiffs contend. Generally, an appellate court "will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court." *Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) (citing *Smith v. City of De Soto*, 634 S.W.2d 204, 205 (Mo. App. 1982)). Application of this standard is universal in every district of the Court of Appeals. *See id.*; *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo. App. E.D. 2003) (reviewing for abuse of discretion trial court's with-prejudice dismissal of a case based on plaintiff's failure to prosecute); *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 505 (Mo. App. E.D. 1999) (holding "[t]here is no absolute right to amend a petition" and finding no

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

abuse of discretion of the lower court's with-prejudice dismissal based on failure to state a claim); *Allen v. City of Greenville, MO*, 336 S.W.3d 508, n.3 (Mo. App. S.D. 2011) (noting the court would have applied abuse of discretion review to the lower court's prejudice determination if the appellant had raised it on appeal).

An exception to that rule may apply when the question on appeal is whether the dismissal itself was proper and "the facts are uncontested." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (applying *de novo* review to the merits of the dismissal decision). But this case does not fall within any known exception to the general rule for several reasons, and Plaintiffs misapply the holding in *Mo. Soybean Ass'n*.

First, Plaintiffs have not appealed the trial court's decision on standing—they appeal only the dismissal being with prejudice. The trial court issued a final judgment after the trial, and the issue of Plaintiffs' standing was a preserved issue for trial. (*See* D117, Respondents' Answer and Affirmative Defenses, pp.15-16). The trial court did not rule on a motion to dismiss where the court would have assumed Plaintiffs' "averments in their petition are true." *Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.*, 92 S.W.3d 232, 234 (Mo. App. W.D. 2002) (reviewing *de novo* the merits of a lower court's grant of a motion to dismiss for lack of standing); *cf. Mo. Soybean Ass'n*,

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004344
Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

102 S.W.3d at 21 (procedural history indicates the case was decided after a trial or hearing on a combined motion to dismiss and for summary judgment).[1]

Unlike a motion to dismiss, where the facts are uncontested, or a summary judgment motion, where there can be no disputed material facts, Respondents contested Plaintiffs' lack of standing. The issue here is not "purely a question of law" as in *Mo. Soybean Ass'n*. Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing, and Respondents raised lack of standing as an affirmative defense. (D117). Respondents also raised the issue in their post-trial brief, highlighting the lack of evidence Plaintiffs submitted at trial to support their standing. And in its final judgment the trial court referenced evidence introduced at trial as to Plaintiffs' standing. (D165, n.5).

Second, Missouri Supreme Court Rule 67.03 also supports giving the trial court discretion to issue a judgment with prejudice, stating that "Any involuntary dismissal shall be without prejudice *unless the court in its order for dismissal shall otherwise specify*." Mo. Sup. Ct. R. 67.03 (emphasis added).

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[1] In addition to *Mo. Soybean Ass'n*, other cases cited by Plaintiffs in their brief also considered dismissals without prejudice upon a motion to dismiss. *E.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 64 (Mo. App. W.D. 2004). Furthermore, other cases rested on the specific language of a previous version of Rule 67.03 or did not state a standard of review at all. *E.g.*, *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

The plain language of the Rule contemplates a court's discretion to specify the prejudicial effect of its dismissal.

Finally, review for abuse of discretion makes sense because it is the standard that governs review of denials of leave to amend a petition. *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992). In those situations, "the denial of amendment is presumed correct and the burden is on the proponent to show an abuse of discretion." *Id.* Dismissals with prejudice are analogous to denials of leave to amend a petition because both effectively prohibit a party to re-plead claims in a future action. There is no principled distinction between these two conceptually similar determinations for purposes of applying a standard of review.

For all these reasons, this Court should apply the abuse of discretion standard and confirm that Plaintiffs carry the burden to show that the trial court abused its discretion in dismissing each count of the Third Amended Petition with prejudice.

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing.

The argument section of Plaintiffs' first point on appeal is virtually devoid of legal argument, instead consisting almost exclusively of parenthetical quotations from case law. Because they apply the wrong

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

standard of review, Plaintiffs do not argue how the trial court abused its discretion for issuing a final judgment holding that they lack standing.

Under the abuse of discretion standard, "[d]iscretion means the option that the trial judge has in doing or not doing that which a litigant does not have the absolute right to demand." *Jennings v. City of Kansas City*, 812 S.W.2d 724, 735 (Mo. App. W.D. 1991). "Abuse of that discretion means an untenable judicial act that defies reason and works an injustice. . . . [or] [w]hen the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable." *Id.* Under the appropriate standard, the trial court soundly exercised its discretion.

First, because the circuit court held a trial where evidence was presented on Plaintiffs' lack of standing, it was proper for the court to decide the standing question on the merits and issue a final judgment. The trial court's decision was properly denominated a "judgment" and it became final 30 days after it was issued. Mo. Sup. Ct. R. 81.05(a)(1). Nothing about issuing a final judgment after trial is arbitrary and unreasonable, or is an injustice against Plaintiffs. During the multiple years of litigation in this case, including a trip to this Court in *NAACP I*, Plaintiffs amended their original Petition three times and had ample opportunity to develop a case with a party possessing standing.[2]

[2] Plaintiffs do not raise on appeal the merits of the trial court's judgment on standing, mootness, or ripeness. The decision below was a final judgment, the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004347
Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Second, amending the trial court's final judgment to simply a dismissal order without prejudice would undermine the work of the parties and the courts in multi-year litigation, which reached a trial on the merits and resulted in a final judgment.[3] It would reward Plaintiffs the benefit of liberal re-pleading rules that accompany a dismissal without prejudice by allowing them to re-plead the same cause of action while remaining plaintiffs to that case. And it would effectively announce a rule that no Missouri case supports—that courts must always dismiss a case without prejudice due to lack of standing, even if denominated as final judgment after a contested trial. This would destabilize a customary practice in Missouri's appellate courts of affirming dismissals with prejudice, and it is not necessary in this case. *See, e.g.*, *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

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finality of which was addressed in Respondents' opposition to Plaintiffs' filing of a late notice of appeal. The finality of the judgment was necessarily affirmed by this Court's special order allowing Plaintiffs to file a late notice of appeal. Plaintiffs have elected not to appeal the merits of the judgment, and so they have forfeited those claims on appeal. *E.g.*, *Eckel v. Eckel*, 540 S.W.3d 476, n.17 (Mo. App. W.D. 2018) (an issue not presented in a point relied on is not preserved for review); *see also* Mo. Sup. Ct. R. 84.04(d).

[3] This Court's opinion in *NAACP I*, 563 S.W.3d at 142–47, thoroughly discusses the procedural history of this case and the claims Plaintiffs raised in their original, first amended, and second amended petitions.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Third, this Court should reject any argument Plaintiffs make that they can cure their pleading defects regarding standing and therefore a without-prejudice dismissal is appropriate. Plaintiffs do not squarely argue they can or will cure this defect. Instead they allude to it in a footnote in their brief as a possibility if the two organizational plaintiffs identify members who present themselves at the polls without a photo ID and suffer an injury from the Voting ID Law. (App. Br. at n.3). Plaintiffs amended their Petition three times and had over two years of litigation to find at least one member of their organizations who has standing to bring their claims. They failed to do so. But even if the organizational plaintiffs did find such an individual in their ranks, the theory of their case—and likely the factual allegations and evidence—would presumably be the same. The circuit court's judgment below is final and as such has the appropriate preclusive affect under the doctrines of collateral estoppel and res judicata. The extent of that

Lastly, the trial court held that *Priorities USA* mooted any of the pleaded claims for relief in Count I. Because Plaintiffs did not raise the merits of the mootness decision on appeal and the decision below is a final judgment, they have forfeited raising the same claims in the same form again. It would thus be futile for this Court to modify the trial court's judgment to be a dismissal without prejudice.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

For these reasons, this Court should affirm the trial court's exercise of discretion in issuing a final judgment dismissing Count I with prejudice for lack of standing.

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III).

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion.

As with the trial court's final judgment disposing of Plaintiffs' claims in Count I with prejudice, this Court should review the trial court's with-prejudice dismissals as to mootness and ripeness for abuse of discretion. Plaintiffs again cite the incorrect standard of review in light of the claims they actually raised on appeal. *De novo* review might be appropriate if Plaintiffs had contested the merits of the dismissals themselves, not merely whether the trial erred in dismissing Plaintiffs' claims with prejudice. *De novo* review was applied in *Mo. Soybean Ass'n* because the Court reviewed the substantive question of whether the trial court properly dismissed the underlying claim as unripe and for lack of subject-matter jurisdiction, not whether the trial court erred by doing so with or without prejudice. 102 S.W.3d at 22 ("a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo."). Plaintiffs here have not appealed the trial court's

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

mootness or ripeness determinations. Thus, the general rule of reviewing for abuse of discretion applies. *See Williams*, 841 S.W.2d at 198.

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims.

Plaintiffs have elected not to appeal the merits of the trial court's decision to dismiss Counts I and II as moot in light of *Priorities USA*. They have therefore forfeited that issue on appeal. Assuming, as this Court therefore must, that the trial court did properly dismiss Plaintiffs' claims as moot, the trial court appropriately exercised its discretion by dismissing them with prejudice.

The principal rationale for dismissing cases without prejudice is that it permits a party to bring another action for the same cause, if it is not otherwise barred. *See Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 506 (Mo. banc 1991). "Ordinarily, when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court." *Osuji v. Missouri Dept. of Social Services, Div. of Family Services*, 34 S.W.3d 251, 253 (Mo. App. E.D. 2000). As other courts have held, "where the pleading's deficiencies 'cannot be cured by re-pleading, because [the claims fail] as a matter of law,' dismissal with prejudice may be appropriate." *Timber Point Properties III, LLC v. Bank of Am., N.A.*, 2014 WL 7005195, at *1 (W.D. Mo. Dec. 10, 2014) (quoting *Rickmyer v. Browne*, 995 F.Supp.2d 989, 1019

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004351

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

(D.Minn.2014)); *see also McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009) ("Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend.")); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. 2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment").

There is no principled reason why a similar rule does not apply in Missouri for with-prejudice dismissals for mootness. Indeed, this same rationale inspires the analysis of a denial of leave to amend a petition, which is conceptually similar to dismissals with prejudice. *See Gohlston*, 825 S.W.2d at 869; *Bratt v. Cohn*, 969 S.W.2d 277, 284 (Mo. App. W.D. 1998) (denial of plaintiffs' motion to file second amended petition was not an abuse of discretion because it "did not cure the deficiencies of their first amended petition."). Nothing in Missouri law mandates dismissal without prejudice when the court's basis is mootness.

Plaintiffs have not argued on appeal how a subsequent lawsuit could cure the mootness problems found by the trial court in light of *Priorities USA*. And because Plaintiffs have not raised that argument, they have forfeited it. As in their first point on appeal, the argument section of their second point on appeal consists almost exclusively of parenthetical quotations from cases, not

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004352

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

substantive legal argument. The Supreme Court's decision in *Priorities USA* affirmed the lower court's permanent injunctions, which—as the trial court below properly found, and which is not contested by Plaintiffs on appeal—encompasses the very relief Plaintiffs sought in this case. (D165, p.5).

The cases Plaintiffs cite in their brief are inapposite. For example, in *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476 (Mo. App. E.D. 2010), the trial court made no determination as to mootness; instead, mootness came *after* the trial court's ruling, and the trial court dismissed the case with prejudice for lack of standing. *Id.* at 477. The parties addressed the merits of the post-decision mootness question on appeal and the appellate court thus considered it on the merits. *Id.* at 483. The appellate court's decision discussed the various public-interest reasons why it vacated the lower court's standing decision and held the controversy should be dismissed without prejudice due to mootness, including because the respondent on appeal did not oppose that remedy. *Id.* at 485. None of those unique circumstances are present here, and *Friends of the San Luis* certainly does not announce a rule that circuit court dismissals due to mootness must always be without prejudice.

Deciding whether a case should be dismissed with or without prejudice is within the sound discretion of the court deciding the mootness question. Plaintiffs have failed to appeal the merits of the trial court's mootness decision. And they have altogether failed to argue in their brief how they might obtain

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

relief in a future, re-pleaded cause of action based on appropriations for Voter ID Law advertising that is not encompassed by the permanent injunctive relief ordered in *Priorities USA*.

This Court should therefore affirm the trials court's decision dismissing as moot Counts I and II with prejudice.

C. The trial court properly dismissed Count II with prejudice as unripe.

The trial court properly exercised its discretion in dismissing Count II with prejudice as unripe. Though this Court can affirm the trial court's dismissal of Count II as moot and therefore avoid ruling on Appellants' third point on appeal, there are independent and sufficient grounds to affirm the trial court's dismissal with prejudice of Count II as unripe.

The Supreme Court in *Priorities USA* affirmed lower-court injunctions concerning the Secretary of State's advertising the Voter ID Law. As the trial court in this case held, "[t]he Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public." (D165, p.5). No party has filed suit complaining of the Secretary's subsequent advertising efforts or compliance with the *Priorities USA* decision.

If a party has any good-faith allegations that the Secretary of State's Office has not complied with the permanent injunctions in *Priorities USA*, those allegations might support a claim for which a party can bring a new

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

action. But Plaintiffs' claims in Count II rest on an entirely separate theory than that potential cause of action. In Count II, Plaintiffs alleged that expenditures on advertising resulted in incorrect and misleading advertising and that the Secretary of State's Office did not issue appropriate corrective advertising. (D98, pp.24–26). Count II is a strict statutory claim, resting solely on § 115.427.5 of the Voter ID Law. The Supreme Court in *Priorities USA* already analyzed claims for violations of that same statute similar to Plaintiffs' claims in Count II. *Priorities USA*, 591 S.W.3d at 459–61.

As the trial court here found, the permanent injunctions in *Priorities USA* encompass essentially the same relief Plaintiffs sought on their advertising claims and "the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*." (D165, pp. 5–6). In mentioning mandatory injunctions, the trial court was necessarily referring to the relief sought by Plaintiffs in Count II to issue new, corrective advertising (D98, p.26). The trial court was correct in ruling that the *Priorities USA* decision forecloses any relief that Plaintiffs actually requested in Count II of the Third Amended Petition based § 115.427.5, and Plaintiffs do not challenge the correctness of that portion of the judgment below.

To the extent Plaintiffs bring a future cause of action based on similar facts due to advertising of the Voter ID Law, any such allegations likely cannot

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

be premised § 115.425.7. Plaintiffs did not plead claims premised on the *Priorities USA* injunctions even though the trial court's decision in that case was issued prior to the Third Amended Petition's filing. To that end, even though the Third Amended Petition cites *Priorities USA* in Count II, it narrows the Count's focus to a "violation of the statute." (D98, p.26). Claims for relief requested in a future lawsuit based on the same facts alleged in the Third Amended Petition but premised on § 115.427.5 and not the *Priorities USA* permanent injunctions are not yet ripe, nor can they ever be ripe. *Priorities USA* forecloses the relief Plaintiffs requested based on the facts and theory of the case they pleaded. There exists a hypothetical claim based on *Priorities USA*'s permanent injunctions that may eventually be ripe, but that is not the claim in Count II of the Third Amended Petition here.

For these reasons, it would be futile to allow Plaintiffs to re-plead the same cause of action under § 115.427.5, for the same relief, and based on future—but presently unripe—facts. The trial court properly exercised its discretion in dismissing with prejudice Count II as unripe.

CONCLUSION

For the reasons stated, this Court should affirm the circuit court's decision.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004356

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Dated: April 5, 2021

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 5th day of April, 2021, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 5,626 words.

/s/ *Jason K. Lewis*

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-004357

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED
10:39 am, May 13, 2021
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Contents

Table of Authorities 3

Argument 5

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003). 5

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits. 13

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdicton or authority to adjudicate the case on the merits after finding the claims to be moot and unripe. 18

Conclusion 23

Certification of Service and of Compliance with Rule 84.06(b) and (c) 25

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Authorities

Abbott Laboratories, Inc. v. Gardner,
387 U.S. 136 (1967) 22

Allen v. City of Greenville,
336 S.W.3d 508 (Mo. App. S.D. 2003) 7

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 12, 13

Brinson v. Whittico,
793 S.W.2d 632 (Mo. App. E.D. 1990) 22

Burnett v. Kansas City Sch. Bd.,
237 S.W.3d 237 (Mo. App.W.D.2007) 10

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 15, 16

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 15, 16

Doe v. Visionaire Corp.,
13 S.W.3d 674 (Mo. App. E.D. 2000) 13, 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 14

Minn. Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 11

Missouri Public Service Commission v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

Missouri Soybean Association v. Missouri Clean Water Commission,
102 S.W.3d 10 (Mo banc. 2003) ..... Passim

Pearson v. Koster,
367 S.W.3d 36 (Mo. banc 2012) 11

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 6, 10

AMERICAN OVERSIGHT

Priorities USA v. State,
591 S.W.3d 448 (Mo banc. 2020) .....Passim

Priorities USA,
591 S.W.3d 21

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999).....7

Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.,
821 F.3d 992 (8th Cir. 2016).....11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 12

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. W.D. 1982) 6

State ex rel. Christian Health Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv.,
229 S.W.3d 270 (Mo. App. W.D.2007) 12

State ex rel. Scherschel v. City of Kansas City,
470 S.W.3d 391 (Mo. App. W.D. 2015) 10

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D.1988) 12

Webb v. Wyciskalla,
275 S.W.3d 249 (Mo banc. 2003) 8, 12

Weinschenk v. State,
203 S.W.3d 201 (Mo. banc 2006) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 5, 6

Mo. Rev. Stat. § 115.427.....Passim

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004361

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Argument

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003).

The issue presented here is purely a question of law, the underlying facts are uncontested, and the correct standard of review in this case is *de novo*. *See* Appellants' Opening Br. at pp. 14–15, 18–19, 21.

The cases relied on by Respondents do not alter the conclusion that review of whether dismissal should have been with prejudice is *de novo*. In *Williams v. City of Kansas City*, 841 S.W.2d 193 (Mo. App. W.D. 1992), the case was dismissed with prejudice on a motion for judgment on the pleadings because the court found that the plaintiff failed to sufficiently plead claims alleging a violation of due process and conversion. *Id.* at 194–97.[1] In upholding the dismissal with prejudice as to the due process claim, this Court noted that "[w]hen a trial court concludes that pleadings do not state a cause of action, and when adequate opportunity to amend has been provided, it is not error for the trial court to dismiss with prejudice." *Id. Williams* does not support abuse-of-discretion review here. In this case, the dismissal was not based upon a finding that Appellants failed to state a claim, nor was the opportunity to amend provided but not utilized. *Williams* did not address a dismissal based on standing, mootness, or ripeness—the grounds for dismissal here. While Respondents note that the *Williams* court relied on

[1] The dismissal of the conversion claim was reversed and that claim was remanded to allow for further development of the facts so that the plaintiff could attempt to prove his claim against the City. *Williams*, 841 S.W.2d at 197; *see also id.* n.3.

AMERICAN OVERSIGHT

Smith v. City of De Soto, 634 S.W.2d 204 (Mo. App. W.D. 1982), *Smith* too is a case where the court dismissed a case with prejudice for failure to state a claim—there because the plaintiff "cite[d] no authority to support his contention a municipal corporation may be held liable in quantum meruit." *Id.* at 204–05 (noting that the law states the contrary). Like in *Williams*, the plaintiff in *Smith* sought a dismissal without prejudice so that he could amend his petition. This Court affirmed the dismissal with prejudice noting that, in the context of that case, the defendant should not have to respond to additional amended petitions because as a legal matter it would be impossible to cure the legal defect that resulted in dismissal. *Smith*, 634 S.W.2d at 205.

In *Peet v. Randolph*, 103 S.W.3d 872, 874 (Mo. App. E.D. 2003), the plaintiff sought specific performance of a real estate contract. After a summary judgment ruling for defendants, followed by an appeal and remand, the case was then ultimately dismissed with prejudice for failure to prosecute. *Id.* There, the trial court believed that the plaintiff failed to reasonably explain his failure to take any action for nearly a year following the remand and noted that it was plaintiff's responsibility to file a motion. *Id.* In finding that the court abused its discretion, the Eastern District noted that, while dismissal for failure to prosecute is typically within the trial court's judicial discretion, because of the "lack of a local rule delineating the plaintiff's responsibilities on remand, the lack of any scheduling conference or schedule on remand, this Court's mandate that a trial be held, and the plaintiff's readiness to proceed to trial, the trial court clearly abused its discretion in dismissing this case." *Id.* at 876–78 (further noting that no dismissal was appropriate, with or without prejudice, reinstating the cause of action, and ordering that it

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

be reassigned to a new trial judge). There, again, the dismissal was not based on standing, mootness, or ripeness. A case with such different facts is not authority to depart from *de novo* review on the question of law presented in this appeal.

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501, 504–05 (Mo. App. E.D. 1999), also involves a motion to dismiss for failure to state a claim. In reversing the dismissal with prejudice of three counts but affirming the dismissal of a fourth count, the Eastern District found that plaintiff had failed to plead sufficient facts to allege the necessary elements of a prima facie tort and noted that "[t]here is no absolute right to amend a petition." *Id.* at 505. In *Allen v. City of Greenville*, 336 S.W.3d 508, 511 (Mo. App. S.D. 2003), the dismissal again followed from a motion to dismiss for failure to state a claim. The Southern District reviewed the underlying decision to dismiss *de novo* and, in a footnote citing *Saidawi* and *Williams*, stated that whether to dismiss with or without prejudice, while not raised as a point on appeal, would be within the discretion of the trial court. *Id.* at 512, 512 n.3. In many cases the decision might be within the court's discretion. In this case, however, the court lacked such discretion and the dismissal should be reviewed *de novo*.

Unlike the cases relied upon by Respondents, there is no dispute here as to whether Appellants' petition stated a claim or whether they prosecuted their case. This case concluded after a week-long trial that included multiple witnesses—including significant expert testimony—and extensive post-trial briefing. Although the trial court did dismiss this case with prejudice, it never reached the merits of Appellants' claims, nor could it have. The dismissal was based only on standing (Count I), mootness (Counts I

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

and II), and ripeness (Count II). Each of these is a requirement for the circuit court's jurisdiction or authority to decide the case or justiciability, not the merits of the case itself.

"[T]he authority to render judgment in a particular case is … the definition of subject matter jurisdiction …." *Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo banc. 2003). This case is simply not like the cases relied on by Respondents. And while *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003), examined whether a declaratory judgment and injunctive relief claim could be brought at all, it is similar to the present case in that the facts were uncontested, it discussed the court's jurisdiction and authority to hear the case, and the issue on appeal was purely one of law. This Court should not depart from *Missouri Soybean Association* by holding that the abuse-of-discretion standard has universal application in all cases involving the review of a lower court's decision to dismiss a case with prejudice.

In *Missouri Soybean Association*, the lower court dismissed the case with prejudice for a lack of subject-matter jurisdiction. *Id.* at 14. There, like here, the parties did not dispute the underlying facts of the case (concerning state inclusion of rivers on a list of impaired waters that is then submitted to the EPA and triggers specific programs designed to improve the water quality), so the appeal centered on whether the plaintiffs could even bring a declaratory judgment action seeking injunctive relief challenging the promulgation of the list as rulemaking. *Id.* at 14–23. Whether the circuit court had the authority to adjudicate the case was a question of subject-matter jurisdiction. More specifically, the issue was whether plaintiffs were properly challenging "the validity of a

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

rule or the threatened application of such a rule" under § 536.050.1 such that the lower court would have the authority (i.e., subject-matter jurisdiction) to hear a declaratory judgment action. *Id.* at 22. If they were, then the court would have the power to render a declaratory judgment. If the promulgation of the list was not rulemaking, the court had no authority over the case—i.e., it lacked subject-matter jurisdiction.

While noting that, "[g]enerally the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of discretion[,]" the court went on to find that "where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Id.* at 22. Ultimately, the Missouri Supreme Court found that the promulgated list was not a rule and therefore "the circuit court lacked subject-matter jurisdiction pursuant to section 536.050.1 to render the sought-after declaratory judgment." *Id.* at 25–26 (noting further that because "the appellants could not even predict the effect such a declaratory judgment would have[,] … it would thus "not have a 'conclusive effect' or 'lay to rest the parties' controversy'" as is required by the general principles underlying declaratory judgment actions). Additionally, the supreme court noted that "the authority of the courts of this State to render declaratory judgments must be used and operate within the limits of the constitutional powers and duties of the courts" and, "[o]ne such limit is the traditional doctrine of ripeness, which, when applied in this case, also commands dismissal of the appellants' actions." *Id.* at 26. In closing, the supreme court concluded that, because the challenged list promulgated by the defendants "is not a rule and the inclusion of the

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Rivers not rulemaking, and because the controversy cannot be resolved by declaratory judgment and is not ripe for adjudication, the judgment of dismissal is affirmed. However, *because the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice*." *Id.* at 29 (emphasis added) (citing Rule 84.14).

Therefore, while dismissals may be reviewed for an abuse of discretion in certain contexts, that standard of review is not appropriate in this particular case, just as it was not appropriate in *Missouri Soybean Association*. This Court is not being asked to determine whether the dismissal itself was appropriate under the circumstances; it is instead being asked to decide a pure question of law: should the dismissal have been with or without prejudice when that dismissal was based solely on standing, mootness, and ripeness—i.e., the jurisdiction or authority of a circuit court and the justiciability of the claims raised.

In any event, even if this Court were to review the dismissal with prejudice for an abuse of discretion, the circuit court erred. Under that standard, this Court must reverse the circuit court's ruling "'if it is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration.'" *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 397 (Mo. App. W.D. 2015) (quoting *Burnett v. Kansas City Sch. Bd.*, 237 S.W.3d 237, 238–39 (Mo. App. W.D. 2007)); *see also Peet*, 103 S.W.3d at 876–77 ("Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to show a lack of careful consideration and shock the sense of justice.").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Moreover, "[a]n abuse of discretion occurs where the [trial] court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc); *see also Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) ("A district court abuses its discretion if, as relevant here, it commits an error of law."). In reviewing questions of law, this Court "reviews the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012) (quotation and citation omitted). As supported by the discussion, *infra*, not only was dismissing the claims with prejudice here unreasonable considering the bases for dismissal were a lack of subject-matter jurisdiction and non-justiciability but dismissing with prejudice under these circumstances was an erroneous legal conclusion because the circuit court had no authority to reach the merits of the case.

Rule 67.03 is irrelevant to the issues in this appeal. Although the rule states that an involuntary dismissal is "without prejudice unless the court in its order for dismissal shall otherwise specify[,]" this does not authorize a court to reach the merits of a case when it otherwise lacks jurisdiction or authority to do so. A circuit court does *not* have the discretion to overstep in this manner. Additionally, a trial court's decision to deny a party's request to amend a petition—a ruling that would be properly reviewed for an abuse of discretion—is, once again, easily distinguishable from a case like this one, where a circuit court improperly reaches the merits of a case despite lacking jurisdiction or authority to do so based upon standing, ripeness, and mootness. And, as discussed,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

infra, standing could be achieved and the circumstances could change in such a way that the claims become ripe and no longer moot.

To obtain judgment on the merits in any case, plaintiffs must have standing, the case must not be moot (or, if moot, it must meet an exception), and the case must be ripe. In other words, standing, mootness, and ripeness are prerequisites for a court to reach the merits of a case.[2] *See, e.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58,

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[2] As this Court has noted, "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012) ("affirm[ing] the circuit court's finding that Borges and Johnson lacked standing and enter[ing] the order the circuit court should have entered, dismissing without prejudice Borges and Johnson's petition" pursuant to Rule 84.14). Presumably, in *Borges*, this Court was alluding to the recent discussion of jurisdiction versus authority in *Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009), where the Missouri Supreme Court noted that "[s]ubject-matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." (noting that, unlike federal courts, the circuit courts in Missouri "have original jurisdiction over *all* cases and matters, civil and criminal"). "[T]he authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction…." *Id.* at 254.

While the law surrounding jurisdiction versus authority continues to evolve in court decisions, the issue need not be reached here. Under either theory, dismissal for standing, mootness, or ripeness should be without prejudice.

In *Borges*, before recognizing that the issue may be one of authority and not jurisdiction, this Court recognized that "[i]n the past, we have found that if a party lacks standing sufficient to maintain an action, the court necessarily does not have jurisdiction over the claims presented." *Id.* (citing *W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D.1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent]."). "Therefore, a claim that a party lacks standing has generally been treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 55.27(a)(1)." *Id.* (citing *State ex rel. Christian Health*

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits.").

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits.

The underlying facts in this case are uncontested. It makes no difference in this appeal that Appellants asserted that they had standing below and maintained that argument through the post-trial filings. In this appeal, Appellants have elected not to dispute the circuit court's ultimate finding that they lack standing to bring Count I. However, it remains true that, "once the circuit court determined that they lacked standing, it was without jurisdiction to reach the merits of their claims." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012). A plaintiff without standing "presents no legally justiciable issue," and therefore, "the trial court should have dismissed the[] petition without prejudice." *Id.* at 184. Thus, while dismissal of a claim where a plaintiff lacks standing is appropriate, what is not appropriate is a dismissal *with prejudice* that, by definition, reaches the merits of the claim.

"A dismissal with prejudice constitutes an adjudication on the merits and 'bars the assertion of the same cause of action or claim against the same party.'" *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000) (quoting Rule 67.01). As such, courts

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Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv., 229 S.W.3d 270, 276 (Mo. App. W.D.2007)).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

do not have any "discretion" to reach the merits of a case where plaintiffs lack standing. Here, the circuit court erred in making a dismissal with prejudice. However, the circuit court did not abuse any discretion, because it had no discretion to abuse under the circumstances.

Amending the dismissal to one without prejudice would not undermine any aspect of this case. While Appellants agree that everyone worked very hard to litigate this case over the span of several years, including a week-long trial and two appeals to this Court, that is simply the nature of litigation. It is not always fast or easy. Moreover, here, standing is curable and could be achieved in the future. The court's determination that these particular plaintiffs did not have standing under the circumstances does not preclude Appellants from ever having standing in the future. This further distinguishes this case from one where a decision related to standing might be based upon undisputed facts but where those facts failed to state a claim at all.

Here, even the circuit court recognized that "[s]tanding is a jurisdictional matter antecedent to the right of relief." D165 p. 2. The circuit court found that, to have standing to challenge the insufficient funding of § 115.427 in a manner that would preclude enforcement, a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification. *Id.* If a member of the organizational plaintiffs suffered this harm, according to the circuit court's order, the organization would have associational standing. Additionally, Missouri courts could—and arguably should—begin to embrace organizational standing, just as federal courts have for decades. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Thus,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

standing to raise the claims is achievable and plaintiffs, with their thousands of members, should not be forever barred because the circuit court found they lacked standing at the time of the trial.

Amending the judgment to a dismissal without prejudice in this case would not destabilize any purported "customary practice" of appellate courts affirming dismissals with prejudice where the issue involved a party's standing. And, if it is a customary practice of appellate courts in this state to affirm dismissals with prejudice based solely upon a lack of standing then that practice should be revisited given the legal error involved and dangerous precedent it sets and the many decisions indicating that a court should not reach the merits of a case when the plaintiffs lack standing.

The cases relied on by Respondents to support this argument are inapposite. In all three of the cited cases, the dismissals were based upon the pleadings, the review of the dismissal itself was *de novo*, and the plaintiffs argued only that their pleadings were sufficient to demonstrate standing but did not raise the issue of whether the dismissal should be with or without prejudice. Therefore, none of the cases include any discussion or point of error related to the fact that the cases were denied with prejudice. In *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 117 (Mo. App. W.D. 2018), and *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017), the plaintiffs argued that they pleaded sufficient facts to establish standing to challenge violations of the Fair Credit Reporting Act (FCRA) and did not raise any argument related to the petitions being denied with prejudice. In both cases, this Court looked at the sufficiency of the pleadings to determine if the plaintiffs pled injuries establishing standing for an FCRA

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

claim. *Campbell*, 561 S.W.3d at 120–21; *see also Corozzo*, 531 S.W.3d at 572. Likewise, in *Missouri Public Service Commission v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009), the appeal followed a lower court's dismissal for lack of standing based upon the allegations in the petition and no error was asserted relating to the dismissal being with prejudice. This Court should not premise its decision in the present case on previous cases where a dismissal with prejudice based on standing was affirmed but where the "with prejudice" distinction was not raised by a party or discussed by this Court.

Moreover, the decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo banc. 2020), does not change the standing argument or foreclose the possibility that a plaintiff or member of a plaintiff organization could subsequently satisfy standing requirements. Count I of the third amended petition alleged that § 115.427.1 could not be enforced pursuant to § 115.427.6(3). There has been no change to the identification requirements in § 115.427.1 or the funding requirements in § 115.427.6(3), namely that "[a]ll costs associated with the implementation of this section shall be reimbursed from the general revenue of this state by an appropriation for that purpose. If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced." Pursuant to the circuit court's holding, standing could still be achieved regardless of the *Priorities USA* decision (i.e., a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification). The *Priorities USA* decision is limited to § 115.427.2(1) and .3 (i.e., the affidavit requirement). At any future election, even though

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

the *Priorities USA* decision requires the acceptance of non-photo forms of identification without a signed affidavit, a poll worker could still require a voter to present photo identification and turn them away if they do not. Section 115.427.1 still states that voters "shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification to elected officials." As long as that subsection remains in effect, poll workers could ask voters to present those types of photo identifications at the polls and this incorrect request could be based on the State's insufficient funding to implement the law.[3]

It is not futile to do as the law requires and amend the dismissal here to one without prejudice when the circuit court had no jurisdiction or authority to enter a dismissal *with* prejudice. If the dismissal with prejudice was to be affirmed, Appellant organizations and their members who do achieve standing would be forever barred from challenging the enforcement of § 115.427.1 pursuant to § 115.427.6(3)—relief that was *not* granted in *Priorities USA*.

[3] *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his over registration card – an acceptable form of non-photo identification under option two").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdiction or authority to adjudicate the case on the merits after finding the claims to be moot and unripe.

Like a case where there is no standing, a moot or unripe case is not justiciable. In other words, the circuit court should not have reached the merits by dismissing Counts I and II with prejudice for mootness (Counts I and II) and being unripe (Count II). Appellants could be eligible to bring a claim at a future date if the issues were no longer moot and ripe for a lawsuit, but Appellants will be forever barred if this Court affirms the dismissal with prejudice.

Count I challenged the enforcement of § 115.427.1 pursuant to § 115.427.6(3). Those specific identification (§ 115.427.1) and funding (§ 115.427.6(3)) requirements have never changed. *Priorities USA* held only that the affidavit requirement found in § 115.427.2(1) and .3 is an unconstitutional burden on the fundamental right to vote. While the *Priorities USA* court enjoined portions of § 115.427 relating specifically to the affidavit requirement, including "the dissemination of materials indicating photo identification is required to vote[,]" 591 S.W.3d at 451, Appellants' potentially broader challenge to the enforcement of § 115.427.1 pursuant to § 115.427.6(3) should not be forever barred on this basis.

Regarding mootness, the circuit court seemed to hold that by eliminating the affidavit requirement, the circuit court in *Priorities USA* also enjoined the strict photo-identification requirements of § 115.427.1 "as a practical matter," D165 pp. 3–4, thus mooting any sufficient funding argument related to the enforcement of § 115.427.1 in this

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

case. However, a mootness finding could change regardless of the affidavit requirement. In fact, *Priorities USA* supports a finding that it is likely a poll worker will not be properly informed as to how to implement the law and may require specific § 115.427.1 photo identification and then turn away a voter who does not have it, despite the injunction in that case. *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his voter registration card – an acceptable form of non-photo identification under option two"). Thus, if an eligible voter were to go to a polling place to cast a ballot and a poll worker required that voter to present a specific form of photo identification and turned them away if they did not (i.e., they achieved standing), and if that voter (or the Appellant organization of which they are a member) alleged that the funding requirements of § 115.427.6(3) were not being met and therefore § 115.427.1 could not be enforced, a claim for relief would be stated and would not be mooted by *Priorities USA*. The funding requirements of § 115.427.6(3) continue to exist and it is well-established law that "requiring individuals to present photo identification to vote is unconstitutional." *Priorities USA*, 591 S.W.3d at 458 (citing *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006)). Although Appellants do not challenge the circuit court determination that this case was mooted under the circumstances, the *Priorities USA* decision as to affidavits should not preclude Appellants from all such future claims.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004376

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Priorities USA was tried in late September and early October 2018 (first decision entered by the circuit court on October 23, 2018) and a final decision of the Missouri Supreme Court was issued on January 14, 2020 (rehearing denied January 30, 2020). This case was tried in August 2019 and a judgment dismissing Appellants' claims was signed April 20, 2020. Given the unique circumstances of the 2020 elections during the COVID-19 pandemic and the significant increase in voting absentee and by mail in Missouri, some of the scenarios that would present a live controversy may yet play out in future elections.

Count II of Appellant's petition alleged that the failure to provide correct information to the public, i.e., the "advance notice" requirement, resulted in a violation of § 115.427.5. Count II was not dismissed on standing grounds but only as being moot and unripe. In dismissing Count II, the circuit court found that the injunctive relief in *Priorities USA* mooted the need for the specific injunctive relief—albeit not precisely the same relief—requested in this case. *See* D165 pp. 5–6 (comparing the relief requested here and the injunction ordered in *Priorities USA*).[4] In making its ruling here, the circuit court noted that "the original manner in which [the State] tried to fulfill [the advance-notice] obligation was found to be deficient" in *Priorities USA* and then found that whether the State's "subsequent information campaigns avoid this deficiency is not yet ripe." D165 pp. 5–6. So, while the mootness determination at the time the circuit court

[4] For example, Appellants asked for a broader injunction regarding multiple materials that had been and were being disseminated and sought an order requiring the State to correct the existing misrepresentations they created.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

ruled in April 2020 is not challenged here, as the circuit court acknowledged in its ripeness finding, Appellants' claim related to advance notice may resurface in the future if the Secretary of State continues to provide incorrect information to voters about all of § 115.427's requirements. In other words, while the *Priorities USA* court did enjoin the State from disseminating materials representing to the public that a photo identification card is required to vote, including materials with a specific graphic indicating voters will be asked for a photo identification card without specifying the other acceptable forms of identification that can be used to vote, that injunction in a case in which Appellants were not parties should not bar them from bringing a claim in the future if the advance notice provision of § 115.427.5 is violated. *See Priorities USA*, 591 S.W.3d at 559–61; D165 p. 5.[5] As such, subsequent information campaigns by the State could make this issue ripe, in which case Appellants should be entitled to bring a suit.

The possibility of a future claim is further supported by the fact that, in *Priorities USA*, the prohibition on the dissemination of materials focused on a single advertisement—one of many used by the State—and the injunction was "limited in scope, as it enjoined the State from disseminating only those 'materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show.'" 591 S.W.3d 460–61. Thus, while it is *possible* that this limited-in-scope injunction will stop the State from disseminating

[5] As noted by the supreme court in *Priorities USA*, a political science expert "testified that materials that are incomplete and fail to describe all the forms of identification permitted by section 115.427 cause voter confusion and decrease voter turnout." 591 S.W.3d at 460.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

incorrect information about the requirements of § 115.427, it in no way guarantees that will be the case. Just because no party has yet brought a lawsuit does not mean that the claim will not become ripe. However, Appellants could not currently bring this claim even if it were to become ripe because they have been barred by the circuit court's dismissal with prejudice. The advance-notice requirement found in § 115.427.5 is ongoing and the State must comply with both the law's requirements *and* the injunction issued in *Priorities USA*. The *Priorities USA* decision should not be read to mean that the claim raised in this case would never become ripe in the future.

"The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Mo. Soybean Ass'n*, 102 S.W.3d at 26 (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148–49 (1967) (overruled on other grounds)). "Filing a suit prematurely should not prevent a plaintiff from proceeding with an action when it becomes ripe." *Brinson v. Whittico*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990). "Thus, if an action is deemed premature and a trial court dismisses it for that reason, the action should be dismissed without prejudice." *Id.* (holding that, "[b]ecause the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication."). Although *an* injunction was issued in *Priorities USA*, Appellants should not be forever barred from raising any claim related to advance notice under § 115.427.5, consistent with the trial

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004379

court's acknowledgement that this issue could subsequently become ripe.

Conclusion

Because Appellants' claims were dismissed based on jurisdictional and justiciability grounds (standing, mootness, and ripeness), the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

Respectfully submitted,

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Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

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MO-AG-22-0644-A-004381

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AMERICAN OVERSIGHT

21-1498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

HILARION KAPRAL, AKA METROPOLITAN HILARION, NICHOLAS OLKHOVSKIY, VICTOR POTAPOV, SERGE LUKIANOV, DAVID STRAUT, ALEXANDRE ANTCHOUTINE, GEORGE TEMIDIS, SERAFIM GAN, BORIS DMITRIEFF, EASTERN AMERICAN DIOCESE OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, MARK MANCUSO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York, No. 20-cv-6597

DEFENDANTS-APPELLANTS' OPENING BRIEF

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AMERICAN OVERSIGHT

RULE 26.1 DISCLOSURE STATEMENT

Defendants Eastern American Diocese of the Russian Orthodox Church Outside of Russia and The Synod of Bishops of the Russian Orthodox Church Outside of Russia state that they have no parent corporation and do not issue stock.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004384

TABLE OF CONTENTS

Page

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

INTRODUCTION 1

JURISDICTIONAL STATEMENT 4

STATEMENT OF ISSUES 4

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 11

STANDARD OF REVIEW 13

ARGUMENT 13

I. Father Alexander's claims are barred by the church autonomy doctrine. 13

A. The church autonomy doctrine can bar defamation claims. 15

B. The church autonomy doctrine bars Father Alexander's defamation claims. 20

1. Father Alexander's claims interfere with Church discipline. 21

2. Father Alexander's claims require courts to interpret Church policy and answer religious questions. 24

3. The discovery process necessary to adjudicate Father Alexander's claims will itself violate church autonomy. 30

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004385

C. The neutral principles doctrine does not apply in this case. 33

II. Father Alexander's claims are barred by the ministerial exception. 35

A. The ministerial exception bars defamation claims that interfere with a church's selection and supervision of its ministers. 36

B. The ministerial exception bars Father Alexander's defamation claims because they interfere with the Church's selection and control of its priests and bishops. 43

C. The district court erred by refusing to dismiss the complaint under the ministerial exception. 45

III. This Court has jurisdiction over this appeal under the collateral order doctrine. 49

A. The Church's First Amendment defenses will be effectively unreviewable after merits discovery. 50

1. The Religion Clauses provide protections akin to immunity. 51

2. The Church's Religion Clauses immunities will be irreparably lost absent immediate appeal. 54

B. The order below conclusively determined the Church's immunity from trial and merits discovery. 55

C. The Church's immunity against merits discovery is collateral to the merits of Father Alexander's defamation claims. 56

IV. The district court erred by failing to limit initial discovery to the resolution of the Religion Clauses defenses. 57

AMERICAN OVERSIGHT

CONCLUSION 59

CERTIFICATE OF COMPLIANCE 61

CERTIFICATE OF SERVICE 62

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004387

TABLE OF AUTHORITIES

Page(s)

Cases

Baker v. Afr. Methodist Episcopal Church,
No. 3-01-CV-2485, 2002 WL 1840931
(N.D. Tex. Aug. 8, 2002) 41

Behrens v. Pelletier,
516 U.S. 299 (1996) 51, 55

Bell v. Presbyterian Church (U.S.A.),
126 F.3d 328 (4th Cir. 1997) 38, 47

Bouchard v. N.Y. Archdiocese,
No. 04 CIV. 9978, 2006 WL 3025883
(S.D.N.Y. Oct. 24, 2006) 6

Bouldin v. Alexander,
82 U.S. (15 Wall.) 131 (1872) 1

Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.,
796 N.E.2d 286 (Ind. 2003) 19, 34

Britt v. Garcia,
457 F.3d 264 (2d Cir. 2006) 56

Bryce v. Episcopal Church in the Diocese of Colo.,
289 F.3d 648 (10th Cir. 2002) ..... *passim*

Byrd v. DeVeaux,
No. 17-3251, 2019 WL 1017602 (D. Md. Mar. 4, 2019) 24, 41

Cannata v. Catholic Diocese of Austin,
700 F.3d 169 (5th Cir. 2012) 46

Cha v. Korean Presbyterian Church of Wash.,
553 S.E.2d 511 (Va. 2001) 40, 42, 43

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 49

AMERICAN OVERSIGHT

Collette v. Archdiocese of Chi.,
200 F. Supp. 3d. 730 (N.D. Ill. 2016) 58

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 30

Conlon v. InterVarsity Christian Fellowship/USA,
777 F.3d 829 (6th Cir. 2015) 37, 52, 56

Coollick v. Hughes,
699 F.3d 211 (2d Cir. 2012) 51

Corp. of Presiding Bishop v. Amos,
483 U.S. 327 (1987) 22

Crowder v. S. Baptist Convention,
828 F.2d 718 (11th Cir. 1987) 34

Dayner v. Archdiocese of Hartford,
23 A.3d 1192 (Conn. 2011) 53

Demkovich v. St. Andrew the Apostle Par.,
3 F.4th 968 (7th Cir. 2021) 32, 44, 52, 55

Dermody v. Presbyterian Church,
530 S.W.3d 467 (Ky. Ct. App. 2017) 19

Digit. Equip. Corp. v. Desktop Direct,
511 U.S. 863 (1994) 49

In re Diocese of Lubbock,
624 S.W.3d 506 (Tex. 2021) ..... *passim*

Downs v. Roman Catholic Archbishop of Balt.,
683 A.2d 808 (Md. Ct. Spec. App. 1996) 19

Edrei v. Maguire,
892 F.3d 525 (2d Cir. 2018) 55

EEOC v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 42, 48

AMERICAN OVERSIGHT

EEOC v. Roman Catholic Diocese of Raleigh,
48 F. Supp. 2d 505 (E.D.N.C. 1999) 47

Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.,
824 F. App'x 680 (11th Cir. 2020) 16-17

El-Farra v. Sayyed,
226 S.W.3d 792 (Ark. 2006) 41, 48

Farley v. Wis. Evangelical Lutheran Synod,
821 F. Supp. 1286 (D. Minn. 1993) 41

Fassl v. Our Lady of Perpetual Help Roman Catholic Church,
No. CIV.A. 05-CV-0404, 2005 WL 2455253
(E.D. Pa. Oct. 5, 2005) 58

Fratello v. Archdiocese of N.Y.,
863 F.3d 190 (2d Cir. 2017) ..... *passim*

Fratello v. Roman Catholic Archdiocese of N.Y.,
175 F. Supp. 3d 152 (S.D.N.Y. 2017) 58

Friedlander v. Port Jewish Ctr.,
347 F. App'x 654 (2d Cir. 2009) 38

Garcia v. Does,
779 F.3d 84 (2d Cir. 2015) 13, 55

Gingras v. Think Fin., Inc.,
922 F.3d 112 (2d Cir. 2019) 55

Gonzalez v. Roman Catholic Archbishop of Manila,
280 U.S. 1 (1929) 1, 14, 15, 45

In re Grand Jury Subpoenas Returnable Dec. 16, 2015,
871 F.3d 141 (2d Cir. 2017) 54

Grussgott v. Milwaukee Jewish Day Sch. Inc.,
260 F. Supp. 3d 1052 (E.D. Wis. 2017) 58

AMERICAN OVERSIGHT

Hartwig v. Albertus Magnus Coll.,
93 F. Supp. 2d 200 (D. Conn. 2000) 41

Heard v. Johnson,
810 A.2d 871 (D.C. 2002) 41

Herzog v. St. Peter Lutheran Church,
884 F. Supp. 2d 668 (N.D. Ill. 2012) 58

Hiles v. Episcopal Diocese of Mass.,
773 N.E.2d 929 (Mass. 2002) 19

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) ..... *passim*

Hubbard v. J Message Grp. Corp.,
325 F. Supp. 3d 1198 (D.N.M. 2018) 17

Hutchison v. Thomas,
789 F.2d 392 (6th Cir. 1986) 39, 48

InterVarsity Christian Fellowship/USA v. Bd. of Governors,
---F. Supp. 3d---, No. 19-10375, 2021 WL 1387787
(E.D. Mich. Apr. 13, 2021) 47

Jackson v. Presbytery of Susquehanna Valley,
686 N.Y.S.2d 273 (N.Y. Sup. Ct.) 19

Jones v. Wolf,
443 U.S. 595 (1979) 33, 34

Kaufmann v. Sheehan,
707 F.2d 355 (8th Cir. 1983) 41

Kavanagh v. Zwilling,
997 F. Supp. 2d 241 (S.D.N.Y.) 26, 30

Kedroff v. St. Nicholas Cathedral,
344 U.S. 94 (1952) ..... *passim*

AMERICAN OVERSIGHT

Kirby v. Lexington Theological Seminary,
426 S.W.3d 597 (Ky. 2014) 53

Klouda v. Sw. Baptist Theological Seminary,
543 F. Supp. 2d 594 (N.D. Tex. 2008) 40

Kraft v. Rector, Churchwardens & Vestry of Grace Church,
No. 01-CV-7871, 2004 WL 540327
(S.D.N.Y. Mar. 17, 2004) 40

Kreisberg v. HealthBridge Mgmt., LLC,
732 F.3d 131 (2d Cir. 2013) 13

Kreshik v. St. Nicholas Cathedral,
363 U.S. 190 (1960) 17

Lee v. Sixth Mount Zion Baptist Church,
903 F.3d 113 (3d Cir. 2018) 29, 32, 37, 38

Lee v. Sixth Mount Zion Baptist Church,
No. 15-1599, 2017 WL 3608140 (W.D. Pa. Aug. 22, 2017) 39

Lewis v. Seventh Day Adventists Lake Region Conf.,
978 F.2d 940 (6th Cir. 1992) 38

Liberty Synergistics Inc. v. Microflo Ltd.,
718 F.3d 138 (2d Cir. 2013) 49, 53, 55, 56

Lishu Yin v. Columbia Int'l Univ.,
No. 3:15-CV-03656, 2017 WL 4296428
(D.S.C. Sept. 28, 2017) 58

Lynch v. Ackley,
811 F.3d 569 (2d Cir. 2016) 51

Maize v. Friendship Cmty. Church, Inc.,
No. E201900183COAR3CV, 2020 WL 6130918
(Tenn. Ct. App. Oct. 19, 2020) 19

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013) ..... *passim*

AMERICAN OVERSIGHT

Miller v. InterVarsity Christian Fellowship/USA,
No. 09-CV-680, 2010 WL 2803123
(W.D. Wis. July 14, 2010) 58

Mitchell v. Forsyth,
472 U.S. 511 (1985) 49, 50, 56, 57

Mitchell v. Helms,
530 U.S. 793 (2000) 30

Moll v. Telesector Res. Grp., Inc.,
760 F.3d 198 (2d Cir. 2014) 13

Moon v. Moon,
431 F. Supp. 3d 394 (S.D.N.Y. 2019) 17, 27

Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y,
719 F. App'x 926 (11th Cir. 2018) 18

Natal v. Christian & Missionary All.,
878 F.2d 1575 (1st Cir. 1989) 38

Natal v. Christian & Missionary All.,
No. 88-0676, 1988 WL 159169 (D.P.R. 1988) 39-40

Nicosia v. Amazon.com, Inc.,
834 F.3d 220 (2d Cir. 2016) 23

NLRB v. Catholic Bishop,
440 U.S. 490 (1979) 30

Ogle v. Church of God,
153 F. App'x 371 (6th Cir. 2005) 40

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) ..... *passim*

Paul v. Watchtower Bible & Tract Soc. of N.Y.,
819 F.2d 875 (9th Cir. 1987) 41

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004393

Penn v. N.Y. Methodist Hosp.,
884 F.3d 416 (2d Cir. 2018) 23, 48

Pfeil v. St. Matthews Evangelical Lutheran Church,
877 N.W.2d 528 (Minn. 2016) 19

Presbyterian Church v. Edwards,
566 S.W.3d 175 (Ky. 2018) 58

Prince v. Massachusetts,
321 U.S. 158 (1944) 41

Rayburn v. Gen. Conf. of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 35, 42, 44, 52

Roman Catholic Archdiocese of San Juan v. Feliciano,
140 S. Ct. 696 (2020) 50

Rweyemamu v. Cote,
520 F.3d 198 (2d Cir. 2008) ..... *passim*

Schleicher v. Salvation Army,
518 F.3d 472 (7th Cir. 2008) 47

Serbian E. Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) ..... *passim*

Skrzypczak v. Roman Catholic Diocese of Tulsa,
611 F.3d 1238 (10th Cir. 2010) 51

Stabler v. Congregation Emanu-El of the City of New York,
No. 16 CIV.9601, 2017 WL 3268201
(S.D.N.Y. July 28, 2017) 58

Sterlinski v. Catholic Bishop of Chi.,
934 F.3d 568 (7th Cir. 2019) 57

Sterlinski v. Catholic Bishop of Chi.,
No. 16 C 00596, 2017 WL 1550186
(N.D. Ill. May 1, 2017) 57, 58

AMERICAN OVERSIGHT

Thibodeau v. Am. Baptist Churches of Conn.,
994 A.2d 212 (Conn. App. Ct. 2010) 19

Tomic v. Catholic Diocese of Peoria,
442 F.3d 1036 (7th Cir. 2006) 52

United Methodist Church v. White,
571 A.2d 790 (D.C. 1990) 53

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871) 14

Werft v. Desert Sw. Ann. Conf.,
377 F.3d 1099 (9th Cir. 2004) 37

Whole Woman's Health v. Smith,
896 F.3d 362 (5th Cir. 2018) 31, 32, 53

Will v. Hallock,
546 U.S. 345 (2006) 49, 52

In re World Trade Ctr. Disaster Site Litig.,
521 F.3d 169 (2d Cir. 2008) 49

Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church in Am.,
64 F.3d 664 (6th Cir. 1995) 40

Statutes

28 U.S.C. § 1258 50

28 U.S.C. § 1291 ..... 4, 49

28 U.S.C. § 1292 10

28 U.S.C. § 1332 4

Other Authorities

2 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* (2020) 39

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004395

Black's Law Dictionary (11th ed. 2019) 27

Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor, 10 First Amend. L. Rev. 233 (2012) 53

Fed. R. Civ. P. 59 10

Fed. R. Evid. 201 6

Individual Practices of United States District Judge Victor Marrero 9-10

Lay Priesthood, ChurchofJesusChrist.org 47

G. Jeffrey MacDonald, *As denominations decline, number of unpaid minsters rise*, Religion News Service (Sept. 17, 2013) 47

Regulations of the Russian Orthodox Church Outside of Russia 6

Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847 (2018) 53

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004396

INTRODUCTION

This lawsuit strikes at the heart of the First Amendment's protection for church autonomy. The Supreme Court has long held that disgruntled clergy members cannot sue their churches over matters of church discipline or appointment to ecclesiastical office. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). Ever since, disgruntled clergy members have tried to evade this rule by repackaging ecclesiastical disputes as church property, breach of contract, or tort claims. Yet the result has been the same: Courts have repeatedly held that when a minister's claim implicates the authority of churches to handle matters of internal governance and selection of clergy, it is barred by the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976). That is this case.

Father Alexander Belya, the Plaintiff, was a Russian Orthodox Priest. He claims he was elected Bishop of Miami. But other priests and key leaders of the Russian Orthodox Church disagreed. As a matter of church procedure, they wrote a letter to church leaders asserting that Father Alexander had not been properly elected Bishop of Miami. The letter also called for investigation of serious allegations of priestly malfeasance, including breaking the seal of the confessional, manipulating parishioners, and financial improprieties. Church leadership responded

AMERICAN OVERSIGHT

with an investigation, concluded Father Alexander had not been elected bishop, and removed him from all priestly duties.

Father Alexander has now sued the Russian Orthodox Church and its leaders, alleging that the letter—an ecclesiastical communication contesting his supposed election and calling for his investigation—constitutes defamation. And he seeks millions of dollars in damages for his alleged "loss of standing" within the Russian Orthodox Church.

This lawsuit, on its face, is barred by the First Amendment in two ways. First, it violates the church autonomy doctrine, which prevents courts from interfering in "ecclesiastical hierarchies, church administration, and appointment of clergy." *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008). Church autonomy also prevents courts from interfering in a church's right to "facilitate[] religious communication and religious dialogue" between a church and its flock, especially communications promoting transparency in the church community on matters of church leadership and discipline. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002). Second, it violates the ministerial exception, which protects the church's "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

The district court declined to engage with these constitutional barriers, determining in three separate opinions that it had the authority

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004398

to delve into the truth or falsity of Father Alexander's claims. But that means a court can weigh in on how a church communicates among its leadership and with its community about the selection of bishops. It also means allowing discovery of internal church documents, permitting depositions of church leadership—including Metropolitan Hilarion, the First Hierarch of the Church—about internal church procedures, judging the truth or falsity of church statements about disciplinary procedures, and ultimately passing judgment on Father Alexander's status within the church. These decisions are appealable under the collateral order doctrine because they deny the church the immunity from suit provided by the First Amendment. Without this Court's intervention, that immunity will be lost.

Finally, at a minimum, this Court should reverse the district court's order requiring the parties to immediately proceed to merits discovery before resolution of the Religion Clauses defenses. This Court has previously recognized that this path is appropriate, and other district and appellate courts to consider the question have uniformly required bifurcation to avoid church-state entanglement. And ruling otherwise would entangle civil courts in deeply sensitive matters by allowing disgruntled priests to depose their bishops any time a promotion doesn't go their way.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004399

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 and the collateral order doctrine. Plaintiff's claims, however, challenge church discipline and governance, matters on which civil courts lack subject matter jurisdiction under the First Amendment of the Constitution.

The district court denied the motion to dismiss on May 19, 2021. On June 17, the Church timely filed a notice of appeal. On July 6, 2021, the district court denied the Church's Rule 59(e) motion to alter or amend the May 19 judgment. The Church timely amended its notice of appeal to include that order on July 16. On July 27, 2021, the district court denied the Church's motion to bifurcate discovery or stay the case pending this appeal. The Church timely amended its notice of appeal to include that order on August 13. Father Alexander's motion to dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1291 is fully briefed and pending in this Court.

STATEMENT OF THE ISSUES

I. Is Father Alexander's suit arising from statements made during internal church disciplinary processes and regarding an ecclesiastical dispute barred by the church autonomy doctrine?

II. Is Father Alexander's suit as a minister against his former church implicating the church's selection and control of its ministers barred by the ministerial exception?

AMERICAN OVERSIGHT

III. Are the district court's orders denying the motion to dismiss and the motion to bifurcate discovery immediately appealable under the collateral order doctrine?

IV. Did the district court err in refusing to limit discovery to resolution of the Religion Clauses defenses, and instead requiring the parties to start merits discovery?

STATEMENT OF THE CASE

This case involves a dispute between a priest and his former church over his failed appointment to the ecclesiastical office of Vicar Bishop. The case below is No. 1:20-cv-6597 in the Southern District of New York, before U.S. District Judge Victor Marrero. The decisions appealed are from a denial of a motion to dismiss, JA.67; a denial of reconsideration of that ruling, JA.114; and a denial of a motion to bifurcate discovery or stay proceedings, JA.146. Defendants-Appellants have appealed those orders under the collateral order doctrine. JA.112, 143, 149.

Defendants. Defendants-Appellants are the Synod of Bishops of the Russian Orthodox Church Outside of Russia, along with individual clergy, a diocese, and other senior leaders of the church (collectively, "the Church" or "ROCOR"). The lead Appellant is the ruling bishop and First Hierarch of the Church, Metropolitan Hilarion, whose legal name is Hilarion Kapral.

ROCOR is part of the Russian Orthodox Church. Founded in 1920 following the 1917 Bolshevik revolution, ROCOR exists to promote "the overall spiritual nourishment of the Orthodox Russian flock in the

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004401

diaspora[.]"[1] ROCOR's highest ecclesiastical body is the Sobor (Council) of Bishops. Regulations at ¶7; *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 96 n.1 (1952) ("A sobor is a convention of bishops, clergymen and laymen with superior powers" and aids "church officials [to] rule their dioceses"). The Sobor is ROCOR's controlling body, meeting every two years to make the Church's laws, carry out its ministry, adjudicate its internal disputes, and elect bishops. Regulations at ¶¶7-8. The Sobor's president is Metropolitan Hilarion. *Id.* ¶8.

The defendant Synod of Bishops is the Sobor's executive organ. *Id.* ¶16. The Synod consists of Metropolitan Hilarion, two of his deputies, and four members of the Sobor. *Id.* As relevant here, the Synod is also charged with several ecclesiastical responsibilities, including investigation of "serious disruption" in a diocese; activities involving the appointment, transfer, release, and retirement of bishops between Sobors; conducting an appellate court to defrock clergy; resolving matters involving church property; and among other things, "the resolution of questions concerning various aspects of church life and church administration." *Id.* ¶¶19, 29.

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[1] Regulations of the Russian Orthodox Church Outside of Russia ¶3, https://perma.cc/TN4H-FNSG. This Court can take judicial notice of a church's publicly available religious law. Fed. R. Evid. 201; *see, e.g.*, *Bouchard v. N.Y. Archdiocese*, No. 04 CIV. 9978, 2006 WL 3025883, at *5 (S.D.N.Y. Oct. 24, 2006).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004402

Plaintiff. The Plaintiff-Appellee is Father Alexander Belya, an "Orthodox Christian archimandrite"—a monastic priest. JA.87. Father Alexander claims he was elected "by a majority of the Bishops" in the Church to the position of Bishop of Miami, Vicar of the Eastern Archdiocese of Florida, on December 6, 2018. JA.92.

According to the complaint, on September 3, 2019, after the Moscow leadership of the Church had recognized Father Alexander's supposed appointment as bishop, several ROCOR Clergy, including members of the Synod, wrote a letter (the Clergy Letter) to the Synod and Metropolitan Hilarion raising concerns about "irregular" aspects of the documents relating to Father Alexander's election as a bishop. JA.19-21. The documents with irregularities were letters allegedly sent by Metropolitan Hilarion and a Canadian archbishop to senior church officials regarding Father Alexander's candidacy and election to the bishopric. JA.19-20. The Clergy Letter also called on the Synod not to consider Father Alexander's candidacy in the future because of "the submission of so many serious complaints against him." JA.20. It described problems with Father Alexander's priestly performance, including him "breaking the seal of Confession," using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and failing to ensure proper accountability for church property and finances. JA.20. The Clergy Letter asked "the Synod to ascertain the circumstances of the confirmation of the non-existent 'election,'" and it closed by calling

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004403

on Metropolitan Hilarion to conduct an investigation into these complaints and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21.

As Father Alexander admits and the district court recognized, this letter—from a group of clergy to the governing Synod, contesting the supposed election of a bishop, describing problems of priestly performance, and requesting an ecclesiastical investigation—is the crux of Father Alexander's complaint and the source of each of the alleged "specific Defamatory Statements" at issue in this case. Mot. to Dismiss at 2, ECF 22-2; JA.71.[2]

Father Alexander's complaint discusses at length his alleged election, the Clergy Letter challenging that election, and the actions of the Church in response, *see* JA.91-99, including the Clergy Letter's alleged publication within the Church and, eventually, alleged publication on a website the Church uses to communicate with members and subsequent coverage by media outlets which cover the Church. JA.98.

The Clergy Letter was followed by a "public decree" from Metropolitan Hilarion instituting an investigation of Father Alexander and his activities and removing him from all ministerial duties. JA.99. Rather than submit to investigation or appeal internally, Father Alexander left the Church and sued for defamation. JA.99. Father Alexander claims

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[2] Filings in this Court are cited as "ECF," and district court filings not included in the appendix are cited as "Dkt."

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004404

damages for the loss of income from members leaving his congregation, and for "severely impaired reputation and standing" within the Russian Orthodox Church Outside of Russia. JA.105-06, 108.

Proceedings in the district court. Father Alexander brought this lawsuit on August 18, 2020, alleging, as relevant here, defamation, defamation per se, and defamation by innuendo against Metropolitan Hilarion and nearly a dozen clergy and senior leaders of the Church, as well as vicarious liability against the Eastern American Diocese and the Synod of Bishops.[3]

On November 24, 2020, the Church sought permission to file a motion to dismiss and requested a hearing. It argued, *inter alia*, that the First Amendment prohibits judicial interference in ecclesiastical disputes, particularly those over the nomination, election, and confirmation of bishops. JA.17. The Church attached the full Clergy Letter to its letter brief to demonstrate the ecclesiastical context of the communication. JA.19-21. Although it had not been attached to Father Alexander's complaint, the Church argued that it should be incorporated by reference because it was integral to all the claims and the complaint quoted it repeatedly.

The district court's practice rules limited both sides to letter briefs of no more than three pages. *See* Individual Practices of United States

[3] Defendant Pavel Loukianoff has not appeared in this appeal as he was not properly served with a complaint.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004405

District Judge Victor Marrero II.B, https://perma.cc/77NM-KKLH. The district court denied the Church's three-page request and directed Father Alexander to respond with a letter brief and an amended complaint, JA.30, which Father Alexander filed as a proposed complaint on January 14, 2021, Dkt. 42-1. The Church replied via three-page letter brief on January 22, explaining that the first amended complaint had the same constitutional flaws and requesting dismissal. JA.35-37.

On May 19, the court construed the Church's November 24 letter brief as a motion to dismiss and denied the motion without permitting full briefing or oral argument. JA.84. The court held that the First Amendment does not bar Father Alexander's defamation claims because the suit "may be resolved by appealing to neutral principles of law." JA.77.

On June 16, 2021, the Church filed a timely Rule 59(e) motion to alter the judgment. Dkt. 51; Fed. R. Civ. P. 59(e). On June 25, the Church filed a separate request that the district court certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. 54.

On July 6, the district court denied both motions in a single five-page order. JA.114-18. The court acknowledged that "the ministerial exception and the doctrine of ecclesiastical abstention" were "the controlling legal doctrines at issue," but reaffirmed its previous order denying the Religion Clauses as a defense and held that disputes "as to whether the factual

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004406

situation presented fits into the ministerial exception or ecclesiastical abstention" warranted denying certification. JA.117.

The Church sought to limit any discovery to resolution of the ministerial exception and church autonomy defenses, or, alternatively, a stay pending this appeal. Dkt. 62. The court denied that motion and ordered the parties to promptly commence and complete merits discovery. JA.146-48; 142.

On June 17, the Church timely filed this collateral order appeal of the order denying the motion to dismiss. JA.112. On July 16, the Church amended its notice of appeal to include the July 6 order denying the Rule 59(e) motion. JA.143. On August 13, the Church amended its notice of appeal to include the July 27 order denying the motion for bifurcated discovery or stay. JA.149.

Proceedings in this Court. Father Alexander moved to dismiss this appeal on July 15, 2021, and that motion remains pending. On August 14, the Church filed a motion to stay district court proceedings to prevent the Church and its leadership from being required to undergo intrusive discovery and depositions regarding the events and communications surrounding the election, confirmation, and suspension of a Bishop.

SUMMARY OF THE ARGUMENT

Father Alexander's defamation claims strike at the heart of the church autonomy doctrine. They seek to punish the Church for ecclesiastical communications about its internal religious policies and decisions about

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004407

choosing and disciplining its clergy. Adjudicating these claims would both violate the Church's right to choose its clergy and unconstitutionally entangle civil courts in ecclesiastical matters. Father Alexander's claims also call for intrusive discovery into the Church's decision-making process, including probing the mind of the highest Church officials regarding their decision to suspend a priest.

Father Alexander's defamation claims are also barred by the ministerial exception, because he is a priest challenging the manner in which his Church selected its bishops and controlled its clergy. Permitting his claims to proceed would undermine the ministerial exception's purpose of leaving the selection and control of ministers solely in the hands of their church.

This Court has jurisdiction over this appeal through the collateral order doctrine. As numerous courts have recognized, church autonomy is not only a defense to *liability*, but also a form of *immunity* protecting against entangling discovery and trial. Thus, the district court's orders rejecting the Religion Clauses defenses and speeding the case toward merits discovery and trial are subject to collateral order review. The district court's orders immediately expose the Church and its senior hierarchy to intrusive merits discovery, which will cause irreparable and unreviewable First Amendment harm if allowed to remain in place. The orders are accordingly conclusive as to the Church's claimed First

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004408

Amendment immunity and entirely separate from the merits of Father Alexander's defamation claim.

Finally, the district court abused its discretion by denying bifurcation of discovery and ordering the parties to commence merits discovery before resolution of the Religion Clauses defenses.

STANDARD OF REVIEW

The standard of review for orders on motions to dismiss and on the district court's interpretation of the Constitution is de novo. *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2015) (denial of qualified immunity on a motion to dismiss); *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir. 2013) (constitutional interpretation). The standard of review for the district court's denial of the motion to bifurcate discovery or stay proceedings is abuse of discretion. *Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 204 (2d Cir. 2014). Abuse of discretion includes "errors of law." *Id.*

ARGUMENT

I. Father Alexander's claims are barred by the church autonomy doctrine.

For over a century, courts have recognized that the First Amendment's Religion Clauses protect against government interference in internal church affairs, guaranteeing a heightened "independence" for churches "from secular control or manipulation." *Kedroff*, 344 U.S. at 116. Under this "general principle of church autonomy," the Religion Clauses protect

AMERICAN OVERSIGHT

a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061.[4] "State interference" in such matters would "obviously" violate the Free Exercise Clause, and "any attempt" by the judiciary to "dictate or even to influence such matters" is an equally clear violation of the Establishment Clause. *Id.* at 2060.

This principle especially applies to disputes over "church discipline [and] ecclesiastical government." *Milivojevich*, 426 U.S. at 714-15. Those who "unite themselves to" a religious organization "do so with an implied consent to this government, and are bound to submit to it," "in all cases of ecclesiastical cognizance." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). As relevant here, that includes a church's selection and discipline of its clergy, as well as church communications about those internal matters. *See Gonzalez*, 280 U.S. at 16 ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Bryce*, 289 F.3d at 659 ("internal ecclesiastical dispute and dialogue [are] protected by the First Amendment").

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[4] The term "church" in church autonomy is used generically to mean religious institutions in any faith tradition. Courts have also used "religious autonomy" and "ecclesiastical abstention" to signify the doctrine.

AMERICAN OVERSIGHT

Based solely on the allegations in the complaint, this Court cannot adjudicate Father Alexander's claims without adjudicating the Church's decision to investigate and discipline its own clergy, interfering in matters of religious doctrine and church policy. Doing so would violate the separation between church and state set by the church autonomy doctrine. The district court erred by holding otherwise.

A. The church autonomy doctrine can bar defamation claims.

The church autonomy doctrine has been held to bar civil authorities from intervening in a broad range of internal church matters involving governance of the Church, including clergy appointment and church discipline. Courts have specifically held that the church autonomy doctrine bars defamation and other tort claims based on communications about clergy appointment, church discipline, and church policies and doctrine.

"Church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern," and courts thus routinely bar suits that interfere with churches' decisions involving clergy selection and discipline. *Milivojevich*, 426 U.S. at 717. For example, in *Gonzalez*, the plaintiff sued the Roman Catholic Archbishop of Manila for appointment to a chaplaincy under the terms of a trust, though "he was ineligible under the then existing canon law." 280 U.S. at 18. The Supreme Court held that since the chaplain's qualifications were "purely ecclesiastical,"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004411

it must accept the decision of the Archbishop that the plaintiff was not qualified. *Id.* at 16.

The Supreme Court later elaborated on *Gonzalez* in its *Milivojevich* decision. There, the Court considered the Serbian Orthodox Church's decision to discipline and remove a bishop. 426 U.S. at 713. Instead of participating in the church's appeal process, the Bishop sued in Illinois state court, arguing that control of his diocese was a property matter that could be determined by neutral principles of law. *Id.* at 706-07. The Supreme Court held that even though the mother church's decision affected who had control over church property, "the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation." *Id.* at 720. It also found that the Illinois Supreme Court's "detailed review of the evidence" regarding the bishop's claims, including "conflicting testimony concerning internal church procedures," was "impermissible." *Id.* at 718.

Courts have long interpreted this line of cases to bar judicial interference in the selection or discipline of clergy. *See, e.g.*, *Rweyemamu*, 520 F.3d at 204-05 ("Since at least the turn of the century, courts have declined to interfere with ecclesiastical hierarchies, church administration, and appointment of clergy." (cleaned up)); *Bryce*, 289 F.3d at 658 ("letter[] to other church leaders [that] discussed an internal church personnel matter and the doctrinal reasons for . . . proposed personnel decision" protected by church autonomy doctrine); *Eglise*

AMERICAN OVERSIGHT

Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla., 824 F. App'x 680, 683 (11th Cir. 2020) (claim rejected involving "whether [defendant] was the rightful successor to the church's leadership").

Recognizing the "independence from secular control" granted to churches in ecclesiastical matters, *Kedroff*, 344 U.S. at 116, courts "generally do not permit [defamation and other] tort claims arising from internal processes by which religious organizations discipline their members." *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1214 (D.N.M. 2018); *cf. Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (rejecting common law claim seeking to transfer control of cathedral). Statements made by clergy as part of a disciplinary process and based on religious concerns "may be incorrect, but they are not actionable." *Bryce*, 289 F.3d at 658.

Those statements include criticism of religious leaders. For instance, in *Moon v. Moon*, the Southern District of New York considered a succession dispute following the death of the Unification Church's leader. 431 F. Supp. 3d 394, 400 (S.D.N.Y. 2019), *aff'd as modified* 833 F. App'x 876 (2d Cir. 2020). The plaintiff argued that statements made by church leadership "disput[ing] [his] proper authority to lead" the church were defamatory. *Id.* at 401. But in a decision affirmed by this Court, the district court held that it could not consider the "truth or falsity of statements concerning [parties'] purported religious standing." *Id.* at 413.

AMERICAN OVERSIGHT

And in *In re Diocese of Lubbock*, the Texas Supreme Court barred defamation claims based on public church discipline. A deacon of the Catholic Church brought defamation claims against a Catholic diocese for including his name on a public list of "clergy against whom credible allegations of sexual abuse of a minor" had been made. 624 S.W.3d 506, 510 (Tex. 2021). The deacon claimed neutral principles could apply to determine whether a woman "with a history of mental and emotional disorders" was a minor under canon law. *Id.* at 509, 514. When the lower courts were going to allow the claims to proceed, the Texas Supreme Court granted mandamus and held that even if the truth or falsity of the deacon's claim could be determined by a factfinder, the suit "ultimately challenge[d] the result of a church's internal investigation into its own clergy," and "[i]nvestigations that relate to the character and conduct of church leaders are inherently ecclesiastical" and off-limits to civil courts. *Id.* at 517-18.

For the reasons articulated in these cases, courts around the country have often barred defamation and other tort claims arising from communications about clergy appointment and church discipline. For example:

- *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928-29 (11th Cir. 2018) (tort claims against religious institution were barred because they "required an examination of doctrinal beliefs and internal church procedures");

AMERICAN OVERSIGHT

- *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 541 (Minn. 2016) (defamation claim that involved statements made during disciplinary proceeding was barred);
- *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 294 (Ind. 2003) (defamation claim to "penalize communication and coordination among church officials . . . on a matter of internal church policy and administration" would violate church autonomy doctrine if adjudicated);
- *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-37 (Mass. 2002) (defamation claim based on letter accusing priest of adultery as part of ecclesiastical disciplinary proceedings was barred);
- *Maize v. Friendship Cmty. Church, Inc.*, No. E201900183COAR3CV, 2020 WL 6130918, at *7 (Tenn. Ct. App. Oct. 19, 2020) (communications "inextricably linked to the termination process" of a pastor were barred by church autonomy);
- *Dermody v. Presbyterian Church*, 530 S.W.3d 467, 474 (Ky. Ct. App. 2017) (a civil court "cannot" "review the determinations of an ecclesiastical body applying its own . . . rules");
- *Thibodeau v. Am. Baptist Churches of Conn.*, 994 A.2d 212, 221 (Conn. App. Ct. 2010) (defamation claim regarding letter discussing ordination candidate's fitness for ministry was barred);
- *Jackson v. Presbytery of Susquehanna Valley*, 686 N.Y.S.2d 273, 275 (N.Y. Sup. Ct.), *aff'd*, 697 N.Y.S.2d 26 (N.Y. App. Div. 1999) (defamation allegations related "to a dispute over the plaintiff's fitness or suitability to act as a clergyman" barred);
- *Downs v. Roman Catholic Archbishop of Balt.*, 683 A.2d 808, 812 (Md. Ct. Spec. App. 1996) ("Questions of truth, falsity, malice, and the various privileges that exist [in defamation claims] often take on a different hue when examined in the light of religious precepts and procedures.").

AMERICAN OVERSIGHT

B. The church autonomy doctrine bars Father Alexander's defamation claims.

In this case, Father Alexander's claims seek to penalize the church for "the incidental effect of an ecclesiastical determination," *Milivojevich*, 426 U.S. at 720, namely: to deny him a bishopric and suspend his priestly duties. Civil courts do not have the authority to intervene in that ecclesiastical process and second-guess those determinations.

The district court erred by holding otherwise. After sharply limited briefing and no oral argument, the court addressed the church autonomy defenses at issue here in just two paragraphs, holding that the complaint "raise[d] secular inquiries" that did not involve "weighing matters of ecclesiastical concern." JA.77. Those inquiries included "whether . . . Defendants made the alleged statements, the truth of the alleged statements, [and] Defendants' knowledge of the alleged statements' falsity . . . ." *Id.* But each of those inquiries involves not just finding out "what occurred," JA.147; they render judgment upon the Church's very process of selecting and disciplining its clergy.

Father Alexander's claims interfere in that process and violate church autonomy in at least four ways: they interfere with church discipline, entangle the court in doctrine and Church policy, require adjudication of a minister's religious standing, and necessitate intrusive discovery.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004416

1. Father Alexander's claims interfere with Church discipline.

First, Father Alexander asks this Court to impose liability on the Church for two of its "ecclesiastical determinations" regarding clergy discipline: whether Father Alexander was properly appointed to be a bishop, and whether he was qualified for his ministry role.

The Clergy Letter is an internal church communication from diocesan leadership, including members of the ROCOR Synod, to the Synod and Metropolitan Hilarion, the church leadership responsible for disciplining and selecting clergy. The Letter pointed out "irregular" aspects of the documents submitted to demonstrate Father Alexander's alleged election and confirmation as a bishop, JA.19, and described problems with Father Alexander's priestly performance, including his "breaking the seal of Confession" and using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and a "total lack of financial (and other) accountability" and "a whole range of unseemly behavior . . . requiring specific investigation," JA.20. The Letter closed by asking the Metropolitan to conduct an investigation into these "serious complaints against him," including "the circumstances of the confirmation of the non-existent 'election'" to the bishopric, and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21. As Father Alexander admits, Metropolitan Hilarion responded by suspending Father Alexander from his priestly duties

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004417

pending an investigation. JA.99. For his part, Father Alexander chose not to pursue the Church investigation, but instead left ROCOR and filed this lawsuit. *Id.*

Holding the Church liable for statements made by its clergy regarding internal church processes and the character of other clergy would chill all manner of religious exercise across religious institutions. It would hinder religious organizations' ability to carry out their most basic functions, including selecting clergy, and would expose religious organizations to the "significant burden" of having to "predict which of its activities a secular court will consider religious." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). In response, religious organizations would either refrain from speaking altogether, or would refrain from implementing directives that require transparent communication between clergy and with the broader church. But the "church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely," including on "internal church disciplinary procedures" and matters. *Bryce*, 289 F.3d at 658. Allowing this case to proceed further would uproot those rights.

Father Alexander attempts to cherry-pick parts of the Clergy Letter—concerning whether the election happened and the irregularities in the letters central to his appointment to bishop—that he claims a secular court can review. But even these narrowly quoted sections do not help

AMERICAN OVERSIGHT

him. As a part of an internal ecclesiastical process concerning both discipline and the church's selection of its leadership, the Clergy Letter cannot be divided up by secular and religious claims because "courts are ill-equipped" to determine whether a "dispute between a minister and his or her religious group is premised on religious grounds" as opposed to "secular considerations." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017) (recognizing "judicial incompetence with respect to strictly ecclesiastical matters"). In holding otherwise, the district court "glosse[d] over core Establishment Clause issues" in "significant ways," including by "cross[ing] the permissible constitutional line and . . . defining 'Church policy, administration, and governance'" in a way that was inconsistent with the Church's own judgment of those matters. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 429 (2d Cir. 2018).

Further, the district court mistakenly considered *only* the portions of the Clergy Letter quoted in the complaint. JA.79 n.4. In doing so, it ignored the ecclesiastical context of the Letter omitted by Father Alexander, including charges of abuse of doctrine and Church policy. Because the complaint "relie[d] heavily" on the "terms and effect" of the Clergy Letter, the court should have considered it in its entirety. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230-31 (2d Cir. 2016).[5]

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[5] Father Alexander has never objected to consideration of the entire Clergy Letter. *See* Dkts. 39, 42, 45 (no opposition to attached Letter); 53 (no response to argument that court erred in ignoring it).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004419

But even the allegedly "secular" components Father Alexander points to relate to the entirely ecclesiastical determination of whether Father Alexander had been properly appointed as bishop. The Church's highest authority determined that he had not, which is a determination that "legal tribunals must accept . . . as binding on them." *Kedroff*, 344 U.S. at 113. For a court to intervene in that determination by parsing the communication involved in it would be to overturn the highest authority in the Church in a "matter[] of church government." *Id.* at 116.

In sum, Father Alexander's claims against Metropolitan Hilarion, the Eastern American Diocese, and the Synod are all premised on contesting their disciplinary decisions. Father Alexander attacks those decisions as intentionally erroneous ecclesiastical determinations of his status as bishop. *See, e.g.*, JA.104 ("intentional and malicious conduct"). He wants not only a civil court's review of "ecclesiastical decisions made by a church body *created to* make those decisions," *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *7 (D. Md. Mar. 4, 2019) (emphasis added), but also civil liability on the decision-making church bodies themselves. Neither is permissible.

2. Father Alexander's claims require courts to interpret Church policy and answer religious questions.

Father Alexander's claims require the court to answer religious questions, including those about the Church's internal religious procedure. They do so in three ways: they ask the court to interpret

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004420

proper ROCOR ecclesiastical election procedures; they ask the court to determine Father Alexander's standing as a minister; and they ask the court to resolve matters of church membership and authority in order to determine damages.

First, Father Alexander has repeatedly argued that the Clergy Letter will be shown false if he proves the authenticity of the Metropolitan's signature on the documents the Clergy Letter addresses. ECF 22-2 at 7. Not so. The Clergy Letter claims irregularities were present in letters sent from the Metropolitan regarding Father Alexander's election. Therefore, even if the signature were proper, that would not resolve the question of the irregularities in the *letters*. Thus, a court would still have to rule on the truth or falsity of the *actual* statements in the Clergy Letter in order to determine whether the appointment communications to Moscow were in fact "drawn up in an irregular manner." JA.19. And "irregularity" is determined by ROCOR and its policies, not civil courts.

Moreover, the irregularities actually identified by the Clergy Letter all involved matters of internal church procedure—including whether appointment communications "contain[ed] the appropriate citation from the decision of the Synod of the Bishops," whether the letter from Archbishop Gabriel was "issued" according to ROCOR custom, and whether it was properly produced "on the official letterhead of the Most Reverend Gabriel." JA.19-20. Whether the Church "complied with church laws and regulations" in executing and communicating about these

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004421

procedures "is exactly the inquiry that the First Amendment prohibits." *Milivojevich*, 426 U.S. at 713; *see also Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 252 (S.D.N.Y.), *aff'd*, 578 F. App'x 24 (2d Cir. 2014) (defamation claim challenging press release describing church discipline would require the court to consider "the truth or falsity of the Catholic Church's characterization of its own law and doctrine"). Such "[r]eligious questions" must be "answered by religious bodies," not juries or judges. *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).

As Father Alexander admits, and the district court recognized, the Clergy Letter is "the heart" of Father Alexander's complaint and each of the alleged "specific Defamatory Statements" are contained within it. ECF 22-2 at 2; *see* JA.71. Thus, because the heart of his claims turns on interpreting Church policy, his claims must fail.

Father Alexander alleges that one defendant—Archpriest Gan, the rector of St. Seraphim of Sarov Memorial Church and Chancellor of the ROCOR Synod—used the word "forgery" outside the Clergy Letter in a statement on St. Seraphim's website. JA.98. The church denies Father Alexander's account, but even taking it as true, his claims of publication implicate the Church's ability to communicate with its members about the status and character of its ministers. Indeed, "communication of the results of" an internal church investigation and disciplinary process "cannot be severed from" the religious requirements that invoke the investigation "in the first place." *Diocese of Lubbock*, 624 S.W.3d at 509.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004422

A church's efforts to maintain transparency with its membership through its own website and social media channels cannot be second-guessed by a court. And First Amendment defenses do not depend "on whether a publication goes beyond church walls but rather whether the substance and nature of the plaintiff's claims implicate ecclesiastical matters." *Id.* at 516.[6]

Second, Father Alexander ultimately asks this Court to adjudicate his "religious standing" as a minister. *Moon*, 431 F. Supp. 3d at 413. Father Alexander's complaint is built around his failed elevation from "an Orthodox Christian archimandrite" to the "Bishop of Miami." JA.87. Father Alexander admits that the whole purpose of the Clergy Letter was to contest his claimed "appointment as Bishop of Miami." JA.101-02. He likewise admits that the Clergy Letter was issued in response to a public statement by the Church just days earlier announcing "the decision of the ROCOR Synod appointing [Father] Alexander as Bishop of Miami," and was part of an effort by the Synod to "undo" this statement. JA.94-95. On that ground alone, his attempt to claim defamation from the

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[6] In any event, "forgery" under the Model Penal Code is defined as "the act of fraudulently altering, authenticating, issuing, or transferring a writing *without appropriate authorization*." Black's Law Dictionary (11th ed. 2019) (emphasis added). And whether the letters were authenticated, issued, or transferred with the "appropriate authorization" is a religious question governed by Church law.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004423

Clergy Letter is inextricably intertwined with the Church's internal ministerial selection and his standing as a bishop.

Further, Father Alexander's complaint makes clear that he wishes the court to recompense him for losing standing in the eyes of his congregation based on whether his appointment to the role of bishop was correct. Father Alexander claims the Church's disciplinary action was "damaging to [his] reputation [as] a religious leader" because it was communicated to the Synod, "parishes, churches, monasteries, and other institutions within ROCOR," and to "parishioners in the Orthodox Christian community." JA.87, 97, 103. He alleges this resulted in him having "severely impaired . . . standing in the community" and a "drastic decrease of the membership in his church," and left him "no future within ROCOR and, more importantly, . . . unable to serve his parish as a ROCOR priest." JA.99, 105-06, 108. But this all goes to his "standing" as a "religious leader." Civil courts cannot adjudicate a priest's claims against his church over his diminished status as a religious leader. This is a quintessential "religious thicket." *Milivojevich*, 426 U.S. at 719.

Third, Father Alexander asks the court to answer religious questions by claiming damages based on his "severely impaired reputation and standing" in the ROCOR community and the resulting "decrease of the membership in his church." JA.105-06.

Even if the court could award damages on those bases, it could not answer the religious questions asked by the damages claim. Father

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004424

Alexander claims that he has lost income as a result of people leaving his church because of the Clergy Letter and its aftermath. But when it comes to a congregant's religious decision whether to attend church or give an offering, for a court to even consider "decreased giving and reduced membership in the Church . . . and how that translates into donations and attendance" would "impermissibly entangle the court in religious governance and doctrine." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 121 (3d Cir. 2018).

Here, the Clergy Letter itself, in statements that Father Alexander does not challenge, identifies several religious reasons congregants might wish to leave his church unrelated to the allegedly defamatory statements: his "breaking of the seal of Confession," "his use of information obtained during Confession and confidential discussions for the purpose of denigrating parishioners and of controlling them," and his failure to organize his cathedral and monastery "according to the norms of the Russian Church Abroad." JA.20. How is a civil court supposed to determine which church members left because of the unchallenged statements in the letter, and which left because of the statements Father Alexander contests?

* * * *

In sum, if allowed to proceed, every stage of the litigation would entail inquiries into internal Church communications and decision-making, with damages based upon Father Alexander's reputation as a Bishop and

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004425

predicted future earnings as a Bishop. Each jurisdictional fact alleged against the non-domiciliary defendants is based upon internal communications among church leadership, and each of the defamatory statements alleged was made in official communications among senior church leadership. JA.99-101. These inquiries are the antithesis of "purely secular," and they are not permitted by the First Amendment. *Kavanagh*, 997 F. Supp. 2d at 251.

3. The discovery process necessary to adjudicate Father Alexander's claims will itself violate church autonomy.

Putting the Church through the discovery that will be necessary to resolve Father Alexander's claims will itself violate the Religion Clauses. The district court asserted that it has the ability to conduct a "fact-based inquiry into what occurred" without "pass[ing] judgment on the internal policies and or determinations of the" Church. JA.147. But in the inherently religious context of internal church discipline of church leaders, the "very process of inquiry" itself will "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *see also Milivojevich*, 426 U.S. at 718 ("detailed review of the evidence" of church policy was "impermissible"). Indeed, it is well established that courts must "refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004426

This principle was illustrated in *Whole Woman's Health v. Smith*, where the Fifth Circuit accepted a collateral order appeal to prevent the Catholic Church from having to turn over internal documents in a civil lawsuit. 896 F.3d 362 (5th Cir. 2018). The Fifth Circuit held that courts should "protect the inner workings" of religious organizations and "maintain their internal organizational autonomy intact from ordinary discovery." *Id.* at 372, 374. For this reason, church autonomy defenses are "similar to a government official's defense of qualified immunity" and must be "resolved at the earliest possible stage of litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 & n.1; *see* Part III.A.1 *infra*.

Here, discovery beyond document production of the already-public documents mentioned in the complaint would entangle civils courts in internal Church deliberations, including:

- A deposition of Metropolitan Hilarion as to whether he "went along, consented to, authorized and participated in the scheme to deny his authorship of" letters, and his "willingness to falsely deny that he had authored the letters," JA.97, 101;
- Depositions of fellow ministers in the search for malice and hostility in their religious judgments regarding Father Alexander's election, *see, e.g.*, JA.104;
- Depositions of clergy on such matters as Father Alexander's suspension, internal clergy communications, and the validity of Father Alexander's alleged election in the Synod; *see, e.g.*, JA.99-101;

AMERICAN OVERSIGHT

- Document requests involving internal church communications, including church discipline, church procedure, or church organization and polity, *e.g.*, JA.94-96;
- Interrogatories demanding clergy opinions on internal church procedures; *see, e.g.*, JA.95-97, 100; and
- Evidence regarding the "drastic decrease of the membership" in Father Alexander's church, JA.105.

This kind of entangling discovery is forbidden by the First Amendment. The Constitution bars the "onerous" burden of "depositions of fellow ministers and the search for a subjective motive behind the alleged hostility" to Father Alexander. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc). It also forbids "attempting to parse the internal communications [of a church] and discern which are 'facts' and which are 'religious' [as] tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause." *Whole Woman's Health*, 896 F.3d at 373. And it does not permit investigation into damages flowing from reduced tithes and church membership related to religious leadership disputes. *Lee*, 903 F.3d at 121; Part I.B.2 *supra*.

If this case is allowed to proceed, it would proliferate defamation lawsuits between ministers and their churches where an employment claim would be barred. Following Father Alexander's footsteps, for instance, a Catholic nun could gain the right to depose her Archbishop, Cardinal, or even the Pope, by appointing herself to a mother superior role and suing the Vatican for de-recognizing her position in a church

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004428

disciplinary document. *Contra McCarthy*, 714 F.3d at 976. That is not the kind of separation of church and state contemplated by the First Amendment.

C. The neutral principles doctrine does not apply in this case.

For the reasons explained above, Father Alexander's claims cannot be resolved by "neutral principles of law," as he claims and as the district court held. JA.32, 77. Where, as here, a lawsuit is brought by a minister against his Church for statements made as part of a disciplinary proceeding involving his candidacy and suitability as a bishop and priest, it cannot be removed from the realm of the Religion Clauses and brought into the secular jurisdiction of this Court.

The "neutral principles" doctrine was developed for church property disputes, and the Supreme Court has never applied it outside that context. *Compare Jones v. Wolf*, 443 U.S. 595 (1979) (applying neutral principles to property dispute), *with Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (no mention of neutral principles doctrine), *and Our Lady*, 140 S. Ct. 2049 (same). Indeed, even when a matter "affects the control of church property," the Supreme Court has explicitly rejected application of neutral principles to cases where the matter is one of "internal [church] discipline and government." *Milivojevich*, 426 U.S. at 709, 724. In *Milivojevich*, for instance, the lower court held that it could determine the bishop's

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004429

property claims based on neutral principles. *Id.* at 721. But the Supreme Court reversed, concluding that the claims could not be resolved "without engaging in a searching and therefore impermissible inquiry into church polity." *Id.* at 723.

Many courts have recognized that "neutral principles" cannot be applied to religious disputes about internal church discipline and procedures. Indeed, even where "a civil court might be able to avoid questions of religious beliefs or doctrines," it cannot consider "questions of church discipline and the composition of the church hierarchy [that] are at the core of ecclesiastical concern." *Crowder v. S. Baptist Convention*, 828 F.2d 718, 726 (11th Cir. 1987).

Diocese of Lubbock is directly on point. There, the plaintiff deacon sued for defamation, claiming that neutral principles could apply to determine whether the church was factually incorrect to include his name on a list of "clergy credibly accused of sexual abuse of a minor." 624 S.W.3d at 509. The court squarely rejected this argument, finding that exercising jurisdiction over the dispute would "invade the Diocese's internal management decision to investigate its clergy consistent with its own norms and policies." *Id.* at 518. The neutral principles doctrine, the court held, must be "narrowly drawn to avoid inhibiting the free exercise of religion or imposing secular interests on religious controversies." *Id.* at 513 (citing *Jones*, 443 U.S. at 603-05; *Milivojevich*, 426 U.S. at 710); *see also Brazauskas*, 796 N.E.2d at 294 (rejecting argument that the court

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004430

could apply neutral principles to resolve defamation and other tort claims involving "communication" about church procedure).

So too here. The district court held that it could determine "what occurred" without "pass[ing] judgment on the internal policies or determinations" of the Church. JA.147. But in order for the litigation to proceed, the court *must* "pass judgment" on the truth or falsity of ecclesiastical judgments made by clergy in the church discipline process, "probe the mind of the church" through intrusive discovery about its internal procedures, *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.), and ultimately decide whether the Church should be held liable for how it rejected Father Alexander's appointment as bishop and later removed him from ministry. None of those things can be done by neutral law and without violating the First Amendment.

II. Father Alexander's claims are barred by the ministerial exception.

This case presents a straightforward application of the ministerial exception. Neither of the more commonly disputed elements of the exception are in question: Father Alexander is undisputedly a minister, and the defendants are undisputedly a church and its senior hierarchy.

So the narrow issue here is whether the ministerial exception bars Father Alexander's defamation claims. It does.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004431

Courts have long and repeatedly recognized that defamation claims by a minister against a church can be barred, especially when they are intertwined with a church's selection or discipline of its ministers. Here, Father Alexander's claims are inextricably wrapped up in both the Church's decision whether to select him as a Bishop and its investigation and discipline of him. And Father Alexander's counterarguments are meritless.

A. The ministerial exception bars defamation claims that interfere with a church's selection and supervision of its ministers.

The ministerial exception is an aspect of the church autonomy doctrine that specifically safeguards churches' "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. This rule prohibits civil adjudication of a minister's claims against religious bodies that would interfere with "the authority to select and control who will minister to the faithful," since that is a "strictly ecclesiastical" matter for a religious body "alone" to decide. *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff*). Thus, "where a defendant is able to establish that the ministerial exception applies, the 'First Amendment has struck the balance for us' in favor of religious liberty" and a civil claim is barred from proceeding. *Fratello*, 863 F.3d at 199 (quoting *Hosanna-Tabor*, 565 U.S. at 196).

AMERICAN OVERSIGHT

The rule is required by both Religion Clauses of the First Amendment. Adjudication of a civil claim that interferes in a ministerial relationship "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and it "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89.

This foundation in both Clauses is related to its role in "ensur[ing] the separation of church and state," *Fratello*, 863 F.3d at 199, which means both church and state have independent interests in maintaining its vitality. That is, "this constitutional protection is not only a personal one" for a religious body; "it is a structural one" that is "imposed on the government by the Religion Clauses" and "categorically prohibits . . . governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015); *accord Lee*, 903 F.3d at 118 n.4 (the "exception is rooted in constitutional limits on judicial authority").

While some civil claims may survive this structural bar because they are unrelated to ministerial selection or control—such as a slip-and-fall on the church steps, *Rweyemamu*, 520 F.3d at 208—"*any* federal or state cause of action" that would "impinge on the Church's prerogative to choose its ministers" is barred. *Werft v. Desert Sw. Ann. Conf.*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004) (emphasis added); *see also id.* at 1103 ("The

AMERICAN OVERSIGHT

ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy, termed the 'lifeblood' of the religious institution."). This is because such claims, "whatever their 'emblemata,'" will "inexorably entangle [courts] in doctrinal disputes." *Rweyemamu*, 520 F.3d at 208 (quoting *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577 (1st Cir. 1989)).

"However a suit may be labelled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal*, 878 F.2d at 1576-78. Thus, the operative question is not whether the action sounds in tort, contract, or statute, but whether it "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188.

Accordingly, courts have barred not only Title VII and other employment discrimination claims under the ministerial exception, as in *Fratello*, but also contract and tort claims. *See, e.g.*, *Lee*, 903 F.3d at 122 (rejecting minister's contract claim against church; noting that "sister circuit courts have repeatedly" done the same); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009) (barring contract claim); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997) (rejecting claims for "breach of contract and various torts"); *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940 (6th Cir. 1992)

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004434

(rejecting tort and contract claims). Indeed, such common-law claims are often part and parcel to a standard wrongful termination claim, all of which can be subject to the ministerial exception. 2 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 14:54 (2020) ("Wrongful termination claims are often joined with claims of common law torts such as defamation and intentional or negligent infliction of emotional distress.").

Courts have thus long and repeatedly applied the ministerial exception to bar defamation and similar claims. *See Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *34 (W.D. Pa. Aug. 22, 2017), *aff'd*, 903 F.3d 113 (3d Cir. 2018) (collecting cases where courts have "clearly held that the ministerial exception applies to . . . defamation claims"). Thirty-five years ago, the Sixth Circuit rejected a defamation claim that was "really seeking civil court review of subjective judgments made by religious officials and bodies that he had become 'unappointable,'" reasoning that "secular authorities may not interfere with the internal ecclesiastical workings and disciplines of religious bodies." *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986). Three years later, the First Circuit affirmed a ruling barring libel and slander claims that were "inextricably intertwined" with an "ecclesiastical dispute" over a church's decision to terminate its minister. *Natal v. Christian & Missionary All.*, No. 88-0676, 1988 WL 159169 (D.P.R. 1988),

AMERICAN OVERSIGHT

aff'd, 878 F.2d 1575 (1st Cir. 1989) (affirming the district court and praising its "opinion [a]s a scholarly piece of work").

Other federal courts and state supreme courts have consistently arrived at the same result ever since. Indeed, "most courts that have considered the question" have broadly concluded that "a pastor's defamation claims against a church and its officials" is barred. *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 (Va. 2001) (collecting cases, rejecting defamation claim that would "substitute [the court's] secular judgment for a church's judgment . . . regarding the selection or retention of its pastor"). The basic rule is that where the "plaintiff's claims of . . . defamation are essentially tied to" a ministerial dispute, the claim is barred. *Kraft v. Rector, Churchwardens & Vestry of Grace Church*, No. 01-CV-7871, 2004 WL 540327, at *6 (S.D.N.Y. Mar. 17, 2004). Thus:

- *Ogle v. Church of God*, 153 F. App'x 371, 375-76 (6th Cir. 2005) (rejecting defamation claim by minister arising from statements made as "part of church disciplinary proceedings" as "squarely within the class of cases" barred by the ministerial exception).
- *Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church in Am.*, 64 F.3d 664 (6th Cir. 1995) (Table) (affirming dismissal of minister's defamation claim concerning statements made during internal church investigation to "resolve an in[ternal] church conflict" and which "concerned the minister's current and future employment relationship with the church").
- *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 613 (N.D. Tex. 2008) (barring defamation claim that was "intimately related to the employment action taken" against minister);

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004436

- *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 218-19 (D. Conn. 2000) (barring defamation and libel claims regarding defendants' statements to "the press and the public that [minister] had misrepresented his priestly status");
- *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (minister's defamation claim barred because it "challenges [church's] authority to request [internal] records pursuant to its internal procedures and to comment on [his] actions and abilities as a [church] minister");
- *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *9 (D. Md. Mar. 4, 2019) (barring false-light claim because the "claim is rooted in the [church's] disciplinary review of Plaintiff and decision that Plaintiff should be placed on administrative leave");
- *Baker v. Afr. Methodist Episcopal Church*, No. 3-01-CV-2485, 2002 WL 1840931, at *2 (N.D. Tex. Aug. 8, 2002) (barring defamation claim since constitution "prohibits judicial encroachment into church decisions concerning the employment of ministers").
- *El-Farra v. Sayyed*, 226 S.W.3d 792, 796 (Ark. 2006) (dismissing defamation claims involving whether appellant's conduct "contradicts the Islamic law," in part because the challenged "statements were made in the context of a dispute over [minister's] suitability to remain as Imam");
- *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader").[7]

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[7] *See also Paul v. Watchtower Bible & Tract Soc. of N.Y.*, 819 F.2d 875, 877 (9th Cir. 1987) (barring defamation claim by church member against church arising from church disciplinary actions, since "religious activities which concern only members of the faith are and ought to be free") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)); *Kaufmann v. Sheehan*, 707 F.2d 355, 357-59 (8th Cir. 1983) (barring under the First Amendment due-process claims arising from

AMERICAN OVERSIGHT

Nor could it be otherwise, since virtually all religious leadership disputes barred as employment actions could easily be re-cast as defamation cases. *Cha*, 553 S.E.2d at 516 ("[I]f our civil courts enter upon disputes between bishops and priests because of allegations of defamation . . . it is difficult to conceive the termination case which could not result in a sustainable lawsuit."). That would burden internal church management in ways the Religion Clauses forbid. "[T]he prospect of future investigations and litigation would inevitably affect to some degree" ministerial decisions, and pressure churches, synagogues, mosques, and temples to make those decisions "'with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (quoting *Rayburn*, 772 F.2d at 1171).

For instance, knowing that communications with and about ministers could be made the basis of a defamation case—to include being "deposed, interrogated, and haled into court," *id.*—cannot help influencing how church hierarchy chooses and controls the shepherds of its flock. Among other things, it will pressure religious bodies to either immediately terminate wayward ministers instead of rehabilitating them, or to overlook clergy misconduct for fear that disciplining problematic

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allegedly defamatory statements because the statements "relate[d] to his status and employment as a priest").

AMERICAN OVERSIGHT

ministers will lead to lawsuits. *Cha*, 553 S.E.2d 511, 517 (noting "chilling effect" of defamation suits). This distortion of ministerial relationships, church doctrine, and discipline, is impermissible: "any attempt . . . even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady*, 140 S. Ct. at 2060.

B. The ministerial exception bars Father Alexander's defamation claims because they interfere with the Church's selection and control of its priests and bishops.

The ministerial exception bars Father Alexander's defamation claims. Indeed, this is a heartland case, meaning there's no need to "delineate the boundaries of the ministerial exception," because the claims here "easily f[all] within them." *Fratello*, 863 F.3d at 202 (quoting *Rweyemamu*, 520 F.3d at 209). There are three ways to see that adjudicating Father Alexander's claim would unconstitutionally interfere with the Church's internal ministerial selection and control.

First, the Clergy Letter at the "heart" of the complaint is a church disciplinary communication between the senior leadership of Father Alexander's church concerning whether to select him as bishop or to discontinue his priestly duties. ECF 22-2 at 2. Thus, the "heart" of his claims is literally a matter of ministerial "selection and control," which means that they concern issues that courts cannot adjudicate. *See* Part I.B.2 *supra*.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004439

Second, proving up his claims will necessarily intrude into the minister-church relationship. The ministerial exception exists in part to prevent "Church personnel" from "becom[ing] subject to subpoena, discovery, cross-examination, [and] the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Compelling "depositions of fellow ministers" in "the search for a subjective motive" regarding ministerial decisions is an "onerous" and "prejudicial" burden the ministerial exception forbids. *Demkovich*, 3 F.4th at 982-83. But here, that's exactly the point: Father Alexander's claims seek to compel the deposition of the head of his former church, Metropolitan Hilarion, to try to prove that he "intentional[ly] and malicious[ly]" lied to prevent Father Alexander from becoming a bishop. JA.101-02, 104 (alleging the Metropolitan was "the key and willing participant" in the Clergy Letter, and "but for" him "the [Clergy] letter would not have gotten off the ground"). That he cannot do.

Third, the measure of damages Father Alexander claims is "loss of income, resulting from the drastic decrease of the membership in his church," JA.105-06, and the damage is based upon his standing and reputation within the church community. JA.105-08. "[A]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister and would be no less prohibited by the First Amendment than an order overturning the termination." *Hosanna-Tabor*, 565 U.S. at 194.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004440

Father Alexander is a minister who is suing his church for over $5,000,000 to penalize it for internal communications among senior church hierarchs about whether he was qualified to be appointed to one of the highest offices of the church. The ministerial exception bars such claims.

C. The district court erred by refusing to dismiss the complaint under the ministerial exception.

Father Alexander has argued that the district court "properly rejected" this defense because the ministerial exception *only* applies to employment discrimination claims, and *only* to paid employees of a church. ECF 22-2 at 8-10. He also suggests that "neutral principles" analysis should control. He is wrong.

First, as shown above, the ministerial exception has regularly been applied to bar common-law claims, including by this Court. Father Alexander cites no contrary case holding that the ministerial exception applies "only" to "employment discrimination claims." ECF 22-2 at 11. There are none. Indeed, the first Supreme Court ruling that barred courts from second-guessing a church's religious leadership decision arose in the context of a claim sounding in trust. *Gonzalez*, 280 U.S. at 16 (rejecting trust claim to chaplaincy position because "church authorities"—not government officials or judges—"determine what the essential qualifications of a chaplain are").

AMERICAN OVERSIGHT

Second, the ministerial exception is not restricted to paid positions. While courts take into account various "considerations" to determine ministerial status, the "focus" is "primarily" on the religious functions they perform. *Fratello*, 863 F.3d at 205. None of the relevant considerations turn on whether the position is paid.

Further, limiting the First Amendment's protections only to formal paid employment would raise serious problems. It would once again turn fundamental church-state separation into a pleadings game, incentivizing plaintiffs to skip over their employers and instead sue any deeper-pocketed ministry partners that allegedly exercised religious influence over the employer.

Courts have avoided this obvious issue by routinely protecting non-employer ministries from similar suits. *Fratello* applied the exception in a suit against both the employer school and the non-employer archdiocese. *Compare* 863 F.3d at 192 ("Fratello was employed by St. Anthony's School"), *with id.* at 206 ("[T]he ministerial exception bars Fratello's . . . claims against the Archdiocese, the Church, and the School, all of which are religious groups within the meaning of the ministerial exception."). In *Cannata v. Catholic Diocese of Austin*, the Fifth Circuit relied on the ministerial exception to dismiss a suit against the employer church and the non-employer diocese. 700 F.3d 169 (5th Cir. 2012). And in *Bell*, the Fourth Circuit dismissed a lawsuit by a minister against religious denominations that contributed to his former religious

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004442

employer. 126 F.3d at 332.[8] These outcomes are correct. Otherwise, in *Fratello* for example, the school would have been protected but the archdiocese would not, even though the core issue—whether a religious body must allow a particular person to hold a religiously significant role—is the same.

Father Alexander's paid-ministers-only rule would also risk "privileging religious traditions" with more formal employment structures "over those that are less formal." *Our Lady*, 140 S. Ct. at 2064. Moneyed religious bodies which could afford to pay their leaders would be protected, while the less well-heeled would be more vulnerable to suit by their unpaid deacons, elders, Sunday School teachers, and worship leaders. Moreover, leaders in many faith bodies are also volunteers, such as the bishops of the Church of Jesus Christ of Latter-day Saints.[9] Thus,

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[8] *See also Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008) ("Ministers of the Salvation Army receive no wages"); *EEOC v. Roman Catholic Diocese of Raleigh*, 48 F. Supp. 2d 505, 513-14 (E.D.N.C. 1999), *aff'd*, 213 F.3d 795 (4th Cir. 2000) (position that could be filled by "an employee or volunteer" was ministerial); *InterVarsity Christian Fellowship/USA v. Bd. of Governors*, ---F. Supp. 3d---, No. 19-10375, 2021 WL 1387787 (E.D. Mich. Apr. 13, 2021) (ministerial exception applies to unpaid volunteer leadership roles).

[9] *See Lay Priesthood*, ChurchofJesusChrist.org, https://perma.cc/GQ7T-YLQ9 ("the bishop . . . receives no pay of any kind for his service in the Church"); *see also* G. Jeffrey MacDonald, *As denominations decline, number of unpaid minsters rise*, Religion News Service (Sept. 17, 2013), https://perma.cc/Y7ES-UXSX ("The unpaid cleric model is gaining traction among Episcopalians.").

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004443

treating payment as dispositive would undermine "the purpose of the ministerial exception": ensuring religious organizations alone have "the authority to select and control" those who lead a church's faith. *Penn*, 884 F.3d at 423.

Third, neutral-principles doctrine is "simply not applicable" to claims that relate to a plaintiff's "status and employment as a minister of the church," including in the defamation context. *Hutchison*, 789 F.2d at 396. A minister's claims cannot generally "be resolved . . . by invoking 'neutral principles of law,'" since the inherently religious ministerial relationship makes inquiries "in themselves" too entangling and thus "forbidden by the First Amendment." *Catholic Univ.*, 83 F.3d at 465-67; *accord El-Farra*, 226 S.W.3d at 795 (rejecting defamation claim under ministerial exception, finding that the "narrow" neutral-principles doctrine applies "only with regard to real-property disputes"). Hence this Court's ruling in *Fratello* that, in the employment discrimination context, courts cannot try to use neutral principles to navigate their way around "excessive entanglement . . . in [a] particular case," since courts are "ill-equipped to assess" such matters in the ministerial context. 863 F.3d at 202-03.

In sum, Father Alexander provides no reason for this Court to split from five circuits and state courts of last resort by setting entangling new precedent allowing ministers to sue their churches in defamation over internal church election and disciplinary communications. His claims are barred by the ministerial exception.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004444

III. This Court has jurisdiction over this appeal under the collateral order doctrine.

This Court has jurisdiction to hear appeals of "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This includes collateral orders resolving rights that are "too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For an order to be collateral, it must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

Qualifying collateral orders include those that involve a party's "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and those that implicate compelling interests of a constitutional dimension, Opp'n to Mot. to Dismiss at 8, ECF 41 (collecting cases). Rights "originating in the Constitution" receive solicitude under the collateral order doctrine. *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 179 (2d Cir. 2008) (denials of "constitutional immunities" immediately appealable). This includes orders causing irreparable harm to First Amendment rights, such as

AMERICAN OVERSIGHT

rights to church autonomy. *See* ECF 41 at 9; *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696 (2020) (accepting interlocutory appeal in church autonomy case arising under 28 U.S.C. § 1258); *McCarthy*, 714 F.3d at 976 (immediate appeal permitted because "harm of . . . governmental intrusion into religious affairs would be irreparable").

This appeal falls squarely within the collateral order doctrine, as it involves the denial of a First Amendment immunity from discovery and trial. It thus fulfills all three criteria of the collateral order doctrine: The district court's orders denying dismissal and ordering merits discovery (1) irreparably harm the Church absent immediate review, making it effectively unreviewable after a final judgment; (2) conclusively reject the Church's immunity from merits adjudication under the church autonomy and ministerial exception doctrines; and (3) implicate the Church's constitutional right to autonomy in its internal religious affairs, an issue collateral to the merits.

A. The Church's First Amendment defenses will be effectively unreviewable after merits discovery.

The central characteristic of an appealable collateral order is that, if the order is not "reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell*, 472 U.S. at 525 (cleaned up). Here, the Church has raised defenses that are akin to an immunity in that they protect the Church not only from liability, but also from entanglement in

AMERICAN OVERSIGHT

merits litigation over its internal religious affairs. Now that these defenses have been denied and merits discovery ordered, only immediate appeal can avoid the constitutional injury the Church faces from the district court's refusal to dismiss this case and to limit discovery.

1. The Religion Clauses provide protections akin to immunity.

It is "well-settled" that denials of immunity from suit are proper collateral-order appeals. *Coollick v. Hughes*, 699 F.3d 211, 217 (2d Cir. 2012). The immunities are meant both "to avoid 'standing trial'" and "also to avoid the burdens of 'such *pretrial* matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996). Courts have recognized that the Religion Clauses provide protections to churches "similar to" such immunities. *Bryce*, 289 F.3d at 654; *accord Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238, 1242 (10th Cir. 2010) (the "ministerial exception, like the broader church autonomy doctrine, can be likened 'to . . . qualified immunity'"). Like qualified immunity, church autonomy questions must be resolved "early in litigation" to avoid harm to the protected right. *Bryce*, 289 F.3d at 654 n.1; *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016) (immunity "should be resolved 'at the earliest possible stage in litigation"). And like qualified immunity, the Religion Clauses' rule against interference in internal religious affairs provides "immunity from the travails of a trial and not just from an adverse judgment." *McCarthy*, 714 F.3d at 975.

AMERICAN OVERSIGHT

Unlike qualified immunity, though, the legal interest is much stronger: the constitutional command that "courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Obeying this command protects not just one but two "substantial public interest[s]" of "a high order." *Will*, 546 U.S. at 352-53. It protects both the church's Free Exercise interest in the autonomy of its religious affairs and the judiciary's Establishment Clause interest in avoiding improper entanglement in those affairs. Indeed, a "federal court" has an independent duty "not [to] allow itself to get dragged into a religious controversy," *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), a duty which reflects the weighty constitutional "structural limitation[s]" that "categorically prohibit[]" the judiciary "from becoming involved in religious leadership disputes." *Conlon*, 777 F.3d at 836.

The "harm of such a governmental intrusion into religious affairs would be irreparable." *McCarthy*, 714 F.3d at 976. And the harm starts with "the beginnings of discovery" into the merits of a minister's claims, since those beginnings can have "prejudicial effects" on "rights guaranteed by the Religion Clauses." *Demkovich,* 3 F.4th at 982-83 (resolving certified interlocutory appeal); *Rayburn*, 772 F.2d at 1171 ("rights guaranteed by the Religion Clauses" limit courts from allowing discovery to "probe the mind of the church in the selection of its ministers"); *see also* Parts I & II *supra*. Thus, "the consequence of forced

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004448

discovery" into internal religious affairs "is 'effectively unreviewable' on appeal from the final judgment." *Whole Woman's Health*, 896 F.3d at 367. For this reason, federal courts have found that this harm to church autonomy rights is just as irreparable as "the other types of case[s] in which the collateral order doctrine allows interlocutory appeals." *McCarthy*, 714 F.3d at 976; *see also Liberty Synergistics, Inc.*, 718 F.3d at 150-51 (finding that harm to First Amendment rights from subjugation to litigation would be effectively unreviewable post-trial).[10]

State courts too have repeatedly found that "the denial of a religious institution's assertion of the ministerial exception . . . is appropriate for interlocutory appeal." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014). This is because "once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated." *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990); *see also Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1199-1200 (Conn. 2011)

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[10] *See also* Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) ("the ministerial exception closely resembles qualified immunity for purposes of the collateral-order doctrine," making "immediate appeal" appropriate); *see also* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) ("equitable consideration[s], coupled with the importance of the threshold constitutional question," warrant "immediate appeal").

AMERICAN OVERSIGHT

("[L]itigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy . . . ."). And the Supreme Court of Texas recently accepted and resolved an interlocutory appeal because allowing lower courts to "exercis[e] jurisdiction" over a defamation case challenging a church's publication of an internal investigation into clergy "would necessarily encroach on the church's ability to manage its internal affairs." *Diocese of Lubbock*, 624 S.W.3d at 518 (cleaned up).

2. The Church's Religion Clauses immunities will be irreparably lost absent immediate appeal.

The Church's Religion Clauses defenses thus fit neatly within this Court's recognition that "a later recognition of immunity" against enduring litigation cannot possibly "mitigate the harm" absent an immediate appeal. *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017). And that is precisely the kind of "irreparable" harm the district court's orders will cause. *McCarthy*, 714 F.3d at 976. The district court denied the Church's Religion Clauses defenses, JA.84, refused to certify them for appeal, JA.118, denied a motion to bifurcate discovery to allow resolution of the Religion Clauses defenses, JA.146-48, and ordered the parties to complete merits discovery by the end of the year, JA.142. Meanwhile, Father Alexander insists that he is entitled to full discovery, including the ability to depose bishops and the Metropolitan. Dkt. 63. These are exactly the kinds of intrusion into

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004450

internal religious governance on matters of church discipline and selection of clergy that the Seventh Circuit has just found—on interlocutory appeal—impermissible under the Religion Clauses. *Demkovich*, 3 F.4th at 983; *see* Part I.B.3 *supra*.

Thus, as with qualified immunity, the district court's orders are immediately appealable because the Church's "entitlement not to . . . face the . . . burdens of litigation" will be "effectively lost if a case is erroneously permitted to" proceed. *Mitchell*, 472 U.S. at 526.

B. The order below conclusively determined the Church's immunity from trial and merits discovery.

This Court has repeatedly recognized that, when a claimed immunity from suit applied, a court's denial of the immunity on a motion to dismiss conclusively determines the issue. *See, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119-20 (2d Cir. 2019); *Edrei v. Maguire*, 892 F.3d 525, 531-32 (2d Cir. 2018); *Garcia*, 779 F.3d at 91. This is because where the "essence of the claimed right" at issue includes "a right not to face the . . . burdens of litigation," then "a denial of that right 'conclusively determines' the disputed issue by ensuring that 'the defendant must bear the burdens of discovery.'" *Liberty Synergistics*, 718 F.3d at 147 (cleaned up). As shown above, the district court's denial of the motion to dismiss conclusively foreclosed the Church's claimed immunity from merits discovery. *Behrens*, 516 U.S. at 308 ("denial of a motion to dismiss is conclusive as to this right."). And the combination of the court's denial of

AMERICAN OVERSIGHT

bifurcation and ordered merits discovery means this immunity will soon be irreparably lost.

C. The Church's immunity against merits discovery is collateral to the merits of Father Alexander's defamation claims.

Finally, an issue "is 'separate' from the merits" if "it turns on matters 'significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.'" *Liberty Synergistics*, 718 F.3d at 148; *see also Britt v. Garcia*, 457 F.3d 264, 271-72 (2d Cir. 2006) (finding jurisdiction because the issue raised was a purely legal question that could be "decided with reference only to undisputed facts and in isolation from the remaining issues of the case"). Whether the Religion Clauses preclude Father Alexander's claims is "a pure question of law." *Conlon*, 777 F.3d at 833; *see also Bryce*, 289 F.3d at 654 (application of the church autonomy doctrine is a "question of law"). And the First Amendment's prohibition on "governmental intrusion into religious affairs" gives rise to an immunity that is "'conceptually distinct' from the merits." *McCarthy*, 714 F.3d at 975-76 (quoting *Mitchell*, 472 U.S. at 527). Because an immunity from trial inheres in these First Amendment

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004452

defenses, they are separate "from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

IV. The district court erred by failing to limit initial discovery to resolution of the Religion Clauses defenses.

The district court denied the Church's motion to limit initial discovery to resolution of the Religion Clauses defenses, and instead ordered the parties to commence and complete merits discovery before the end of the year. This order was an abuse of discretion and will cause irreparable harm both to the Church's First Amendment rights and the corresponding structural limitations on judicial authority.

As explained above in Parts I.B.3 and III.A.2, the Supreme Court "established the rule of *Hosanna-Tabor*" "precisely to avoid . . . judicial entanglement" such as "subjecting religious doctrine to discovery." *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019). Thus, in cases where discovery is necessary to resolve Religion Clauses defenses, this Court has recognized that it is "appropriate[]" to "order[] discovery limited to" those defenses before allowing merits proceedings. *Fratello*, 863 F.3d at 198.

Other courts likewise routinely "limit discovery to the applicability of the ministerial exception" "[b]efore launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid." *Sterlinski v. Catholic Bishop of Chi.*, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017); *see*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004453

also Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2017) (court "directed the parties to engage in limited discovery on the [ministerial exception]"); *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) ("Plaintiff was permitted to conduct limited discovery" on the ministerial exception defense); *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d. 730, 735 (N.D. Ill. 2016) (where a ministerial exception defense is asserted, "the scope of the issue subject to discovery is narrow," limited to whether the role "was ministerial"); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (allowing "limited discovery to determine whether the ministerial exception applies").[11] Requiring merits discovery before resolution of the threshold Religion Clauses defenses has been recognized as "result[ing] in a substantial miscarriage of justice." *Presbyterian Church v. Edwards*, 566 S.W.3d 175, 178 (Ky. 2018) (allowing merits discovery before resolving a church's ministerial exception defense).

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[11] *Stabler v. Congregation Emanu-El of the City of New York*, No. 16 CIV.9601, 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (authorizing discovery "limited to the ministerial exception defense" and specifically whether plaintiff performed religious functions); *Sterlinski*, 2017 WL 1550186, at *5 ("limit[ing] discovery to the applicability of the ministerial exception"); *Lishu Yin v. Columbia Int'l Univ.*, No. 3:15-CV-03656, 2017 WL 4296428, at * 4 (D.S.C. Sept. 28, 2017) (same); *Miller v. InterVarsity Christian Fellowship/USA*, No. 09-CV-680, 2010 WL 2803123, at *2 (W.D. Wis. July 14, 2010) (same); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) (court authorized "very limited discovery" as to whether job functions were ministerial in nature).

AMERICAN OVERSIGHT

Against this uniform practice and such significant First Amendment considerations, neither Father Alexander nor the district court identified any reason, or any precedent, against delaying merits discovery until resolution of the threshold defenses. Rather, after briefing limited to three-page letters, the district court again deemed the matter adequately briefed and denied bifurcation based solely on its perceived ability to decide whether the Clergy Letter was defamatory without offending the "doctrine of ecclesiastical abstention." JA.147. As demonstrated above, that conclusion is incorrect. Further, it failed to consider the Church's additional argument under the ministerial exception for granting bifurcation.

Because allowing merits discovery to proceed will cause irreparable harm to First Amendment rights, and do so entirely unnecessarily, the district court abused its discretion. At a minimum, then, this Court should remand and require bifurcation.

CONCLUSION

The district court's decisions below should be reversed.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004455

Respectfully submitted,

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-004456

CERTIFICATE OF COMPLIANCE

This document complies with the requirements of 2d Cir. R. 32.1(a)(4) because it has 13,619 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 26, 2021

/s/ Diana M. Verm
Diana M. Verm

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004457

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 26, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

August 26, 2021

/s/ Diana M. Verm
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AMERICAN OVERSIGHT

MO-AG-22-0644-A-004458

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Contents

Table of Authorities 3

Jurisdictional Statement 6

Statement of Facts and Procedural Background 7

Points Relied On 9

Argument 11

Point I. 14

A. Standard of Review and Preservation of Error 14

B. Argument 15

Point II 18

A. Standard of Review and Preservation of Error 18

B. Argument 19

Point III 21

A. Standard of Review and Preservation of Error 21

B. Argument 21

Conclusion 24

Certification of Service and of Compliance with Rule 84.06(b) and (c) 26

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004460

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Table of Authorities

Cases

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 11

Asberry v. Bannes-Shaughnessy,
734 S.W.2d 250 (Mo. App. E.D. 1987) 11

B.S. v. State,
966 S.W.2d 343 (Mo. App. E.D. 1998) 10, 12, 19

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 9, 16

Boyd v. Boone Mgmt., Inc.,
676 S.W.2d 24 (Mo. App. W.D. 1984) 14, 19, 21

Brinson v. Whittico, M.D.,
793 S.W.2d 632 (Mo. App. E.D. 1990) 10, 23

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 17

Charron v. State,
257 S.W.3d 147 (Mo. App. W.D. 2008) 11, 20

Chastain v. Geary,
539 S.W.3d 841 (Mo. App. W.D. 2017) 15

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 17

Doss v. Brown,
419 S.W.3d 784 (Mo. App. W.D. 2012) 15

Eaton v. Doe,
563 S.W.3d 745 (Mo. App. E.D. 2018) 17

AMERICAN OVERSIGHT

Empire Dist. Elec. Co. v. Coverdell,
588 S.W.3d 225 (Mo. App. S.D. 2019) 11

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 20

Healthcare Servs. of the Ozarks, Inc. v. Copeland,
198 S.W.3d 604 (Mo. banc 2006) 16

Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit,
277 S.W.3d 740 (Mo. App. W.D. 2008) 19

Mo. Coal. for Env't v. State,
579 S.W.3d 924 (Mo. banc 2019) 17

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 17

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) ..... Passim

Peachtree Apartments v. Pallo,
317 S.W.3d 189 (Mo. App. E.D. 2010) 10, 12, 18

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 8

Querry v. State Highway & Transp. Comm'n,
60 S.W.3d 630 (Mo. App. W.D. 2001) 15

Rosenfeld v. Thoele,
28 S.W.3d 446 (Mo. App. E.D. 2000) 10, 19

Schultz v. Warren Cty.,
249 S.W.3d 898 (Mo. App. E.D. 2008) 10, 22

Schweich v. Nixon,
408 S.W.3d 769 (Mo. banc 2013) 10, 22

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004462

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 11, 19

Sexton v. Jenkins & Assocs.,
152 S.W.3d 270 (Mo. banc 2004) 12

State v. West,
548 S.W.3d 406 (Mo. App. W.D. 2018) 14, 18, 21

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D. 1988) 9, 16, 17

Statutes

Section § 115.427, RSMo 7, 8

Section § 510.150, RSMo 9, 10, 15, 19, 22

Other Authorities

35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 21

Missouri Constitution, article 5, section 3 ..... 6, 12

Missouri Supreme Court Rule 67.01 11

Missouri Supreme Court Rule 84.14 ..... 14, 20, 21, 22, 24

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004463

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of Cole County entered on April 20, 2020. Following this Court's order allowing Appellants to file a Notice of Appeal by Special Order pursuant to Rule 81.07(a), the Notice of Appeal was filed on September 23, 2020.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Western District of the Court of Appeals. § 474.050.

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AMERICAN OVERSIGHT

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Statement of Facts and Procedural Background

On June 8, 2017, Appellants, Missouri State Conference of the National Association for the Advancement of Colored People and the League of Women Voters of Missouri, filed a Petition seeking injunctive and declaratory relief with respect to Missouri Revised Statute § 115.427. That statute, which went into effect on June 1, 2017, drastically reduced voters' options for identifying themselves in order to vote in person. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, 17AC-CC00309 (19th Jud. Cir. Ct.).[1] On December 6, 2017, the trial court granted Respondents' Motion for Judgment on the Pleadings and dismissed Appellants' Petition for failure to state a claim. *Id.*

After this Court reversed that decision, the case was reinstated in November 2018 and proceeded at the trial court in case number 17AC-CC00309-01. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD81484; D83-84. On June 18, 2019, Appellants filed their Third Amended Petition. D98-106. After trial on the merits, the trial court dismissed the Third Amended Petition for lack of standing, mootness, and/or ripeness. The trial court did not address the merits of Plaintiffs' claims, but nonetheless dismissed the Petition *with prejudice.* That jurisdictional, or justiciability, dismissal with prejudice was error and is the issue in this appeal.

In Count I of the Third Amended Petition, Appellants asserted that § 115.427.1 cannot be enforced under § 115.427.6(3) because insufficient state funds were

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[1] On June 30, 2017, Appellant Christine Dragonette was added as a party with the filing of the First Amended Petition.

AMERICAN OVERSIGHT

appropriated from the general revenue to properly implement § 115.427.1. D98 pp. 19-23. In Count II, Appellants asserted that the requirement in § 115.427.5 was violated by the failure to provide the public accurate and non-misleading "Advance Notice" about the law restricting the options for identifying oneself at the polls. D98 pp. 24-26.

The court held a bench trial from August 19 - 23, 2019. Thereafter, on April 20, 2020, the circuit court entered its final judgment, dismissing Count I with prejudice for lack of standing and mootness, and dismissing Count II with prejudice as moot and not ripe in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). D165.

On May 19, 2020, Appellants moved the court to amend its judgment to be a dismissal without prejudice. D166. The trial court did not rule on this post-trial motion. Appellants then filed a notice of appeal on August 26, 2020. *See Mo. State Conf. of the NAACP, et al. v. Missouri, et al.*, WD83987. However, the parties then disputed whether the post-trial motion was *authorized*, which would have delayed the date upon which the judgment became final for appeal. Appellants then filed a motion to file a notice of appeal by special order, which was sustained. Appellants' Notice of Appeal was filed on September 23, 2020.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004466

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

Points Relied On

I. THE CIRCUIT COURT ERRED IN DISMISSING COUNT I WITH PREJUDICE FOR LACK OF STANDING BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR LACK OF STANDING SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT STANDING IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012)**

***W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988)**

Section 510.150, RSMo.

II. THE CIRCUIT COURT ERRED IN DISMISSING COUNTS I AND II WITH PREJUDICE BASED ON MOOTNESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR MOOTNESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT MOOTNESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004467

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

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***Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010)**

***Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000)**

***B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998)**

Section 510.150, RSMo.

III. THE CIRCUIT COURT ERRED IN DISMISSING COUNT II WITH PREJUDICE BASED ON RIPENESS BECAUSE MISSOURI LAW REQUIRES THAT CLAIMS DISMISSED FOR RIPENESS SHOULD BE DISMISSED WITHOUT PREJUDICE, IN THAT RIPENESS IS A JURISDICTIONAL REQUIREMENT THAT GOES TO THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION.

***Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003)**

***Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013)**

***Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008)**

***Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990)**

Section 510.150, RSMo.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004468

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Argument

This appeal presents a discrete question of law: when a circuit court finds that it lacks subject-matter jurisdiction in a case because of a lack of standing, mootness, or ripeness, should it dismiss with or without prejudice? The answer is clear: when a circuit court lacks subject-matter jurisdiction to resolve a dispute's underlying merits, it should dismiss claims *without* prejudice. *See Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice."); *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986) ("Inasmuch as the trial court did not have jurisdiction … the dismissal is without prejudice to any further action appellant may wish to take"); *see also Asberry v. Bannes-Shaughnessy*, 734 S.W.2d 250, 252 (Mo. App. E.D. 1987) (explaining that the burden of proof on a motion for lack of subject matter jurisdiction "is lower since it is not a decision on the merits, the dismissal is without prejudice and because any action taken by a court lacking subject matter jurisdiction is void").

Whether a trial court dismisses a claim with or without prejudice is significant. "[D]ismissal with prejudice bars the assertion of the same cause of action or claim against the same party." Rule 67.01. *Accord Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d

AMERICAN OVERSIGHT

225, 237 (Mo. App. S.D. 2019). On the other hand, "[d]ismissal without prejudice is usually not an adjudication on the merits of the claim and does not affect the plaintiff's right to refile the action." *Sexton v. Jenkins & Assocs.*, 152 S.W.3d 270, 273 (Mo. banc 2004). In certain circumstances, not applicable here, Appellants acknowledge that "a dismissal without prejudice may be considered a judgment on the merits of issues, such as jurisdiction, that are actually litigated and decided." *Id*. In this appeal, Appellants do not challenge the trial court's factual findings. Instead, Appellants assert only that the trial court erred in dismissing their claims *with prejudice*, thus preventing any chance they may have to vindicate their rights if they gain standing, the case is no longer moot, and the issues become ripe for adjudication.

The Missouri Constitution confers jurisdiction upon the circuit courts over "cases and matters." Mo. Const. art. V, sec. 14(a). "Article V of the Missouri Constitution governs subject-matter jurisdiction, which is the court's authority to render a judgment in a particular category of case." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010); *see also Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) ("Subject-matter jurisdiction concerns 'the nature of the cause of action or the relief sought 'and exists only when the court 'has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.'" (citations omitted)). The Missouri Constitution "requires a case to be justiciable in order for the circuit court to have subject-matter jurisdiction over it." *Id.*; *see also B.S. v. State*, 966 S.W.2d 343, 344 (Mo. App. E.D. 1998).

AMERICAN OVERSIGHT

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Appellants do not dispute that a trial court lacks subject-matter jurisdiction to decide the merits of a case where: (1) the plaintiff lacks standing; (2) the case is moot and no exception applies; or (3) the case is not ripe. But where the circuit court dismisses a case on one or more of these jurisdictional issues, it ought to do so *without* prejudice because any decision on the merits is inappropriate.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

AMERICAN OVERSIGHT

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Point I

The circuit court erred in dismissing Count I with prejudice for lack of standing because Missouri law requires that claims dismissed for lack of standing should be dismissed without prejudice, in that standing is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal is purely a question of law. Appellants do not dispute the underlying facts. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*"). The review here is straightforward because Appellants do not dispute the trial court's finding that they lack standing, only the court's act of dismissing the claims *with* prejudice based on that finding.

The error was preserved for appeal. Although no post-trial motion was required to preserve the issue, Appellants tried to resolve it with the trial court before filing this appeal by filing a post-trial motion to amend the judgment to reflect dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment

AMERICAN OVERSIGHT

as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

This Court has routinely found that a dismissal for lack of standing is a dismissal for want of subject matter jurisdiction. *See, e.g.*, *Chastain v. Geary*, 539 S.W.3d 841, 848 (Mo. App. W.D. 2017) ("[T]he court does not have subject matter jurisdiction to decide substantive issues if the party lacks standing."); *Doss v. Brown*, 419 S.W.3d 784, 787 (Mo. App. W.D. 2012) ("A trial court does not have subject matter jurisdiction if a petitioner lacks standing to bring the action."); *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 637 (Mo. App. W.D. 2001) (same).

"Subject-matter jurisdiction concerns the nature of the cause of action or the relief sought and exists only when the court has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." *Mo. Soybean Ass'n,* 102 S.W.3d at 21 (internal quotation omitted). "A dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Here, there should have been no adjudication on the merits where dismissal was for a lack of standing because "[w]hether considered a claim for lack of subject matter jurisdiction or lack of authority, a court, in disposing of a case for lack of standing, cannot reach the merits."[2]

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[2] In *Borges*, this Court noted that "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." 358 S.W.3d at 183. Like *Borges*, that issue need not be decided here; the solution in the present case is simply to dismiss the claim without prejudice because the

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Borges v. Mo. Pub. Entity Risk Mgmt. Fund, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012); *see also W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D. 1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent].").

"Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. banc 2006). Consequently, a dismissal for lack of standing should be without prejudice. *See*, *e.g.*, *Borges*, 358 S.W.3d at 183-84 ("[O]nce it determined that [Plaintiffs] lacked standing, the trial court was without authority to reach any substantive claim, and, thus, dismissal should have been entered . . . . Therefore, we affirm the circuit court's finding that [Plaintiffs] lacked standing and enter the order the circuit court should have entered, dismissing without prejudice [Plaintiffs'] petition."); *Eaton v. Doe*, 563 S.W.3d 745, 750 (Mo. App. E.D. 2018) ("[B]ecause we have concluded the dismissal is due to a lack of standing, we modify the dismissal to be without prejudice, rather than with prejudice . . . . We affirm the judgment of the trial court as modified.").[3]

---

trial court could not reach the merits if its dismissal was because Appellants lacked standing.

[3] The limited exception in which the Missouri Supreme Court has affirmed a dismissal for lack of standing with prejudice is distinguishable. *See Mo. Coal. for Env't v.*

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Electronically Filed - WESTERN DISTRICT CT OF APPEALS - February 02, 2021 - 03:27 PM

The trial court erred in dismissing Count I with prejudice for lack of standing, and this Court should enter judgment dismissing Count I without prejudice.[4]

State, 579 S.W.3d 924, 928 (Mo. banc 2019) (affirming dismissal with prejudice for lack of standing where plaintiffs conceded lack of taxpayer standing and where the Court held standing was not created by a statute). Plaintiffs' standing in that case could not be cured because it was foreclosed as a matter of law. There is no such lack of standing here. Appellants' lack of associational standing under the circuit court's order would be cured if individual Plaintiff members are denied their right to vote upon presenting themselves at the polls without a photo ID. D165 p. 2 ("The potential injured party would have to first, timely present himself to the polls and second, be eligible to vote. One cannot claim to be injured by a photo ID requirement unless they [are] otherwise eligible to vote, actually try to vote…but [are] not allowed to vote for a lack of a photo ID."). *See W. Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 583 (Mo. App. W.D. 1988) (holding plaintiff was entitled to amend petition to cure defects with regard to standing).

[4] Appellants also acknowledge other cases include an unchallenged dismissal with prejudice on the basis of standing. Those cases, however, do not provide guidance because the issue of the denial being with (as opposed to without) prejudice was not raised or discussed. *See Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

AMERICAN OVERSIGHT

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Point II

The circuit court erred in dismissing Counts I and II with prejudice based on mootness because Missouri law requires that claims dismissed for mootness should be dismissed without prejudice, in that mootness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

As noted *supra*, although the Court defers "to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). "A circuit court does not have subject-matter jurisdiction under [a]rticle V, section 14(a) to adjudicate a case that is not justiciable because it has become moot." *Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192 (Mo. App. E.D. 2010). The issue before this Court is purely a question of law and thus subject to *de novo* review. *See Mo. Soybean Ass'n*, 102 S.W.3d at 22 (noting that, "[g]enerally, the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion[; h]owever, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*").

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v.*

AMERICAN OVERSIGHT

Boone Mgmt., Inc., 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

A dismissal for mootness is a dismissal for want of subject-matter jurisdiction and as such should be without prejudice. *See*, *e.g.*, *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. E.D. 2000) ("Moot cases should generally be dismissed, as the circuit court lacks subject matter jurisdiction."); *B.S. v. State*, 966 S.W.2d 343, 344-45 (Mo. App. E.D. 1998) ("Because plaintiffs 'cause of action was moot, it was not justiciable and the trial court did not have subject matter jurisdiction over it."); *see also Jackson Cty. Bd. of Election Comm'rs ex rel. Brown v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. W.D. 2008) (raising mootness sua sponte after explaining that "[p]arties cannot . . . confer subject matter jurisdiction upon a court"). When courts lack subject matter jurisdiction to resolve the merits of a dispute, the claims should be dismissed without prejudice. *Compare* § 510.150 ("A dismissal with prejudice operates as an adjudication upon the merits."), *with Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits."); *Charron v. State*, 257 S.W.3d 147, 155 (Mo. App. W.D. 2008) ("[T]he trial court erred in dismissing Appellant's petition with prejudice because the dismissal was for lack of

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subject matter jurisdiction. Pursuant to our authority under Rule 84.14, we modify the judgment to be a dismissal without prejudice.").

Accordingly, because the law is clear that dismissal for mootness cannot be on the merits and thus must be without prejudice, appellate courts routinely modify such judgments. *See Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476, 485 (Mo. App. E.D. 2010) ("We remand the cause to the circuit court with instructions to vacate its judgment and to dismiss [Plaintiffs'] petition without prejudice due to the mootness of the controversy"); Defenses, 35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 24:9 ("Moot cases should be dismissed without prejudice.").

The trial court erred in dismissing Counts I and II with prejudice for mootness, and this Court should enter judgment dismissing Counts I and II without prejudice.

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AMERICAN OVERSIGHT

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Point III

The circuit court erred in dismissing Count II with prejudice based on ripeness because Missouri law requires that claims dismissed for ripeness should be dismissed without prejudice, in that ripeness is a jurisdictional requirement that goes to the circuit court's subject matter jurisdiction.

A. Standard of Review and Preservation of Error

While this Court "give[s] deference to the trial court's findings of fact, [it] review[s] all questions of law *de novo*." *State v. West*, 548 S.W.3d 406, 412–13 (Mo. App. W.D. 2018). Here, the issue on appeal—whether a claim that is not ripe should be dismissed with or without prejudice—is purely a question of law and is subject to *de novo* review.

The error was preserved for appeal. Although no post-trial motion was required to preserve this issue for appeal, Appellants did attempt to resolve this issue with the trial court before filing this appeal by filing a post-trial motion seeking to have the judgment amended to reflect a dismissal without prejudice. This Court should exercise its "authority to enter the judgment that should have been entered by the trial court." *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26 (Mo. App. W.D. 1984); *see also* Rule 84.14 ("The appellate court shall … give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.").

B. Argument

Ripeness implicates the justiciability of a claim and therefore any dismissal should not reach the merits of the case. As noted, however, "[a] dismissal with prejudice operates as an adjudication upon the merits." § 510.150. Because the trial court cannot reach the

AMERICAN OVERSIGHT

merits if it determines a claim is not ripe for adjudication, dismissals on ripeness grounds have been modified by appellate courts, including the Missouri Supreme Court, to dismissals without prejudice. *See Mo. Soybean Ass'n*, 102 S.W.3d at 29 ("[B]ecause the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice."); *Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013) ("While the lack of standing and ripeness does not implicate the merits of the Auditor's claims as to his own appropriation, it does preclude relief in this action. Accordingly, pursuant to Rule 84.14, this Court will issue the ruling that the trial court should have entered. The Auditor's claims are dismissed without prejudice."); *see also Schultz v. Warren Cty.*, 249 S.W.3d 898, 902 (Mo. App. E.D. 2008) ("[B]ecause the controversy was not ripe for judicial review, the circuit court's judgment is one without prejudice . . . . The circuit court's judgment of dismissal is hereby modified to explicitly state that the dismissal is due to lack of ripeness and is one without prejudice.").

In addition, modifying the trial court's judgment to dismissal without prejudice on Count II is particularly warranted in this case as a prudential matter. The court made clear that Appellants 'request for mandatory injunctive relief could be cured and would become ripe if the Secretary of State failed to provide adequate advance notice to the public under the terms of the *Priorities USA* injunction:

> The Court finds that the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*. The Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public. The original manner in which he tried to fulfill that obligation was found to be

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> deficient. The question of whether or not the Secretary's subsequent information campaigns avoid this deficiency is not yet ripe.

D165 pp. 5-6.

Should the Secretary of State fail to provide sufficient required advance notice, including by making inaccurate statements regarding the narrowing of identification options for voters in Missouri, Appellants should not be barred from seeking the appropriate mandatory injunctive relief in the future. *Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990) ("The judgment is reversed and the cause remanded. Because the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication.").

Thus, the circuit court erred in dismissing Count II with prejudice based on ripeness, and this Court should enter judgment dismissing Count II without prejudice.

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MO-AG-22-0644-A-004481

Conclusion

Because Appellants' claims were dismissed based on jurisdictional grounds of standing and mootness and justiciability grounds of ripeness, the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

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AMERICAN OVERSIGHT

Respectfully submitted,

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MO-AG-22-0644-A-004483

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on February 2, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,762 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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WD84028

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs-Appellants,

v.

STATE OF MISSOURI, et al.,

Defendants-Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

INTRODUCTION 4

STATEMENT OF FACTS 6

ARGUMENT 11

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I). 11

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion. 11

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing. 14

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III). 18

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion. 18

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims. 19

C. The trial court properly dismissed Count II with prejudice as unripe. 22

CONCLUSION 24

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004486

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

TABLE OF AUTHORITIES

Cases

Allen v. City of Greenville, MO,
336 S.W.3d 508 (Mo. App. S.D. 2011) 12

Am. Indus. Res., Inc. v. T.S.E. Supply Co.,
708 S.W.2d 806 (Mo. App. E.D. 1986) 13

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 16

Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.,
92 S.W.3d 232 (Mo. App. W.D. 2002) 12

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 16

Eckel v. Eckel,
540 S.W.3d 476 (Mo. App. W.D. 2018) 16

Friends of the San Luis, Inc. v. Archdiocese of St. Louis,
312 S.W.3d 476 (Mo. App. E.D. 2010) 21

Gohlston v. Lightfoot,
825 S.W.2d 864 (Mo. App. W.D. 1992) 14, 20

Jennings v. City of Kansas City,
812 S.W.2d 724 (Mo. App. W.D. 1991) 15

Mahoney v. Doerhoff Surgical Servs., Inc.,
807 S.W.2d 503 (Mo. banc 1991) 19

McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.,
339 F.3d 1087 (9th Cir. 2003) 20

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 20

Mo. Pub. Serv. Comm'n v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

AMERICAN OVERSIGHT

Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. banc 2003) 4, 12, 18

Osuji v. Missouri Dept. of Social Services, Div. of Family Services,
34 S.W.3d 251 (Mo. App. E.D. 2000) 19

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 11

Priorities USA v. State,
591 S.W.3d 448 (Mo. banc 2020) 4, 6, 7, 8, 23

Rickmyer v. Browne,
995 F.Supp.2d 989 (D.Minn.2014) 19

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999) 11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 13

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. 1982) 11

State Conference of Nat'l Ass'n for Advancement of Colored People v. State,
563 S.W.3d 138 (Mo. App. W.D. 2018) 6, 8, 9, 10, 16

Timber Point Properties III, LLC v. Bank of Am., N.A.,
2014 WL 7005195 (W.D. Mo. Dec. 10, 2014) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 4, 11, 19

Statutes

Section 115.427, RSMo 6

Rules

Missouri Supreme Court Rule 67.03 13

Mo. Sup. Ct. R. 81.05(a)(1) 15

Mo. Sup. Ct. R. 84.04(d) 16

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004488

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

INTRODUCTION

The circuit court correctly issued a final judgment ruling that Plaintiffs lack standing to bring an insufficient-appropriations claim under Missouri's voter-identification law, that all of their claims are moot in light of the Supreme Court's decision in *Priorities USA v. State*, 591 S.W.3d 448, 461 (Mo. banc 2020), and that their statutory claims about insufficient advance notice of Missouri's voter identification requirements are not ripe. On appeal, Plaintiffs do not argue the merits of any of those determinations. Rather, they contend only that the trial court erred in dismissing their claims *with prejudice*. For three principal reasons, this Court should affirm the trial court's with-prejudice dismissals and thereby reinforce the prevailing rule that trial courts have discretion to dismiss claims with or without prejudice based on the circumstances present in a case.

First, Plaintiffs apply the wrong standard of review of a trial court's decision to dismiss cases with or without prejudice; this Court should review for abuse of discretion and not exercise *de novo* review. *See Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) ("This court will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court."); *cf. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (*de novo* review of the merits of the dismissal may be appropriate where "the facts are uncontested.").

AMERICAN OVERSIGHT

Second, under the correct standard of review, the trial court properly exercised its discretion in dismissing Count I with prejudice for lack of standing. The trial court issued its judgment after a weeklong trial on Plaintiffs' third amended petition, the judgment references evidence elicited at trial, and the parties contested the facts of Plaintiffs' standing to bring the case. It would be futile, and it would prejudice Respondents, to transform the trial court's judgment into a mere dismissal without prejudice and allow Plaintiffs to bring the same suit again.

Third, the trial court correctly dismissed, with prejudice, Counts I and II as moot and Count II as unripe because there is no realistic probability that Plaintiffs can cure those problems in light of the Supreme Court's permanent injunctions in *Priorities USA*. Plaintiffs have not appealed the merits of the mootness question, and thus they have conceded that issue. It would be futile to allow them to bring their suit again, and nothing in Missouri law mandates that dismissals for mootness be without prejudice. The trial court also correctly dismissed Count II as unripe. Count II is purely a statutory claim where all the relief requested was provided in the *Priorities USA* injunctions based on the facts Plaintiffs pleaded, and Plaintiffs have not identified subsequent Voter ID advertising that violates those injunctions.

For these reasons, this Court should affirm the trial court's judgment dismissing Counts I and II of the Third Amended Petition with prejudice.

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STATEMENT OF FACTS

Backed by a constitutional amendment ("Voter ID Amendment") approved by popular vote, in 2016 the State adopted its current voter identification statute that allows for voting with both photo and non-photo forms of identification. § 115.427, RSMo (the "Voter ID Law"). After a constitutional challenge to certain aspects of the Voter ID Law's requirements, the Missouri Supreme Court largely upheld the statute last year in *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020). But the Court affirmed a trial court's declaration that the statute's affidavit requirement for some non-photo forms of identification was unconstitutional. And it upheld the lower court's injunctions against disseminating certain advertising materials about the Voter ID Law, including "materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show," *Id.* at 460–61, and "materials which represent that a photo identification card is required to vote," (D165, p.5).

A. The Third Amended Petition's claims and early procedural history.

Plaintiffs in this case are two organizations and one individual Missouri voter. They filed the original Petition in June 2017, and the case has previously been before this Court in an earlier stage of litigation. *See State Conference of Nat'l Ass'n for Advancement of Colored People v. State*, 563 S.W.3d 138 (Mo.

AMERICAN OVERSIGHT

App. W.D. 2018) (hereinafter "*NAACP I*"). After this Court remanded the case to the circuit court for further proceedings, Plaintiffs filed their Third Amended Petition after a lower court's ruling in *Priorities USA* but before the Supreme Court's opinion. (D98).

In Count I, Plaintiffs brought a statutory claim seeking declaratory and injunctive relief that the personal identification requirements in the Voter ID Law may not be enforced due to insufficient legislative appropriations in fiscal years 2017 to 2019. (D98, p.23). In Count II, they sought various prohibitory and mandatory injunctions against advertising materials under § 115.427.5 of the Voter ID Law. (D98, pp.24–26). Specifically, in Count II Plaintiffs asked the trial court to:

> A. Issue an injunction barring the Secretary of State from telling the public that there is a photo ID requirement and/or from instructing poll workers to ask for photo IDs when voters come to the polls;
>
> B. Issue an injunction directing the Secretary of State to provide public notice that there is no photo ID required for voting in Missouri;
>
> C. Issue an injunction directing the Secretary of State to provide correct information to the public about the non-photo options;
>
> D. Issue an injunction directing the Secretary of State to take down misleading advertisements that are still being used or made available to the public;
>
> E. Allow such other and further relief as is proper under the circumstances.

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AMERICAN OVERSIGHT

(D98, p.26).

The trial court presided over a weeklong trial in August 2019, where the court heard the testimony of several witnesses and admitted into evidence the parties' joint stipulated facts and exhibits. (D120–121). The parties did not stipulate to Plaintiffs' standing to bring the case. (*Id.*; D117). Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing (D117, ¶¶14–18), raised lack of standing as an affirmative defense (*id.* at p. 7), and argued in their post-trial brief that Plaintiffs lack standing based on the evidence.

B. The parties brief the effect of the Priorities USA *decision.*

On January 14, 2020, the Supreme Court issued its opinion in *Priorities USA*. The next day, the trial court asked the parties to submit memoranda concerning the effect of *Priorities USA* on this case. (D159). For Plaintiffs' appropriations claim in Count I, Respondents argued that it was moot because the Priorities USA decision already provided the only relief sought by Plaintiffs: a declaration and injunction that the Voter ID Law's identification requirements cannot be enforced. (D162, p.3). As to Plaintiffs' statutory claims in Count II regarding insufficient advance notice of the Voter ID Law's personal identification requirements, Respondents argued that *Priorities USA* also mooted these claims. *Priorities USA* upheld permanent injunctions

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

against those very requirements, "any proposed negative relief was already granted," and "[n]either [§ 115.427.5] nor the order require additional notice campaigns or any of the other remedies Plaintiffs propose." (D162, p.4-6).

Plaintiffs responded to Respondents' *Priorities USA* arguments, contending that Count I is not moot because their relief requested—an order "directing that voters cannot be asked to show a Photo ID at the polls"—is not encompassed by *Priorities USA*. (D160 at p.3). For Count II, Plaintiffs agreed that "the *Priorities USA* remedial order prevents further dissemination of such misleading information," but they contended that it "does not affirmatively correct the existing misimpression." (D160, p.2). They asserted that the Voter ID Law's "obligation to provide advance notice necessarily requires the provision of accurate and non-misleading information." (*Id.*). In other words, Plaintiffs disagreed that *Priorities USA* precluded their claims in this case for a mandatory injunction to promote corrective advertisements.

C. The trial court's final judgment and post-judgment developments.

On April 20, 2020, the trial court issued a final judgment holding that Plaintiffs lacked standing to bring their claims in Count I, that Count I is moot under *Priorities USA*, and that Count II is both moot and not ripe under *Priorities USA*. (D165).

As to Count I, the trial court discussed what evidence a plaintiff must show to demonstrate injury under the photo ID requirement: "the potential

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

injured party would have to first, timely present himself to the polls and second, be eligible to vote." (*Id.* at p.2). In a footnote, the court highlighted evidence actually introduced at trial regarding the ability of voters to vote with non-photo forms of identification. (*Id.* at n.5). The court held that the two organization plaintiffs lack associational standing and organizational standing, and it further held that taxpayer standing is not a theory on which the individual plaintiff here, Christine Dragonette, can base a claim for insufficient appropriations. (*Id.* at p.3). The court alternatively found that the injunctions upheld in *Priorities USA* render Count I moot, because the case held that the photo identification requirement "may not be enforced." (*Id.*).

As to Count II, the trial court compared the injunctions upheld in *Priorities USA* with the relief requested in this case. (*Id.* at p.4–6). The court held that "the prohibitory injunctions of *Priorities USA* [are] essentially the same as prayed for in this case[.]" (*Id.* at p.5). Referring to Plaintiffs' request for an injunction that the Secretary of State affirmatively issue correct advertisements, the court reasoned that "the specific mandatory injunctions requested are not required given the findings made and instructions provided to the Secretary of State in *Priorities USA*." (*Id.*). The court also held that Count II is not ripe to the extent it is based on advertisements not yet promoted. (*Id.* at p.6).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

On May 19, 2020, Plaintiffs filed a motion to modify the judgment to transform the dismissals with prejudice to dismissals without prejudice. (D166). The trial court did not rule on that motion, and Plaintiffs eventually appealed the trial court's judgment under special order by the Court permitting a late notice of appeal. (D167, D168).

ARGUMENT

I. The circuit court properly exercised its discretion by issuing a final judgment after trial that dismissed with prejudice Plaintiffs' claims in Count I for lack of standing. (Responding to Point Relied On I).

A. This Court should review the trial court's dismissal with prejudice for abuse of discretion.

The correct standard of review is one for abuse of discretion, and not *de novo* review as Plaintiffs contend. Generally, an appellate court "will not disturb the trial court's dismissal with prejudice absent a finding of a clear abuse of discretion by the trial court." *Williams v. City of Kansas City*, 841 S.W.2d 193, 198 (Mo. App. W.D. 1992) (citing *Smith v. City of De Soto*, 634 S.W.2d 204, 205 (Mo. App. 1982)). Application of this standard is universal in every district of the Court of Appeals. *See id.*; *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo. App. E.D. 2003) (reviewing for abuse of discretion trial court's with-prejudice dismissal of a case based on plaintiff's failure to prosecute); *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 505 (Mo. App. E.D. 1999) (holding "[t]here is no absolute right to amend a petition" and finding no

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

abuse of discretion of the lower court's with-prejudice dismissal based on failure to state a claim); *Allen v. City of Greenville, MO*, 336 S.W.3d 508, n.3 (Mo. App. S.D. 2011) (noting the court would have applied abuse of discretion review to the lower court's prejudice determination if the appellant had raised it on appeal).

An exception to that rule may apply when the question on appeal is whether the dismissal itself was proper and "the facts are uncontested." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 21 (Mo. banc 2003) (applying *de novo* review to the merits of the dismissal decision). But this case does not fall within any known exception to the general rule for several reasons, and Plaintiffs misapply the holding in *Mo. Soybean Ass'n*.

First, Plaintiffs have not appealed the trial court's decision on standing—they appeal only the dismissal being with prejudice. The trial court issued a final judgment after the trial, and the issue of Plaintiffs' standing was a preserved issue for trial. (*See* D117, Respondents' Answer and Affirmative Defenses, pp.15-16). The trial court did not rule on a motion to dismiss where the court would have assumed Plaintiffs' "averments in their petition are true." *Cmty. Care Ctr. of Lemay v. Missouri Health Facilities Review Comm.*, 92 S.W.3d 232, 234 (Mo. App. W.D. 2002) (reviewing *de novo* the merits of a lower court's grant of a motion to dismiss for lack of standing); *cf. Mo. Soybean Ass'n*,

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

102 S.W.3d at 21 (procedural history indicates the case was decided after a trial or hearing on a combined motion to dismiss and for summary judgment).[1]

Unlike a motion to dismiss, where the facts are uncontested, or a summary judgment motion, where there can be no disputed material facts, Respondents contested Plaintiffs' lack of standing. The issue here is not "purely a question of law" as in *Mo. Soybean Ass'n*. Respondents denied the Third Amended Petition's allegations that Plaintiffs have standing, and Respondents raised lack of standing as an affirmative defense. (D117). Respondents also raised the issue in their post-trial brief, highlighting the lack of evidence Plaintiffs submitted at trial to support their standing. And in its final judgment the trial court referenced evidence introduced at trial as to Plaintiffs' standing. (D165, n.5).

Second, Missouri Supreme Court Rule 67.03 also supports giving the trial court discretion to issue a judgment with prejudice, stating that "Any involuntary dismissal shall be without prejudice *unless the court in its order for dismissal shall otherwise specify*." Mo. Sup. Ct. R. 67.03 (emphasis added).

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[1] In addition to *Mo. Soybean Ass'n*, other cases cited by Plaintiffs in their brief also considered dismissals without prejudice upon a motion to dismiss. *E.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58, 64 (Mo. App. W.D. 2004). Furthermore, other cases rested on the specific language of a previous version of Rule 67.03 or did not state a standard of review at all. *E.g.*, *Am. Indus. Res., Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808–09 (Mo. App. E.D. 1986).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

The plain language of the Rule contemplates a court's discretion to specify the prejudicial effect of its dismissal.

Finally, review for abuse of discretion makes sense because it is the standard that governs review of denials of leave to amend a petition. *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992). In those situations, "the denial of amendment is presumed correct and the burden is on the proponent to show an abuse of discretion." *Id.* Dismissals with prejudice are analogous to denials of leave to amend a petition because both effectively prohibit a party to re-plead claims in a future action. There is no principled distinction between these two conceptually similar determinations for purposes of applying a standard of review.

For all these reasons, this Court should apply the abuse of discretion standard and confirm that Plaintiffs carry the burden to show that the trial court abused its discretion in dismissing each count of the Third Amended Petition with prejudice.

B. The trial court properly exercised its discretion in issuing a final judgment dismissing Count I due to Plaintiffs' lack of standing.

The argument section of Plaintiffs' first point on appeal is virtually devoid of legal argument, instead consisting almost exclusively of parenthetical quotations from case law. Because they apply the wrong

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004499

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

standard of review, Plaintiffs do not argue how the trial court abused its discretion for issuing a final judgment holding that they lack standing.

Under the abuse of discretion standard, "[d]iscretion means the option that the trial judge has in doing or not doing that which a litigant does not have the absolute right to demand." *Jennings v. City of Kansas City*, 812 S.W.2d 724, 735 (Mo. App. W.D. 1991). "Abuse of that discretion means an untenable judicial act that defies reason and works an injustice. . . . [or] [w]hen the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable." *Id.* Under the appropriate standard, the trial court soundly exercised its discretion.

First, because the circuit court held a trial where evidence was presented on Plaintiffs' lack of standing, it was proper for the court to decide the standing question on the merits and issue a final judgment. The trial court's decision was properly denominated a "judgment" and it became final 30 days after it was issued. Mo. Sup. Ct. R. 81.05(a)(1). Nothing about issuing a final judgment after trial is arbitrary and unreasonable, or is an injustice against Plaintiffs. During the multiple years of litigation in this case, including a trip to this Court in *NAACP I*, Plaintiffs amended their original Petition three times and had ample opportunity to develop a case with a party possessing standing.[2]

[2] Plaintiffs do not raise on appeal the merits of the trial court's judgment on standing, mootness, or ripeness. The decision below was a final judgment, the

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AMERICAN OVERSIGHT

Second, amending the trial court's final judgment to simply a dismissal order without prejudice would undermine the work of the parties and the courts in multi-year litigation, which reached a trial on the merits and resulted in a final judgment.[3] It would reward Plaintiffs the benefit of liberal re-pleading rules that accompany a dismissal without prejudice by allowing them to re-plead the same cause of action while remaining plaintiffs to that case. And it would effectively announce a rule that no Missouri case supports—that courts must always dismiss a case without prejudice due to lack of standing, even if denominated as final judgment after a contested trial. This would destabilize a customary practice in Missouri's appellate courts of affirming dismissals with prejudice, and it is not necessary in this case. *See, e.g.*, *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. App. W.D. 2018); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017); *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 139 (Mo. App. W.D. 2009).

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finality of which was addressed in Respondents' opposition to Plaintiffs' filing of a late notice of appeal. The finality of the judgment was necessarily affirmed by this Court's special order allowing Plaintiffs to file a late notice of appeal. Plaintiffs have elected not to appeal the merits of the judgment, and so they have forfeited those claims on appeal. *E.g.*, *Eckel v. Eckel*, 540 S.W.3d 476, n.17 (Mo. App. W.D. 2018) (an issue not presented in a point relied on is not preserved for review); *see also* Mo. Sup. Ct. R. 84.04(d).

[3] This Court's opinion in *NAACP I*, 563 S.W.3d at 142–47, thoroughly discusses the procedural history of this case and the claims Plaintiffs raised in their original, first amended, and second amended petitions.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Third, this Court should reject any argument Plaintiffs make that they can cure their pleading defects regarding standing and therefore a without-prejudice dismissal is appropriate. Plaintiffs do not squarely argue they can or will cure this defect. Instead they allude to it in a footnote in their brief as a possibility if the two organizational plaintiffs identify members who present themselves at the polls without a photo ID and suffer an injury from the Voting ID Law. (App. Br. at n.3). Plaintiffs amended their Petition three times and had over two years of litigation to find at least one member of their organizations who has standing to bring their claims. They failed to do so. But even if the organizational plaintiffs did find such an individual in their ranks, the theory of their case—and likely the factual allegations and evidence—would presumably be the same. The circuit court's judgment below is final and as such has the appropriate preclusive affect under the doctrines of collateral estoppel and res judicata. The extent of that

Lastly, the trial court held that *Priorities USA* mooted any of the pleaded claims for relief in Count I. Because Plaintiffs did not raise the merits of the mootness decision on appeal and the decision below is a final judgment, they have forfeited raising the same claims in the same form again. It would thus be futile for this Court to modify the trial court's judgment to be a dismissal without prejudice.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004502

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

For these reasons, this Court should affirm the trial court's exercise of discretion in issuing a final judgment dismissing Count I with prejudice for lack of standing.

II. The trial court properly exercised its discretion by issuing a final judgment that dismissed with prejudice Counts I and II as moot or unripe. (Responding to Points Relied On II and III).

A. This Court should review the trial court's final judgment on mootness and ripeness for abuse of discretion.

As with the trial court's final judgment disposing of Plaintiffs' claims in Count I with prejudice, this Court should review the trial court's with-prejudice dismissals as to mootness and ripeness for abuse of discretion. Plaintiffs again cite the incorrect standard of review in light of the claims they actually raised on appeal. *De novo* review might be appropriate if Plaintiffs had contested the merits of the dismissals themselves, not merely whether the trial erred in dismissing Plaintiffs' claims with prejudice. *De novo* review was applied in *Mo. Soybean Ass'n* because the Court reviewed the substantive question of whether the trial court properly dismissed the underlying claim as unripe and for lack of subject-matter jurisdiction, not whether the trial court erred by doing so with or without prejudice. 102 S.W.3d at 22 ("a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo."). Plaintiffs here have not appealed the trial court's

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

mootness or ripeness determinations. Thus, the general rule of reviewing for abuse of discretion applies. *See Williams*, 841 S.W.2d at 198.

B. The trial court properly dismissed with prejudice Counts I and II as moot because there is no realistic chance Plaintiffs can cure the mootness of their claims.

Plaintiffs have elected not to appeal the merits of the trial court's decision to dismiss Counts I and II as moot in light of *Priorities USA*. They have therefore forfeited that issue on appeal. Assuming, as this Court therefore must, that the trial court did properly dismiss Plaintiffs' claims as moot, the trial court appropriately exercised its discretion by dismissing them with prejudice.

The principal rationale for dismissing cases without prejudice is that it permits a party to bring another action for the same cause, if it is not otherwise barred. *See Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 506 (Mo. banc 1991). "Ordinarily, when an action is dismissed without prejudice, a plaintiff may cure the dismissal by filing another suit in the same court." *Osuji v. Missouri Dept. of Social Services, Div. of Family Services*, 34 S.W.3d 251, 253 (Mo. App. E.D. 2000). As other courts have held, "where the pleading's deficiencies 'cannot be cured by re-pleading, because [the claims fail] as a matter of law,' dismissal with prejudice may be appropriate." *Timber Point Properties III, LLC v. Bank of Am., N.A.*, 2014 WL 7005195, at *1 (W.D. Mo. Dec. 10, 2014) (quoting *Rickmyer v. Browne*, 995 F.Supp.2d 989, 1019

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004504

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

(D.Minn.2014)); *see also McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009) ("Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend.")); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. 2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment").

There is no principled reason why a similar rule does not apply in Missouri for with-prejudice dismissals for mootness. Indeed, this same rationale inspires the analysis of a denial of leave to amend a petition, which is conceptually similar to dismissals with prejudice. *See Gohlston*, 825 S.W.2d at 869; *Bratt v. Cohn*, 969 S.W.2d 277, 284 (Mo. App. W.D. 1998) (denial of plaintiffs' motion to file second amended petition was not an abuse of discretion because it "did not cure the deficiencies of their first amended petition."). Nothing in Missouri law mandates dismissal without prejudice when the court's basis is mootness.

Plaintiffs have not argued on appeal how a subsequent lawsuit could cure the mootness problems found by the trial court in light of *Priorities USA*. And because Plaintiffs have not raised that argument, they have forfeited it. As in their first point on appeal, the argument section of their second point on appeal consists almost exclusively of parenthetical quotations from cases, not

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

substantive legal argument. The Supreme Court's decision in *Priorities USA* affirmed the lower court's permanent injunctions, which—as the trial court below properly found, and which is not contested by Plaintiffs on appeal—encompasses the very relief Plaintiffs sought in this case. (D165, p.5).

The cases Plaintiffs cite in their brief are inapposite. For example, in *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476 (Mo. App. E.D. 2010), the trial court made no determination as to mootness; instead, mootness came *after* the trial court's ruling, and the trial court dismissed the case with prejudice for lack of standing. *Id.* at 477. The parties addressed the merits of the post-decision mootness question on appeal and the appellate court thus considered it on the merits. *Id.* at 483. The appellate court's decision discussed the various public-interest reasons why it vacated the lower court's standing decision and held the controversy should be dismissed without prejudice due to mootness, including because the respondent on appeal did not oppose that remedy. *Id.* at 485. None of those unique circumstances are present here, and *Friends of the San Luis* certainly does not announce a rule that circuit court dismissals due to mootness must always be without prejudice.

Deciding whether a case should be dismissed with or without prejudice is within the sound discretion of the court deciding the mootness question. Plaintiffs have failed to appeal the merits of the trial court's mootness decision. And they have altogether failed to argue in their brief how they might obtain

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004506

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

relief in a future, re-pleaded cause of action based on appropriations for Voter ID Law advertising that is not encompassed by the permanent injunctive relief ordered in *Priorities USA*.

This Court should therefore affirm the trials court's decision dismissing as moot Counts I and II with prejudice.

C. The trial court properly dismissed Count II with prejudice as unripe.

The trial court properly exercised its discretion in dismissing Count II with prejudice as unripe. Though this Court can affirm the trial court's dismissal of Count II as moot and therefore avoid ruling on Appellants' third point on appeal, there are independent and sufficient grounds to affirm the trial court's dismissal with prejudice of Count II as unripe.

The Supreme Court in *Priorities USA* affirmed lower-court injunctions concerning the Secretary of State's advertising the Voter ID Law. As the trial court in this case held, "[t]he Secretary of State is still obligated to provide advance notice in a manner calculated to generally inform the public." (D165, p.5). No party has filed suit complaining of the Secretary's subsequent advertising efforts or compliance with the *Priorities USA* decision.

If a party has any good-faith allegations that the Secretary of State's Office has not complied with the permanent injunctions in *Priorities USA*, those allegations might support a claim for which a party can bring a new

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

action. But Plaintiffs' claims in Count II rest on an entirely separate theory than that potential cause of action. In Count II, Plaintiffs alleged that expenditures on advertising resulted in incorrect and misleading advertising and that the Secretary of State's Office did not issue appropriate corrective advertising. (D98, pp.24–26). Count II is a strict statutory claim, resting solely on § 115.427.5 of the Voter ID Law. The Supreme Court in *Priorities USA* already analyzed claims for violations of that same statute similar to Plaintiffs' claims in Count II. *Priorities USA*, 591 S.W.3d at 459–61.

As the trial court here found, the permanent injunctions in *Priorities USA* encompass essentially the same relief Plaintiffs sought on their advertising claims and "the specific mandatory injunctions requested are not required, given the findings made and instructions given to the Secretary of State in *Priorities USA*." (D165, pp. 5–6). In mentioning mandatory injunctions, the trial court was necessarily referring to the relief sought by Plaintiffs in Count II to issue new, corrective advertising (D98, p.26). The trial court was correct in ruling that the *Priorities USA* decision forecloses any relief that Plaintiffs actually requested in Count II of the Third Amended Petition based § 115.427.5, and Plaintiffs do not challenge the correctness of that portion of the judgment below.

To the extent Plaintiffs bring a future cause of action based on similar facts due to advertising of the Voter ID Law, any such allegations likely cannot

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

be premised § 115.425.7. Plaintiffs did not plead claims premised on the *Priorities USA* injunctions even though the trial court's decision in that case was issued prior to the Third Amended Petition's filing. To that end, even though the Third Amended Petition cites *Priorities USA* in Count II, it narrows the Count's focus to a "violation of the statute." (D98, p.26). Claims for relief requested in a future lawsuit based on the same facts alleged in the Third Amended Petition but premised on § 115.427.5 and not the *Priorities USA* permanent injunctions are not yet ripe, nor can they ever be ripe. *Priorities USA* forecloses the relief Plaintiffs requested based on the facts and theory of the case they pleaded. There exists a hypothetical claim based on *Priorities USA*'s permanent injunctions that may eventually be ripe, but that is not the claim in Count II of the Third Amended Petition here.

For these reasons, it would be futile to allow Plaintiffs to re-plead the same cause of action under § 115.427.5, for the same relief, and based on future—but presently unripe—facts. The trial court properly exercised its discretion in dismissing with prejudice Count II as unripe.

CONCLUSION

For the reasons stated, this Court should affirm the circuit court's decision.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004509

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

Dated: April 5, 2021

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 5th day of April, 2021, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 5,626 words.

/s/ *Jason K. Lewis*

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - April 05, 2021 - 04:43 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004510

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED
10:39 am, May 13, 2021
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD84028

Missouri State Conference of the National Association for the Advancement of Colored People, et al.,

Plaintiffs-Appellants,

v.

State of Missouri, et al.,

Defendants-Respondents.

On Appeal from the Circuit Court of Cole County
Case Number 17AC-CC00309-01
The Honorable Jon E. Beetem

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AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Contents

Table of Authorities 3

Argument 5

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003). 5

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits. 13

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdicton or authority to adjudicate the case on the merits after finding the claims to be moot and unripe. 18

Conclusion 23

Certification of Service and of Compliance with Rule 84.06(b) and (c) 25

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Table of Authorities

Abbott Laboratories, Inc. v. Gardner,
387 U.S. 136 (1967) 22

Allen v. City of Greenville,
336 S.W.3d 508 (Mo. App. S.D. 2003) 7

Borges v. Mo. Pub. Entity Risk Mgmt. Fund,
358 S.W.3d 177 (Mo. App. W.D. 2012) 12, 13

Brinson v. Whittico,
793 S.W.2d 632 (Mo. App. E.D. 1990) 22

Burnett v. Kansas City Sch. Bd.,
237 S.W.3d 237 (Mo. App.W.D.2007) 10

Campbell v. Adecco USA, Inc.,
561 S.W.3d 116 (Mo. App. W.D. 2018) 15, 16

Corozzo v. Wal-Mart Stores, Inc.,
531 S.W.3d 566 (Mo. App. W.D. 2017) 15, 16

Doe v. Visionaire Corp.,
13 S.W.3d 674 (Mo. App. E.D. 2000) 13, 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 14

Minn. Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 11

Missouri Public Service Commission v. Oneok, Inc.,
318 S.W.3d 134 (Mo. App. W.D. 2009) 16

Missouri Soybean Association v. Missouri Clean Water Commission,
102 S.W.3d 10 (Mo banc. 2003) ..... Passim

Pearson v. Koster,
367 S.W.3d 36 (Mo. banc 2012) 11

Peet v. Randolph,
103 S.W.3d 872 (Mo. App. E.D. 2003) 6, 10

AMERICAN OVERSIGHT

Priorities USA v. State,
591 S.W.3d 448 (Mo banc. 2020) .....Passim

Priorities USA,
591 S.W.3d 21

Saidawi v. Giovanni's Little Place, Inc.,
987 S.W.2d 501 (Mo. App. E.D. 1999).....7

Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.,
821 F.3d 992 (8th Cir. 2016).....11

Seldomridge v. Gen. Mills Operations, Inc.,
140 S.W.3d 58 (Mo. App. W.D. 2004) 12

Smith v. City of De Soto,
634 S.W.2d 204 (Mo. App. W.D. 1982) 6

State ex rel. Christian Health Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv.,
229 S.W.3d 270 (Mo. App. W.D.2007) 12

State ex rel. Scherschel v. City of Kansas City,
470 S.W.3d 391 (Mo. App. W.D. 2015) 10

W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.,
743 S.W.2d 578 (Mo. App. W.D.1988) 12

Webb v. Wyciskalla,
275 S.W.3d 249 (Mo banc. 2003) 8, 12

Weinschenk v. State,
203 S.W.3d 201 (Mo. banc 2006) 19

Williams v. City of Kansas City,
841 S.W.2d 193 (Mo. App. W.D. 1992) 5, 6

Mo. Rev. Stat. § 115.427.....Passim

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004514

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Argument

I. *De novo* is the correct standard of review in this case, and Appellants do not misapply the holding in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003).

The issue presented here is purely a question of law, the underlying facts are uncontested, and the correct standard of review in this case is *de novo*. *See* Appellants' Opening Br. at pp. 14–15, 18–19, 21.

The cases relied on by Respondents do not alter the conclusion that review of whether dismissal should have been with prejudice is *de novo*. In *Williams v. City of Kansas City*, 841 S.W.2d 193 (Mo. App. W.D. 1992), the case was dismissed with prejudice on a motion for judgment on the pleadings because the court found that the plaintiff failed to sufficiently plead claims alleging a violation of due process and conversion. *Id.* at 194–97.[1] In upholding the dismissal with prejudice as to the due process claim, this Court noted that "[w]hen a trial court concludes that pleadings do not state a cause of action, and when adequate opportunity to amend has been provided, it is not error for the trial court to dismiss with prejudice." *Id. Williams* does not support abuse-of-discretion review here. In this case, the dismissal was not based upon a finding that Appellants failed to state a claim, nor was the opportunity to amend provided but not utilized. *Williams* did not address a dismissal based on standing, mootness, or ripeness—the grounds for dismissal here. While Respondents note that the *Williams* court relied on

[1] The dismissal of the conversion claim was reversed and that claim was remanded to allow for further development of the facts so that the plaintiff could attempt to prove his claim against the City. *Williams*, 841 S.W.2d at 197; *see also id.* n.3.

AMERICAN OVERSIGHT

Smith v. City of De Soto, 634 S.W.2d 204 (Mo. App. W.D. 1982), *Smith* too is a case where the court dismissed a case with prejudice for failure to state a claim—there because the plaintiff "cite[d] no authority to support his contention a municipal corporation may be held liable in quantum meruit." *Id.* at 204–05 (noting that the law states the contrary). Like in *Williams*, the plaintiff in *Smith* sought a dismissal without prejudice so that he could amend his petition. This Court affirmed the dismissal with prejudice noting that, in the context of that case, the defendant should not have to respond to additional amended petitions because as a legal matter it would be impossible to cure the legal defect that resulted in dismissal. *Smith*, 634 S.W.2d at 205.

In *Peet v. Randolph*, 103 S.W.3d 872, 874 (Mo. App. E.D. 2003), the plaintiff sought specific performance of a real estate contract. After a summary judgment ruling for defendants, followed by an appeal and remand, the case was then ultimately dismissed with prejudice for failure to prosecute. *Id.* There, the trial court believed that the plaintiff failed to reasonably explain his failure to take any action for nearly a year following the remand and noted that it was plaintiff's responsibility to file a motion. *Id.* In finding that the court abused its discretion, the Eastern District noted that, while dismissal for failure to prosecute is typically within the trial court's judicial discretion, because of the "lack of a local rule delineating the plaintiff's responsibilities on remand, the lack of any scheduling conference or schedule on remand, this Court's mandate that a trial be held, and the plaintiff's readiness to proceed to trial, the trial court clearly abused its discretion in dismissing this case." *Id.* at 876–78 (further noting that no dismissal was appropriate, with or without prejudice, reinstating the cause of action, and ordering that it

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AMERICAN OVERSIGHT

be reassigned to a new trial judge). There, again, the dismissal was not based on standing, mootness, or ripeness. A case with such different facts is not authority to depart from *de novo* review on the question of law presented in this appeal.

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501, 504–05 (Mo. App. E.D. 1999), also involves a motion to dismiss for failure to state a claim. In reversing the dismissal with prejudice of three counts but affirming the dismissal of a fourth count, the Eastern District found that plaintiff had failed to plead sufficient facts to allege the necessary elements of a prima facie tort and noted that "[t]here is no absolute right to amend a petition." *Id.* at 505. In *Allen v. City of Greenville*, 336 S.W.3d 508, 511 (Mo. App. S.D. 2003), the dismissal again followed from a motion to dismiss for failure to state a claim. The Southern District reviewed the underlying decision to dismiss *de novo* and, in a footnote citing *Saidawi* and *Williams*, stated that whether to dismiss with or without prejudice, while not raised as a point on appeal, would be within the discretion of the trial court. *Id.* at 512, 512 n.3. In many cases the decision might be within the court's discretion. In this case, however, the court lacked such discretion and the dismissal should be reviewed *de novo*.

Unlike the cases relied upon by Respondents, there is no dispute here as to whether Appellants' petition stated a claim or whether they prosecuted their case. This case concluded after a week-long trial that included multiple witnesses—including significant expert testimony—and extensive post-trial briefing. Although the trial court did dismiss this case with prejudice, it never reached the merits of Appellants' claims, nor could it have. The dismissal was based only on standing (Count I), mootness (Counts I

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

and II), and ripeness (Count II). Each of these is a requirement for the circuit court's jurisdiction or authority to decide the case or justiciability, not the merits of the case itself.

"[T]he authority to render judgment in a particular case is … the definition of subject matter jurisdiction …." *Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo banc. 2003). This case is simply not like the cases relied on by Respondents. And while *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo banc. 2003), examined whether a declaratory judgment and injunctive relief claim could be brought at all, it is similar to the present case in that the facts were uncontested, it discussed the court's jurisdiction and authority to hear the case, and the issue on appeal was purely one of law. This Court should not depart from *Missouri Soybean Association* by holding that the abuse-of-discretion standard has universal application in all cases involving the review of a lower court's decision to dismiss a case with prejudice.

In *Missouri Soybean Association*, the lower court dismissed the case with prejudice for a lack of subject-matter jurisdiction. *Id.* at 14. There, like here, the parties did not dispute the underlying facts of the case (concerning state inclusion of rivers on a list of impaired waters that is then submitted to the EPA and triggers specific programs designed to improve the water quality), so the appeal centered on whether the plaintiffs could even bring a declaratory judgment action seeking injunctive relief challenging the promulgation of the list as rulemaking. *Id.* at 14–23. Whether the circuit court had the authority to adjudicate the case was a question of subject-matter jurisdiction. More specifically, the issue was whether plaintiffs were properly challenging "the validity of a

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

rule or the threatened application of such a rule" under § 536.050.1 such that the lower court would have the authority (i.e., subject-matter jurisdiction) to hear a declaratory judgment action. *Id.* at 22. If they were, then the court would have the power to render a declaratory judgment. If the promulgation of the list was not rulemaking, the court had no authority over the case—i.e., it lacked subject-matter jurisdiction.

While noting that, "[g]enerally the decision to dismiss for lack [of] subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of discretion[,]" the court went on to find that "where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Id.* at 22. Ultimately, the Missouri Supreme Court found that the promulgated list was not a rule and therefore "the circuit court lacked subject-matter jurisdiction pursuant to section 536.050.1 to render the sought-after declaratory judgment." *Id.* at 25–26 (noting further that because "the appellants could not even predict the effect such a declaratory judgment would have[,] … it would thus "not have a 'conclusive effect' or 'lay to rest the parties' controversy'" as is required by the general principles underlying declaratory judgment actions). Additionally, the supreme court noted that "the authority of the courts of this State to render declaratory judgments must be used and operate within the limits of the constitutional powers and duties of the courts" and, "[o]ne such limit is the traditional doctrine of ripeness, which, when applied in this case, also commands dismissal of the appellants' actions." *Id.* at 26. In closing, the supreme court concluded that, because the challenged list promulgated by the defendants "is not a rule and the inclusion of the

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Rivers not rulemaking, and because the controversy cannot be resolved by declaratory judgment and is not ripe for adjudication, the judgment of dismissal is affirmed. However, *because the circuit court lacked subject-matter jurisdiction, and because the controversy is not ripe for review, the judgment of dismissal is modified to one without prejudice*." *Id.* at 29 (emphasis added) (citing Rule 84.14).

Therefore, while dismissals may be reviewed for an abuse of discretion in certain contexts, that standard of review is not appropriate in this particular case, just as it was not appropriate in *Missouri Soybean Association*. This Court is not being asked to determine whether the dismissal itself was appropriate under the circumstances; it is instead being asked to decide a pure question of law: should the dismissal have been with or without prejudice when that dismissal was based solely on standing, mootness, and ripeness—i.e., the jurisdiction or authority of a circuit court and the justiciability of the claims raised.

In any event, even if this Court were to review the dismissal with prejudice for an abuse of discretion, the circuit court erred. Under that standard, this Court must reverse the circuit court's ruling "'if it is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration.'" *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 397 (Mo. App. W.D. 2015) (quoting *Burnett v. Kansas City Sch. Bd.*, 237 S.W.3d 237, 238–39 (Mo. App. W.D. 2007)); *see also Peet*, 103 S.W.3d at 876–77 ("Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to show a lack of careful consideration and shock the sense of justice.").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

Moreover, "[a]n abuse of discretion occurs where the [trial] court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc); *see also Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) ("A district court abuses its discretion if, as relevant here, it commits an error of law."). In reviewing questions of law, this Court "reviews the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012) (quotation and citation omitted). As supported by the discussion, *infra*, not only was dismissing the claims with prejudice here unreasonable considering the bases for dismissal were a lack of subject-matter jurisdiction and non-justiciability but dismissing with prejudice under these circumstances was an erroneous legal conclusion because the circuit court had no authority to reach the merits of the case.

Rule 67.03 is irrelevant to the issues in this appeal. Although the rule states that an involuntary dismissal is "without prejudice unless the court in its order for dismissal shall otherwise specify[,]" this does not authorize a court to reach the merits of a case when it otherwise lacks jurisdiction or authority to do so. A circuit court does *not* have the discretion to overstep in this manner. Additionally, a trial court's decision to deny a party's request to amend a petition—a ruling that would be properly reviewed for an abuse of discretion—is, once again, easily distinguishable from a case like this one, where a circuit court improperly reaches the merits of a case despite lacking jurisdiction or authority to do so based upon standing, ripeness, and mootness. And, as discussed,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

infra, standing could be achieved and the circumstances could change in such a way that the claims become ripe and no longer moot.

To obtain judgment on the merits in any case, plaintiffs must have standing, the case must not be moot (or, if moot, it must meet an exception), and the case must be ripe. In other words, standing, mootness, and ripeness are prerequisites for a court to reach the merits of a case.[2] *See, e.g.*, *Seldomridge v. Gen. Mills Operations, Inc.*, 140 S.W.3d 58,

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[2] As this Court has noted, "[i]t remains an open question whether a lack of standing implicates the court's jurisdiction or merely the court's authority, but we need not decide this issue given that this case should have been dismissed under either theory." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012) ("affirm[ing] the circuit court's finding that Borges and Johnson lacked standing and enter[ing] the order the circuit court should have entered, dismissing without prejudice Borges and Johnson's petition" pursuant to Rule 84.14). Presumably, in *Borges*, this Court was alluding to the recent discussion of jurisdiction versus authority in *Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009), where the Missouri Supreme Court noted that "[s]ubject-matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." (noting that, unlike federal courts, the circuit courts in Missouri "have original jurisdiction over *all* cases and matters, civil and criminal"). "[T]he authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction…." *Id.* at 254.

While the law surrounding jurisdiction versus authority continues to evolve in court decisions, the issue need not be reached here. Under either theory, dismissal for standing, mootness, or ripeness should be without prejudice.

In *Borges*, before recognizing that the issue may be one of authority and not jurisdiction, this Court recognized that "[i]n the past, we have found that if a party lacks standing sufficient to maintain an action, the court necessarily does not have jurisdiction over the claims presented." *Id.* (citing *W. Cas. & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 580 (Mo. App. W.D.1988) ("If [appellant] lacked standing, then its petition was subject to dismissal because it failed to establish the requisite subject matter jurisdiction. It must also follow that the trial court, lacking subject matter jurisdiction, could not enter a judgment on the merits for the [respondent]."). "Therefore, a claim that a party lacks standing has generally been treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 55.27(a)(1)." *Id.* (citing *State ex rel. Christian Health*

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

63–64 (Mo. App. W.D. 2004) ("A dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits.").

II. Dismissal of Count I for lack of standing should be without prejudice because standing could be achieved and the circuit court had no jurisdiction or authority to adjudicate the case on the merits.

The underlying facts in this case are uncontested. It makes no difference in this appeal that Appellants asserted that they had standing below and maintained that argument through the post-trial filings. In this appeal, Appellants have elected not to dispute the circuit court's ultimate finding that they lack standing to bring Count I. However, it remains true that, "once the circuit court determined that they lacked standing, it was without jurisdiction to reach the merits of their claims." *Borges v. Mo. Pub. Entity Risk Mgmt. Fund*, 358 S.W.3d 177, 183 (Mo. App. W.D. 2012). A plaintiff without standing "presents no legally justiciable issue," and therefore, "the trial court should have dismissed the[] petition without prejudice." *Id.* at 184. Thus, while dismissal of a claim where a plaintiff lacks standing is appropriate, what is not appropriate is a dismissal *with prejudice* that, by definition, reaches the merits of the claim.

"A dismissal with prejudice constitutes an adjudication on the merits and 'bars the assertion of the same cause of action or claim against the same party.'" *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000) (quoting Rule 67.01). As such, courts

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Care of Springfield, Inc. v. Mo. Dep't of Health and Senior Serv., 229 S.W.3d 270, 276 (Mo. App. W.D.2007)).

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

do not have any "discretion" to reach the merits of a case where plaintiffs lack standing. Here, the circuit court erred in making a dismissal with prejudice. However, the circuit court did not abuse any discretion, because it had no discretion to abuse under the circumstances.

Amending the dismissal to one without prejudice would not undermine any aspect of this case. While Appellants agree that everyone worked very hard to litigate this case over the span of several years, including a week-long trial and two appeals to this Court, that is simply the nature of litigation. It is not always fast or easy. Moreover, here, standing is curable and could be achieved in the future. The court's determination that these particular plaintiffs did not have standing under the circumstances does not preclude Appellants from ever having standing in the future. This further distinguishes this case from one where a decision related to standing might be based upon undisputed facts but where those facts failed to state a claim at all.

Here, even the circuit court recognized that "[s]tanding is a jurisdictional matter antecedent to the right of relief." D165 p. 2. The circuit court found that, to have standing to challenge the insufficient funding of § 115.427 in a manner that would preclude enforcement, a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification. *Id.* If a member of the organizational plaintiffs suffered this harm, according to the circuit court's order, the organization would have associational standing. Additionally, Missouri courts could—and arguably should—begin to embrace organizational standing, just as federal courts have for decades. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Thus,

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

standing to raise the claims is achievable and plaintiffs, with their thousands of members, should not be forever barred because the circuit court found they lacked standing at the time of the trial.

Amending the judgment to a dismissal without prejudice in this case would not destabilize any purported "customary practice" of appellate courts affirming dismissals with prejudice where the issue involved a party's standing. And, if it is a customary practice of appellate courts in this state to affirm dismissals with prejudice based solely upon a lack of standing then that practice should be revisited given the legal error involved and dangerous precedent it sets and the many decisions indicating that a court should not reach the merits of a case when the plaintiffs lack standing.

The cases relied on by Respondents to support this argument are inapposite. In all three of the cited cases, the dismissals were based upon the pleadings, the review of the dismissal itself was *de novo*, and the plaintiffs argued only that their pleadings were sufficient to demonstrate standing but did not raise the issue of whether the dismissal should be with or without prejudice. Therefore, none of the cases include any discussion or point of error related to the fact that the cases were denied with prejudice. In *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 117 (Mo. App. W.D. 2018), and *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017), the plaintiffs argued that they pleaded sufficient facts to establish standing to challenge violations of the Fair Credit Reporting Act (FCRA) and did not raise any argument related to the petitions being denied with prejudice. In both cases, this Court looked at the sufficiency of the pleadings to determine if the plaintiffs pled injuries establishing standing for an FCRA

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

claim. *Campbell*, 561 S.W.3d at 120–21; *see also Corozzo*, 531 S.W.3d at 572. Likewise, in *Missouri Public Service Commission v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009), the appeal followed a lower court's dismissal for lack of standing based upon the allegations in the petition and no error was asserted relating to the dismissal being with prejudice. This Court should not premise its decision in the present case on previous cases where a dismissal with prejudice based on standing was affirmed but where the "with prejudice" distinction was not raised by a party or discussed by this Court.

Moreover, the decision in *Priorities USA v. State*, 591 S.W.3d 448 (Mo banc. 2020), does not change the standing argument or foreclose the possibility that a plaintiff or member of a plaintiff organization could subsequently satisfy standing requirements. Count I of the third amended petition alleged that § 115.427.1 could not be enforced pursuant to § 115.427.6(3). There has been no change to the identification requirements in § 115.427.1 or the funding requirements in § 115.427.6(3), namely that "[a]ll costs associated with the implementation of this section shall be reimbursed from the general revenue of this state by an appropriation for that purpose. If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced." Pursuant to the circuit court's holding, standing could still be achieved regardless of the *Priorities USA* decision (i.e., a person who is eligible to vote would have to timely appear at the polls, try to vote, and be turned away for lack of a proper photo identification). The *Priorities USA* decision is limited to § 115.427.2(1) and .3 (i.e., the affidavit requirement). At any future election, even though

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004526

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

the *Priorities USA* decision requires the acceptance of non-photo forms of identification without a signed affidavit, a poll worker could still require a voter to present photo identification and turn them away if they do not. Section 115.427.1 still states that voters "shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification to elected officials." As long as that subsection remains in effect, poll workers could ask voters to present those types of photo identifications at the polls and this incorrect request could be based on the State's insufficient funding to implement the law.[3]

It is not futile to do as the law requires and amend the dismissal here to one without prejudice when the circuit court had no jurisdiction or authority to enter a dismissal *with* prejudice. If the dismissal with prejudice was to be affirmed, Appellant organizations and their members who do achieve standing would be forever barred from challenging the enforcement of § 115.427.1 pursuant to § 115.427.6(3)—relief that was *not* granted in *Priorities USA*.

[3] *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his over registration card – an acceptable form of non-photo identification under option two").

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

III. Dismissal of Counts I and II for mootness and Count II as being unripe should be without prejudice because there is a realistic chance that both counts will no longer be moot in the future and Count II will become ripe; the circuit court had no jurisdiction or authority to adjudicate the case on the merits after finding the claims to be moot and unripe.

Like a case where there is no standing, a moot or unripe case is not justiciable. In other words, the circuit court should not have reached the merits by dismissing Counts I and II with prejudice for mootness (Counts I and II) and being unripe (Count II). Appellants could be eligible to bring a claim at a future date if the issues were no longer moot and ripe for a lawsuit, but Appellants will be forever barred if this Court affirms the dismissal with prejudice.

Count I challenged the enforcement of § 115.427.1 pursuant to § 115.427.6(3). Those specific identification (§ 115.427.1) and funding (§ 115.427.6(3)) requirements have never changed. *Priorities USA* held only that the affidavit requirement found in § 115.427.2(1) and .3 is an unconstitutional burden on the fundamental right to vote. While the *Priorities USA* court enjoined portions of § 115.427 relating specifically to the affidavit requirement, including "the dissemination of materials indicating photo identification is required to vote[,]" 591 S.W.3d at 451, Appellants' potentially broader challenge to the enforcement of § 115.427.1 pursuant to § 115.427.6(3) should not be forever barred on this basis.

Regarding mootness, the circuit court seemed to hold that by eliminating the affidavit requirement, the circuit court in *Priorities USA* also enjoined the strict photo-identification requirements of § 115.427.1 "as a practical matter," D165 pp. 3–4, thus mooting any sufficient funding argument related to the enforcement of § 115.427.1 in this

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

case. However, a mootness finding could change regardless of the affidavit requirement. In fact, *Priorities USA* supports a finding that it is likely a poll worker will not be properly informed as to how to implement the law and may require specific § 115.427.1 photo identification and then turn away a voter who does not have it, despite the injunction in that case. *See, e.g.*, *Priorities USA*, 591 S.W.3d at 454 (noting that, "election officials did not understand the affidavit requirement[,]" one voter was "informed by an election official that she would need to obtain photo identification to vote in the next election[,]" and another voter "was told he could not vote despite presenting his voter registration card – an acceptable form of non-photo identification under option two"). Thus, if an eligible voter were to go to a polling place to cast a ballot and a poll worker required that voter to present a specific form of photo identification and turned them away if they did not (i.e., they achieved standing), and if that voter (or the Appellant organization of which they are a member) alleged that the funding requirements of § 115.427.6(3) were not being met and therefore § 115.427.1 could not be enforced, a claim for relief would be stated and would not be mooted by *Priorities USA*. The funding requirements of § 115.427.6(3) continue to exist and it is well-established law that "requiring individuals to present photo identification to vote is unconstitutional." *Priorities USA*, 591 S.W.3d at 458 (citing *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006)). Although Appellants do not challenge the circuit court determination that this case was mooted under the circumstances, the *Priorities USA* decision as to affidavits should not preclude Appellants from all such future claims.

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004529

Priorities USA was tried in late September and early October 2018 (first decision entered by the circuit court on October 23, 2018) and a final decision of the Missouri Supreme Court was issued on January 14, 2020 (rehearing denied January 30, 2020). This case was tried in August 2019 and a judgment dismissing Appellants' claims was signed April 20, 2020. Given the unique circumstances of the 2020 elections during the COVID-19 pandemic and the significant increase in voting absentee and by mail in Missouri, some of the scenarios that would present a live controversy may yet play out in future elections.

Count II of Appellant's petition alleged that the failure to provide correct information to the public, i.e., the "advance notice" requirement, resulted in a violation of § 115.427.5. Count II was not dismissed on standing grounds but only as being moot and unripe. In dismissing Count II, the circuit court found that the injunctive relief in *Priorities USA* mooted the need for the specific injunctive relief—albeit not precisely the same relief—requested in this case. *See* D165 pp. 5–6 (comparing the relief requested here and the injunction ordered in *Priorities USA*).[4] In making its ruling here, the circuit court noted that "the original manner in which [the State] tried to fulfill [the advance-notice] obligation was found to be deficient" in *Priorities USA* and then found that whether the State's "subsequent information campaigns avoid this deficiency is not yet ripe." D165 pp. 5–6. So, while the mootness determination at the time the circuit court

[4] For example, Appellants asked for a broader injunction regarding multiple materials that had been and were being disseminated and sought an order requiring the State to correct the existing misrepresentations they created.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

ruled in April 2020 is not challenged here, as the circuit court acknowledged in its ripeness finding, Appellants' claim related to advance notice may resurface in the future if the Secretary of State continues to provide incorrect information to voters about all of § 115.427's requirements. In other words, while the *Priorities USA* court did enjoin the State from disseminating materials representing to the public that a photo identification card is required to vote, including materials with a specific graphic indicating voters will be asked for a photo identification card without specifying the other acceptable forms of identification that can be used to vote, that injunction in a case in which Appellants were not parties should not bar them from bringing a claim in the future if the advance notice provision of § 115.427.5 is violated. *See Priorities USA*, 591 S.W.3d at 559–61; D165 p. 5.[5] As such, subsequent information campaigns by the State could make this issue ripe, in which case Appellants should be entitled to bring a suit.

The possibility of a future claim is further supported by the fact that, in *Priorities USA*, the prohibition on the dissemination of materials focused on a single advertisement—one of many used by the State—and the injunction was "limited in scope, as it enjoined the State from disseminating only those 'materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show.'" 591 S.W.3d 460–61. Thus, while it is *possible* that this limited-in-scope injunction will stop the State from disseminating

[5] As noted by the supreme court in *Priorities USA*, a political science expert "testified that materials that are incomplete and fail to describe all the forms of identification permitted by section 115.427 cause voter confusion and decrease voter turnout." 591 S.W.3d at 460.

AMERICAN OVERSIGHT

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

incorrect information about the requirements of § 115.427, it in no way guarantees that will be the case. Just because no party has yet brought a lawsuit does not mean that the claim will not become ripe. However, Appellants could not currently bring this claim even if it were to become ripe because they have been barred by the circuit court's dismissal with prejudice. The advance-notice requirement found in § 115.427.5 is ongoing and the State must comply with both the law's requirements *and* the injunction issued in *Priorities USA*. The *Priorities USA* decision should not be read to mean that the claim raised in this case would never become ripe in the future.

"The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Mo. Soybean Ass'n*, 102 S.W.3d at 26 (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148–49 (1967) (overruled on other grounds)). "Filing a suit prematurely should not prevent a plaintiff from proceeding with an action when it becomes ripe." *Brinson v. Whittico*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990). "Thus, if an action is deemed premature and a trial court dismisses it for that reason, the action should be dismissed without prejudice." *Id.* (holding that, "[b]ecause the trial court deemed the lawsuit premature, it may either dismiss the lawsuit without prejudice or may allow the lawsuit to pend until ripe for adjudication."). Although *an* injunction was issued in *Priorities USA*, Appellants should not be forever barred from raising any claim related to advance notice under § 115.427.5, consistent with the trial

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

court's acknowledgement that this issue could subsequently become ripe.

Conclusion

Because Appellants' claims were dismissed based on jurisdictional and justiciability grounds (standing, mootness, and ripeness), the trial court should have dismissed the claims *without* prejudice. Appellants request that this Court, pursuant to its authority under Rule 84.14, dispose finally of the case by entering the judgment the trial court should have entered and dismiss Counts I and II of the Third Amended Petition without prejudice.

Respectfully submitted,

/s/ Anthony E. Rothert
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Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

MO-AG-22-0644-A-004533

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Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT
MO-AG-22-0644-A-004534

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on May 4, 2021, the foregoing brief was filed electronically and served automatically on the counsel for Respondents.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,948 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

/s/ Anthony E. Rothert

Electronically Filed - WESTERN DISTRICT CT OF APPEALS - May 04, 2021 - 06:37 PM

AMERICAN OVERSIGHT

Message

From: Christians for Life and Liberty [CLL@spiritcom.net]
Sent: 8/24/2021 12:54:48 PM
Subject: 449th Anniversary: 1572 France - Roman Catholic / Jesuit / Papal St. Bartholomew's Day Massacre of French Protestant Christians /// French Roman Catholics Slaughter 75,000 French Protestant Christians (Reformed Huguenots) in Paris and France beginni...

Christians for Life and Liberty (CLL)
aka Columbia Christians for Life (CCL)
Columbia, South Carolina
August 23, 2021

449th Anniversary: 1572 France - Roman Catholic / Jesuit / Papal

St. Bartholomew's Day Massacre of French Protestant Christians

French Roman Catholics Slaughter 75,000 French Protestant Christians

(Reformed Huguenots) in Paris and France beginning August 24, 1572

2009 Report:

437th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal
St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists)
Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572
August 23, 2009 / Revised August 24, 2009
http://christianlifeandliberty.net/2009-08-23-437th-Anniv-Aug-24-1572-Romes-St-Bartholomews-Day-Massacre-of-French-Protestant-Huguenots.doc

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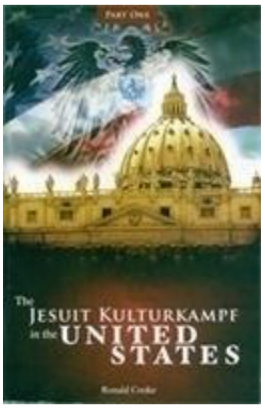
"The early American Puritans were united in their opposition to the papacy and the Roman Catholic Church-State.
Unlike modern evangelicals they did NOT regard the Jesuits as their cobelligerent

AMERICAN OVERSIGHT

in some cultural struggle;
they regarded them as their mortal enemy." [Emphasis added]

"The Jesuit Kulterkampf in the United States"

by Dr. Ronald Cooke
Wittenburg Press
http://www.truthinternationalministries.com/Publications.html



The present cultural struggle in the United States is Jesuit-inspired, and is obviously helping to Romanize rather than Christianize this country. In this study, documentation is provided to show that the willingness of some Protestant Evangelicals, some conservative Baptists, some "truly" Reformed, and some Charismatics to become **cobelligerents with the Roman Catholic System** is **helping the goals of the papacy in the United States today.** The **early American Puritans** were united in their opposition to the papacy and the Roman Catholic Church-State.
Unlike modern evangelicals they did NOT regard **the Jesuits** as their cobelligerent in some cultural struggle; they regarded them as **their mortal enemy.** They believed that **a sound education involved the ability to expose the errors and superstitions of Roman Catholicism.** In this first book of his three part series, Dr. Ronald Cooke exposes the activities of **the Jesuit Order in America,** comparing the Culture War of our own time with what was called **the Kulturkampf (Culture Struggle) in Germany during the decades leading to Hitler's rise to power.** Is the same pattern happening in America today? A re Catholics, Protestants, and Conservatives being led into an army of Culture Warriors that may one day be used for a diabolical purpose? [Emphasis added]

'THE VATICAN JESUIT GLOBAL CONSPIRACY'

Dr. Ronald Cooke, 1985
http://christianlifeandliberty.net/The-Vatican-Jesuit-Global-Conspiracy-Dr-Ron-Cooke-1985.pdf
https://granddesignexposed.com/download/nwo.html

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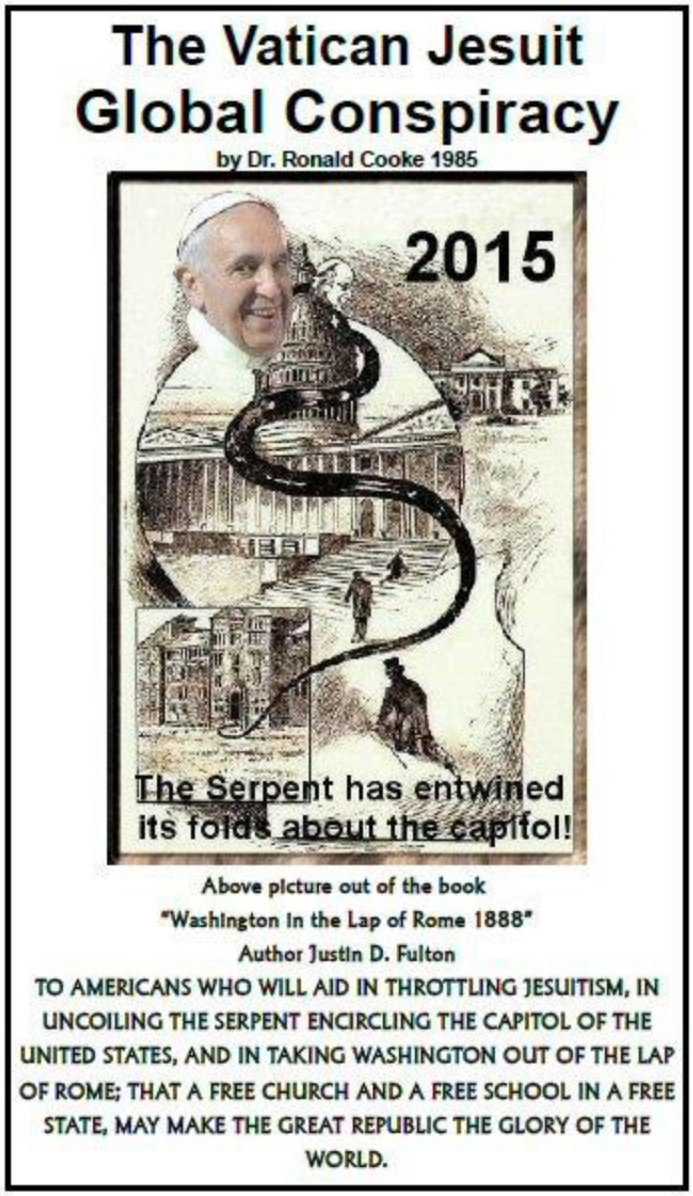

'911:Vatican & Jesuits'
http://web.archive.org/web/20090204032607/http:/wikicompany.org/wiki/911:Vatican_%26_Jesuits

---

The Jesuits and Modern America - "The Jesuits have been out to *Romanize* America ..."

" ... as late as 1920 many Protestants were concerned about the inroads Roman Catholicism was making into the politics of the United States. **Spearheading the advance was the same old Protestant nemesis, the *Jesuits*, who have sought to overthrow the Protestant Reformation since the inception of their order."**
"Americans, as late as 1920, were still concerned about the scheme the Jesuits were planning for the

AMERICAN OVERSIGHT

Romanizing of the United States. Jeremiah J. Crowley, who was a Roman Catholic priest for twenty-one years before his conversion to Christ, wrote a large tome on the effect Roman Catholicism was having upon the United States in his day. He entitled his work ***Romanism: A Menace to the Nation.*** The book was published in 1912."
Antichrist Exposed (The Reformed and Puritan View of the Antichrist), **by Ronald N. Cooke, 2002.**
http://christianlifeandliberty.net/scan00011.jpg

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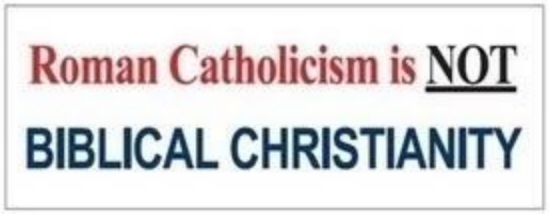
Roman Catholicism is NOT Biblical Christianity.
ROMAN CATHOLICISM IS A FALSE RELIGION.
March 22, 2012



Christians:

KNOW YOUR ENEMY !

2 Corinthians 2:11, KJV

—

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—

Note: E-mail below sent August 23, 2020

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[Edited 8/23/21]

Date: Sun, 23 Aug 2020
From: Christians for Life and Liberty
Subject: 448th Anniversary: St. Bartholomew's Day Massacre / French Roman

AMERICAN OVERSIGHT

Catholics Slaughter 75,000 French Protestant Christians
(Reformed Huguenots) in Paris and France; begun August 24, 1572

Christians for Life and Liberty (CLL)
aka Columbia Christians for Life (CCL)
Columbia, South Carolina
August 23, 2020

448th Anniversary: St. Bartholomew's Day Massacre

French Roman Catholics Slaughter 75,000 French Protestant Christians

(Reformed Huguenots) in Paris and France; begun August 24, 1572

Today in August 2020, many Christians in America are making the costly mistake of unequal yoking
with Rome in some ways even more so than did the French Huguenots in 1572; *and in multiple though different ways, the shedding of innocent blood has likewise followed:*
Witness for example the false,
unbiblical, Romish/ecumenical, incrementalist, so-called "Pro-Life Movement", which has managed
to perpetuate child-murder in the womb, for now 47+ years, and over 62 million (reported) dead,
and to prolong the day when we see the ENDING of child-murder in the womb in the United States,
which WILL HAPPEN ONE DAY, either by the faith and obedience of Christians (Matthew 5:13-16, KJV),
or, alternatively, by national calamity (national bloodbath - Numbers 35:33, Hosea 4:2, KJV ?), when
we have known since even BEFORE the wicked, unconstitutional, January 22, 1973 US Supreme Court
Opinion was even announced, that by incontrovertibly establishing in law, the God-given, unalienable,
Personhood of human beings at fertilization, with no "exceptions", then the God-given, unalienable,
right to life of preborn human beings would be protected by the US

AMERICAN OVERSIGHT

Constitution and State Constitutions.
[Listen to the audio of the October 11, 1972 Second Oral Argument in the *Roe v. Wade* case, and
read the transcript, at https://www.oyez.org/cases/1971/70-18]

"Co-belligerency" with Rome is sin:

[And the use by Rome of moral issues in the culture wars as a pretext to join hands with Christians
is but a stratagem to advance Rome's Second Vatican Council (1962-1965) ecumenical agenda.]

American Council of Christian Churches
Resolution on the [Unbiblical] Doctrine of "Co-belligerence" (pdf)

**Furthermore, if the Roman Catholic Church institutional Hierarchy (Bishops, Archbishops, Cardinals, Pope),
were really, truly, actually "Pro-Life", then why are the Pope - appointed Roman Catholic Bishops in the
United States of America in multiple States *NOT* supporting "Personhood" legislation ? Why is the
Roman Catholic Church Hierarchy in the United States *against* the ENDING of child-murder-by-"abortion"
by Establishing Justice through recognizing the God-given, unalienable right to life as "Persons" of all
pre-birth human beings, at fertilization (conception), and that without "exception", because God's holy,
inspired, inerrant Word says, "Thou shalt not kill (murder)." Exodus 20:13, KJV ?**

Personhood Report:
**Opposition of Pope - Appointed US Roman Catholic Bishops
to Multiple States' Personhood Legislation: 2006 - 2012**

Michigan (2006)
Georgia (2008)
Colorado (2008, 2009/2010, 2012)
Montana (2008, 2009)
North Dakota (2009)
Florida (2009)
Missouri (2010)
Mississippi (2011)
http://christianlifeandliberty.net/2018-01-09-Opposition-of-Pope-Appointed-US-Roman-Catholic-Bishops-to-Multiple-States-Personhood-Legislation-2006-2012.pdf

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Note: E-mail below sent August 24, 2019

[Revised 8/23/20]

Date: Sat, 24 Aug 2019
From: Christians for Life and Liberty
Subject: 447th Anniversary: St. Bartholomew's Day Massacre / French Roman Catholics Slaughter 75,000 French Protestant Christians
(Reformed Huguenots) in Paris and France; begun August 24, 1572

Christians for Life and Liberty (CLL)
aka Columbia Christians for Life (CCL)
Columbia, South Carolina
August 24, 2019

447th Anniversary: St. Bartholomew's Day Massacre

French Roman Catholics Slaughter 75,000 French Protestant Christians

(Reformed Huguenots) in Paris and France; begun August 24, 1572

Video
St. Bartholomew's Day Massacre
https://www.youtube.com/watch?v=IDrUNhdPjVs&feature=youtu.be
Video - 8:52
Views - 46,672
Published on May 23, 2012
Watch the tragic story of King Charles the IX, his mother and the massacre of the French Huguenots.

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437th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal
St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists)

Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572

August 24, 2009

http://christianlifeandliberty.net/2009-08-23-437th-Anniv-Aug-24-1572-Romes-St-Bartholomews-Day-Massacre-of-French-Protestant-Huguenots.doc

Please Christians, READ HISTORY !!!

Counter-Reformation

France

https://en.m.wikipedia.org/wiki/Counter-Reformation#France

[Comments, emphasis added]

Main articles: Massacre of Mérindol, St. Bartholomew's Day massacre, Persecution of Huguenots under Louis XV, French Wars of Religion, and Hu guenot rebellions

Huguenots (French Reformed Protestants) fought a series of wars in France with **[Roman]** Catholics, resulting in millions of deaths and the Edict of Fontainebleau in 1685 which revoked their freedom of religion. **In 1565, several hundred Huguenot shipwreck survivors surrendered to the Spanish in Florida,** believing they would be treated well. Although a **[Roman]** Catholic minority in their party was spared, all of the rest were executed for heresy, with active **[Roman Catholic]** clerical participation.[FN 13]



Matanzas Inlet, **Florida,** where the [**Huguenot shipwreck survivors**] were killed **[in 1565].** [Revised photo 8/23/20]

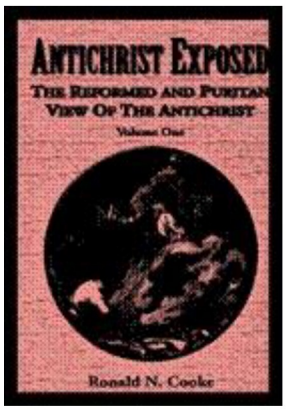
The Jesuits and Modern America - "The Jesuits have been out to *Romanize* America ..."

" ... as late as 1920 many Protestants were concerned about the inroads Roman

AMERICAN OVERSIGHT

Catholicism was making
into the politics of the United States. **Spearheading the advance was the same old Protestant nemesis,**
the *Jesuits,* who have sought to overthrow the Protestant Reformation since the inception of their order."
"Americans, as late as 1920, were still concerned about the scheme the Jesuits were planning for the
Romanizing of the United States. Jeremiah J. Crowley, who was a Roman Catholic priest for twenty-one years
before his conversion to Christ, wrote a large tome on the effect Roman Catholicism was having upon the
United States in his day. He entitled his work ***Romanism: A Menace to the Nation.*** The book was published in 1912."
***Antichrist Exposed (The Reformed and Puritan View of the Antichrist),* by Ronald N. Cooke, 2002.**
http://christianlifeandliberty.net/scan00011.jpg

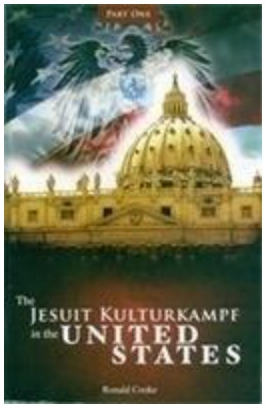
"Antichrist Exposed"
by Dr. Ronald Cooke
http://www.truthinternationalministries.com/Publications.html



An historical review of how the Antichrist was viewed by those dissenters from Roman Catholicism
before the Reformation, and how the Reformers and Puritans viewed the Antichrist bringing the
subject up to modern times. Looking at how some modern Roman Catholic writers have viewed
the identity of Antichrist and how modern evangelicals and Reformed also have identified Antichrist.
Two Volumes Vinyl Covers 744 Page

"The Jesuit Kulterkampf in the United States"
by Dr. Ronald Cooke
http://www.truthinternationalministries.com/Publications.html
[Emphasis added]

AMERICAN OVERSIGHT



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Note: E-mail below sent August 23, 2018

[Edited August 24, 2019]

Date: Thu, 23 Aug 2018
From: Christians for Life and Liberty
Subject: 446th Anniversary: French Roman Catholics Slaughter 75,000 French Protestant Christians in Paris and France; St. Bartholomew's Day Massacre begun August 24, 1572

Christians for Life and Liberty (CLL)
aka Columbia Christians for Life (CCL)

AMERICAN OVERSIGHT

Columbia, South Carolina
August 23, 2018

446th Anniversary:

French Roman Catholics Slaughter 75,000 French Protestant Christians

(Reformed Huguenots) in Paris and France; St. Bartholomew's Day Massacre

begun August 24, 1572

Note: E-mail below sent August 24, 2017

Date: Thu, 24 Aug 2017
From: Christians for Life and Liberty
Subject: 445th Anniversary: French Roman Catholic Slaughter of 75,000 French Protestant Christians in Paris and France; St. Bartholomew's Day Massacre begun August 24, 1572

Columbia Christians for Life (CCL)
aka Christians for Life and Liberty
Columbia, South Carolina
August 24, 2017

AMERICAN OVERSIGHT

445th Anniversary:

French Roman Catholic Slaughter of 75,000 French Protestant Christians

(Reformed Huguenots) in Paris and France; St. Bartholomew's Day Massacre

begun August 24, 1572

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_____

Rome's St. Bartholomew's Day Massacre in Paris, France - August 24, 1572



François Dubois (1529-1584)

AMERICAN OVERSIGHT

Reproduction of *La Saint-Barthélemy*, ca. 1572-84
Photo: J.C. Ducret, Musée cantonal des Beaux-Arts de Lausanne

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St. Bartholomew's Day Massacre
The famous painting of the **Saint Bartholomew's Day massacre in Paris on 24 August 1572** depicts scenes
from the most notorious incident in the French wars of religion and one of the most striking examples of the extremes
of religious intolerance in the age.
The Huguenot painter, François Dubois is reputed to have been an eyewitness
to the massacre of thousands of his fellow Huguenots on the streets of Paris.
http://folgerpedia.folger.edu/Voices_for_Tolerance_in_an_Age_of_Persecution#St._Bartholomew.27s_Day_Massacre

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Painting by François Dubois, a Huguenot painter born circa 1529 ...
he depicts Admiral Coligny's body hanging out
of a window at the rear to the right. To the left rear, Catherine de' Medici is shown emerging from the Louvre castle
to inspect a heap of bodies.
^ Knecht, Robert J. (2002). *The French religious wars: 1562-1598*. Oxford: Osprey. pp. 51–52. ISBN 1841763950.
http://en.wikipedia.org/wiki/St._Bartholomew's_Day_massacre

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445th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal St. Bartholomew's Day Massacre of French Protestants (Reformed Huguenots) Began

Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572.

Does not the nation of France still suffer today in 2017 from Rome's overt, planned, schemed, *intended extirpation of Christians in France in 1572* ? Is not the true, Bible-believing church of born-again Christians effectively a "spiritual immune system" for the protection of a nation, which the Romanist French King Charles IX, she-wolf Queen Regent Catherine de Medici, and the Jesuit-trained Roman Catholic Cardinal of Lorraine, sought to *exterminate* in obedience to the Vatican's Pope Pius V (formerly "Brother Michael" the Inquisitor) and the 3rd Jesuit General, Francis Borgia (1565-1572)?

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437th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal
St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists)

Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572
August 23, 2009 / Revised August 24, 2009
http://christianlifeandliberty.net/2009-08-23-437th-Anniv-Aug-24-1572-Romes-St-Bartholomews-Day-Massacre-of-French-Protestant-Huguenots.doc

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Note: E-mail below sent August 24, 2016

Date: Wed, 24 Aug 2016
From: Columbia Christians for Life
Subject: 444 Years

AMERICAN OVERSIGHT

since Rome's Slaughter of 75,000 French Christians (Protestant Huguenots) in Paris and France, began August 24, 1572

Columbia Christians for Life (CCL)
Columbia, SC
August 24, 2016

444 Years since Rome's Slaughter of 75,000 French Christians

(Protestant Huguenots) in Paris and France, began August 24, 1572

St. Bartholomew's Day Massacre in Paris, France - August 24, 1572

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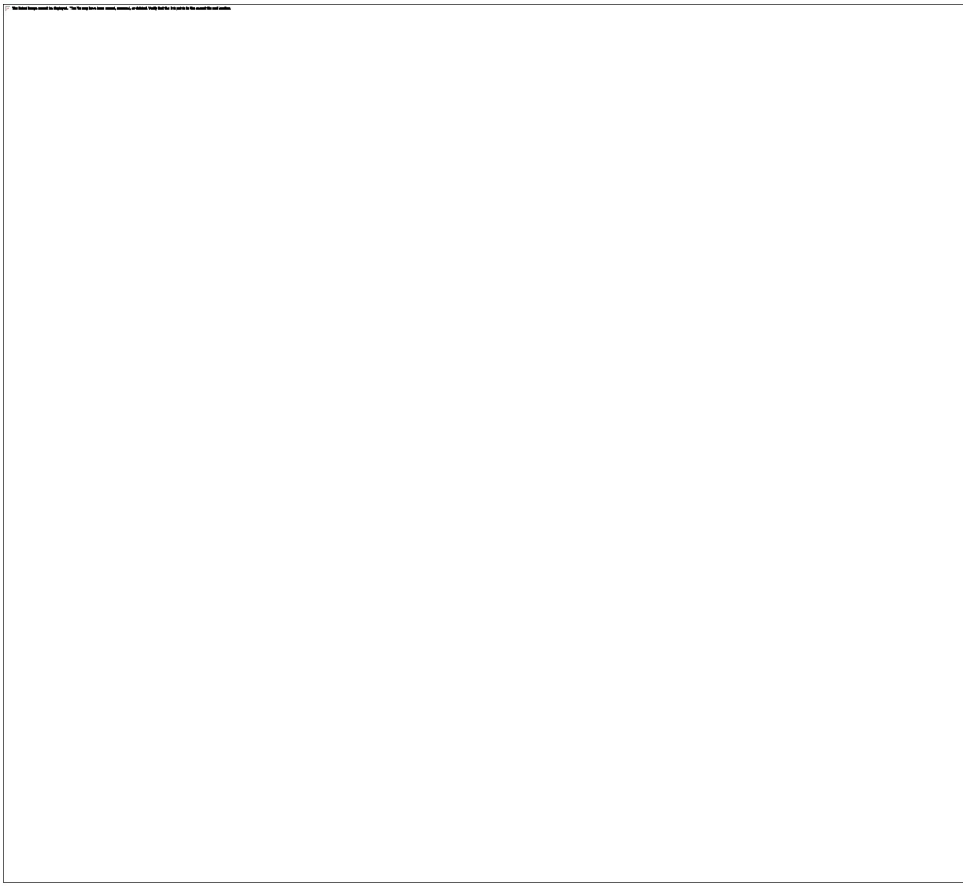

Getty Images
François Dubois (1529-1584) - St. Bartholomew's Night, August 24, 1572.
http://www.gettyimages.com/detail/news-photo/fran%C3%A7ois-dubois-st-bartholomews-night-august-24-1572-news-photo/1223399 11

Folgerpedia
St. Bartholomew's Day Massacre
"The famous painting of the **Saint Bartholomew's Day massacre in Paris on 24 August 1572** depicts scenes from the most notorious incident in the French wars of religion and one of the most striking examples of the

AMERICAN OVERSIGHT

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http://folgerpedia.folger.edu/Voices_for_Tolerance_in_an_Age_of_Persecution#St._Bartholomew.27s_Day_Massacre

---

Roman Catholicism is NOT Biblical Christianity. ROMAN CATHOLICISM IS A FALSE RELIGION.
March 22, 2012

Five Reasons Why Roman Catholicism is not Biblical Christianity
www.ianpaisley.org/tiara.asp?printerfriendly=true

437th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal

AMERICAN OVERSIGHT

St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists)
Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572
August 24, 2009

444th Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists) Began

Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572.

Does not the

AMERICAN OVERSIGHT

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Massacre of Protestants on St. Bartholomew's Day

AMERICAN OVERSIGHT



The New Book Of Martyrs
Massacre of Protestants on St. Bartholomew's Day
www.chick.com/reading/books/153/153_02.asp

"On August 22, 1572, the bloody St. Bartholomew massacre began. This was to be one fatal blow to destroy the Protestant movement in France. **The king of France had cleverly arranged a marriage between his sister and Henry of Navarre, head of the [French Huguenot] Protestant army.** There was a great feast with much celebrating. After

AMERICAN OVERSIGHT

four days of feasting the soldiers were given a signal. At an hour before dawn, all the houses of the Protestants in the city were forced open at once. Admiral Coligny, the chief Protestant leader, was killed, his body thrown out of a window into the street where his head was cut off and sent to the pope. They also cut off his arms and privates and dragged him through the streets for three days until they finally hung his body by the heels outside the city."

[emphasis, comment added]

Smokescreens, by Jack T. Chick, p.14 Dangers of the Ecumenical movement.
http://chick.com/catalog/books/0153.asp
http://www.chick.com/catalog/catholicism.asp

AMERICAN OVERSIGHT

St Bartholomew's Day Massacre Pictures and Images
(Getty Images)

(46) Editorial Images

AMERICAN OVERSIGHT



Getty Images

St. Bartholomew's Day massacre. The Huguenot being

AMERICAN OVERSIGHT

killed, August 24, 1572.
http://www.gettyimages.com/detail/news-photo/st-bartholomews-day-massacre-the-huguenot-being-killed-news-photo/535799741

"It is under the inspiration of those diabolical laws of Rome, that 75,000 Protestants were massacred, the night and following of St. Bartholomew."

Charles Chiniquy, 1886
French-Canadian Ex-Catholic Priest (became born-again Christian and left Roman Catholicism)
Fifty Years in the Church of Rome **(** www.chick.com/catalog/catholicism.asp **)**

"In **France** the **Protestants,** called **"Huguenots,"**

AMERICAN OVERSIGHT

were gaining wealth and political power. **Admiral Gaspard de Coligny** was their leader. The **Jesuits** with that she-wolf, **Catherine de Medici,** [*Roman Catholic*] Queen Regent of France, plotted their destruction. On **August 24, 1572** the murderous frenzy began. Admiral Coligny bravely resisted his assassins but to no avail. He was murdered and his head was sent as a trophy to the [*Roman Catholic*] **Cardinal of Lorraine** who had been educated, *or rather brainwashed,* by the **Jesuits** in Flanders. **Rome celebrated, struck a coin** commemorating the "great victory" and sang her **"Te Deums." "**

The Roman Catholic Cardinal of Lorraine, 1572 Receiving the Head

AMERICAN OVERSIGHT

of French Protestant Huguenot leader Admiral Gaspard de Coligny



http://i303.photobucket.com/albums/nn130/iasios/Vat%20Assas/CardinalofLorraine.jpg

"The Huguenots had been victorious in three Civil Wars against

AMERICAN OVERSIGHT

their Monarch of France, Charles IX, governed by his Queen mother, Catherine de Medici. They had obtained religious liberty with the Peace of St. Germain and Coligny sought to aid the Low Countries in their Calvinist revolt against Spain. Under the eye of *the* ***Black Pope* [Jesuit General], a trap was set luring all of the Protestants to a royal wedding in Paris. After the party, early in the morning, with white crosses on their hats, the assassins first murdered the great Admiral Coligny in his bedroom. After the savage and ghoulish massacre of 75,000 [*French*] Protestant Huguenots, the Medicis sent his [Admiral Coligny's] head as a trophy to the Jesuit-trained [*Roman Catholic*] Cardinal of**

AMERICAN OVERSIGHT

Lorraine pictured here] (and further below).
Ridpath's Universal History, John Clark Ridpath, (New York: Merrill & Baker, 1901) Vol. XIII, p. 255.

[emphasis in original retained, comments/selected emphasis added]

"Francis Borgia, the 3rd Jesuit General (1565-1572), having been in secret counsel with the Monarchs of France, laid the plan for this mass-murder of the righteous French Protestant Calvinists including their great leader, Admiral Gaspard de Coligny.

continued... [with Graphic]

Saint Bartholomew's Massacre, August 24, 1572
http://christianlifeandliberty.net/2016-08-23-Saint-Bartholomew's-Massacre-August-24-1572-Vatican-Assassins-p110.pd

Vatican Assassins, by Eric Jon Phelps (June 2004 ed.), pp. 108-111.

AMERICAN OVERSIGHT

Block I - (1540-1773), Chapter 2, The Jesuits - 1572

St. Bartholomew's Massacre

Assassination of Admiral Gaspard de Coligny

[**Vatican Assassins: "Wounded In The House Of My Friends" -** Updated eBook VA III CD-ROM]

www.VaticanAssassins.org

Christians, let this historical example be a great spiritual, historical, and present lesson. The reason the bloodbath of the St. Bartholomew's Day Massacre began in Paris on August 24, 1572 is because the leadership of the French Huguenot Protestants had

AMERICAN OVERSIGHT

agreed for professing Protestant Henry of Navarre to marry the Roman Catholic sister of the French King, Charles IX.

In doing so, Henry of Navarre, the Huguenot military leader, apparently with the acceptance of Admiral Coligny, the chief Huguenot leader, agreed to become unequally yoked in marriage, disobeying God's commandment of Biblical separation for believers from unbelievers, revealed in both the Old and New Testaments of the Bible, as revealed for example in 2 Corinthians 6;14-18, KJV:

2 Corinthians 6;14-18, KJV:
14 ¶ **Be ye not unequally yoked together with unbelievers:** for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?

AMERICAN OVERSIGHT

15 And what concord hath Christ with Be'li-al? or what part hath he that believeth with an infidel?
16 And what agreement hath the temple of God with idols? for ye are the temple of the living God; 1 Cor. 3.16 ; 6.19 as God hath said,
I will dwell in them, and walk in *them;* and I will be their God, and they shall be my people. Lev. 26.12 · Ezek. 37.27
17 **Wherefore come out from among them, and be ye separate, saith the Lord,** and touch not the unclean *thing;* Is. 52.11
and I will receive you,
18 and will be a Father unto you, and ye shall be my sons and daughters, 2 Sam. 7.14 · 1 Chr. 17.13 saith the Lord Almighty.

As wicked and evil and treacherous as was the murderous scheming of the Roman Catholic civil and church leaders, including the Jesuit General, the Pope, the Cardinal, the French King, and his she-wolf Queen Regent mother, pursuing their goal of

AMERICAN OVERSIGHT

exterminating "heretics" [sic] consistent with Rome's evil Council of Trent (1545-1563), the French Huguenots would not have been set-up as such an easy prey for the pre-dawn strike of the Roman Catholic soldiers if the French Huguenot leadership had not disobeyed the Word of God by agreeing to Henry of Navarre's marriage to the Roman Catholic sister of the French King, and thereby leading the rest of the French Huguenots into a bloody trap in Paris, which for thousands proved to be a fatal mistake. The French Huguenots were not faithful to obey God's Word in the matter of Biblical separation, and they paid a horrific, for many thousands, deadly price.*

AMERICAN OVERSIGHT

***** ***Note**: The Council of Trent (1545-1563), which anathematizes over Bible-believing Christian beliefs over 100 times, is still in effect today in 2016, and was affirmed by Pope John XXIII at the beginning of the Second Vatican Council:*

Pope John XXIII opening address to Second Vatican Council on October 11, 1962:
[excerpt, emphasis added]

"The salient point of this Council is not, therefore, a discussion of one article or another of the fundamental doctrine of the Church which has repeatedly been taught by the Fathers and by ancient and modern theologians, and which is presumed to be well known and familiar to all."

"For this a Council was not necessary. But from the renewed, serene, and tranquil adherence to all the teaching of the Church in its entirety and preciseness, **as it still shines forth in the Acts of the Council of Trent** ..."

AMERICAN OVERSIGHT

Council of Trent
https://history.hanover.edu/texts/trent.html
*The canons and decrees of the sacred **[sic]** and oecumenical Council of Trent*,
Ed. and trans. J. Waterworth (London: Dolman, 1848)

[Council of] Trent: Let Me Be Anathema
http://hereiblog.com/trent-let-me-be-anathema/

Anathemas Proclaimed by the Catholic Church
http://blog.guidedbytruth.com/anathema.php

Today in 2016 in the United States, and for the last several decades at least, evangelical Christians in the United States of America have done something similar, "yoking up" with followers of the false religion of Roman Catholicism in the culture wars, particularly regarding the issues of pro-life, marriage and religious liberty, naively, foolishly, and disobediently

AMERICAN OVERSIGHT

providing the Vatican / Jesuit General / Papacy with ongoing "causes" through which to ecumenically "unite" with evangelicals and protestants, purportedly as "co-belligerents" in the culture wars. The result has been disastrous in many ways, not the least of which for example, is the perpetuation of child-murder-by-"abortion" in America, as Roman Catholic Bishops in the U.S. have repeatedly opposed State Personhood legislation to bring child-murder to an END, and instead continue to advocate various forms of incremental child-murder "regulation" legislation. Through the false leadership of the Roman Catholic Bishops, and various Roman Catholic and ecumenical "pro-life" establishment

AMERICAN OVERSIGHT

organizations (e.g., NRL, AUL, FOF, FRC), whose lead many sincere pro-lifers unfortunately foolishly follow, the continued existence of the "cause" of "abortion" has therefore perpetuated the ecumenical so-called "Pro-Life Movement", and so has enabled Rome to continue to "use" the pro-life movement (and also the marriage and religious liberty causes), as vehicles and platforms to pursue and advance her goal of establishing a one-world false religion under the umbrella of the anti-Christ Pope/Vatican.

The Manhattan Declaration (2009), co-signed by over three dozen Roman Catholic Bishops and over one dozen Roman Catholic Archbishops is a prominent ecumenical

AMERICAN OVERSIGHT

example.
(List of Religious & Organizational Leaders Signatories as of January 2015).
The Manhattan Declaration uses three culture war issues (pro-life, marriage, religious liberty) to provide a platform for Rome to portray Orthodox, Roman Catholics, and Evangelicals, all as "Christians". After the Preamble, it begins: "We, as Orthodox, [Roman] Catholic, and Evangelical Christians ...".

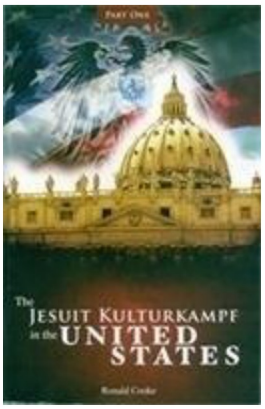
Quote cited in "Smokescreens":

"Rome when in minority is as gentle as a lamb, when in equality is as clever as a fox, and when in the majority is as fierce as a tiger."

Smokescreens
by Jack T. Chick

AMERICAN OVERSIGHT

"The Jesuit Kulterkampf in the United States"
by Dr. Ronald Cooke
http://www.truthinternationalministries.com/Publications.html



The Jesuit Kulterkampf in the United States

The present cultural struggle in the United States is Jesuit-inspired, and is obviously helping to Romanize rather than Christianize this country. In this study, documentation is provided to show that the willingness of some Protestant Evangelicals, some conservative Baptists, some “truly” Reformed, and some

AMERICAN OVERSIGHT

Charismatics
to become
cobelligerents with
the Roman Catholic
System is helping the
goals of the papacy in
the United States
today. The early
American Puritans
were united in their
opposition to the
papacy and the
Roman Catholic
Church-State.
Unlike modern
evangelicals they did
NOT regard the
Jesuits as their
cobelligerent in some
cultural struggle; they
regarded
them as their mortal
enemy. They believed
that a sound education
involved the ability to
expose the errors and
superstitions
of Roman
Catholicism. In this
first book of his three
part series, Dr.
Ronald Cooke
exposes the activities
of the Jesuit Order
in America,
comparing the Culture
War of our own time
with what was called
the Kulturkampf
(Culture Struggle) in
Germany
during the decades
leading to Hitler's rise
to power. Is the same
pattern happening in
America today? Are
Catholics, Protestants,
and Conservatives
being led into an army
of Culture Warriors
that may one day be
used for a diabolical

AMERICAN OVERSIGHT

purpose?

by Dr. Ronald Cooke
Wittenburg Press

Christians, PLEASE READ, LISTEN, and LEARN TRUE* HISTORY !!!

*** Not the censored, white-washed, false, ecumenical version of history presented in government indoctrination centers (aka "public schools"), and in the "history" [*sic* - "narrative/spin"] textbooks used therein, and by the talk radio shows hosted by non-Christians or ecumenical professing Christians (this covers most nearly all so-called national "conservative" talk radio shows aired today).**

AMERICAN OVERSIGHT

Righteousness shall not be done in a land of forgetfulness:

Psalm 88:12, KJV
(w/ Deity capitalized)
12 **Shall Thy wonders be known in the dark? and Thy righteousness in the land of forgetfulness?**

Righteousness shall not be done in a land of forgetfulness. We must know true history. Many good resources are available, including from the 18th, 19th, 20th, and 21st centuries, some in print, some on-line, some in audio form. Read, Listen, and Learn True History.

Proverb 1:7, KJV
7 **The fear of the LORD is the beginning of knowledge: but fools despise wisdom and instruction.**

AMERICAN OVERSIGHT

"COUNTER REFORMATION "

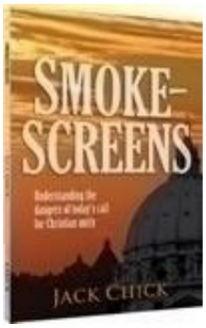
- "The response of the Roman Catholic church to the Protestant Reformation in the 16th century. In this response, Rome made much use of the Inquisition* and in the decrees of the Council of Trent, produced a theological statement anathematizing the leading doctrines of the Reformation. The names of some prominent Roman Catholic "saints" stand to the fore in Rome's attack on Protestantism: Cajetan, Ignatius Loyola, Vincent de Paul, etc. The work of the Counter Reformation was, and is, carried on mostly by the order Loyola founded, the so-called Society of

AMERICAN OVERSIGHT

Jesus, the Jesuits." [CCL: emphasis added]

Source: "Dictionary of Theological Terms", Expanded Third Edition, by Alan Cairns, "A ready reference of over 800 theological and doctrinal terms", published by Ambassador-Emerald International, 2002, pp. 111, 112.

Ecumenism is a Major Goal of the Second Vatican Council (*continuing* Counter - Reformation)



Smokescreens
Jack T. Chick
96 pages - Paperback

Dangers of the

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Ecumenical movement.
http://chick.com/catalog/books/0153.asp
~~http://www.chick.com/catalog/catholicism.asp~~ link no longer functional [8/24/19]
https://chick.com/

(Video) [Roman] Catholic Inquisition and The Torture Tools
by Former Roman Catholic Priest Richard Bennett
www.youtube.com/watch?v=Rx8PdvOELvY&eurl
Video (58:27)
433,447 views

Roman Catholic Inquisition and The Torture Tools (Video)
"The Inquisition ..."
"... the 605 Years of Torture and Murder that was Inflicted on Bible-believing Christians [by Rome]
because they refused to compromise their faith."

"From the beginning of the Papacy, until the present time, it is estimated by credible historians that more than 50,000,000 [50

AMERICAN OVERSIGHT

Million], men and women have been slaughtered for the crime of heresy charged against them by Papal Rome."
www.christianlifeandliberty.net/2009-02-25-Roman-Catholic-Inquisition-Torture-Tools-Video.doc
(Report prepared February 25, 2009)

"JESUITS"

- "A Roman Catholic society formed in 1534 by Ignatius Loyola (1491-1556) and officially instituted as an Order of the Roman church by a papal bull* in 1540. According to the bull, the Jesuits were constituted "to wield the arms of God" in obedience to the pope. Their chief aim was to stamp out the Reformation (see *Counter Reformation*). This militant purpose is vividly displayed by a plaster cast in the Church of the Jesuits in Rome,

AMERICAN OVERSIGHT

depicting Loyola with his foot triumphantly placed on the neck of Protestantism. By their oath, Jesuits swear unswerving loyalty to the pope, ascribing to him the power to depose "heretical" kings and states. They renounce any allegiance due to Protestant states. Ever since their institution, their energy and activities have been boundless. They came to have such enormous power that they posed a very real threat to lawful authority in many countries. They were expelled from one nation after another, until finally in 1773 Pope Clement XIV abolished their order entirely. But Pope Pius VII reestablished it in 1814, declaring that "if any should again attempt to abolish it he would incur the indignation of Almighty God and of the Holy Apostles Peter and Paul." Jesuit philosophy has always been synonymous with deceit, dissimulation, and immorality. It teaches that it is morally

AMERICAN OVERSIGHT

acceptable "to do evil that good may come," holding that "the end justifies the means." That moral flexibility has rendered the Jesuits very valuable to the Vatican in many areas. For example, they have taken the leading role in Rome's church-unity dealings with ecumenical Protestants, where their skill in diplomatic duplicity has paid great dividends."
continued...
[CCL: emphasis added]

Source: "Dictionary of Theological Terms", Expanded Third Edition, by Alan Cairns, "A ready reference of over 800 theological and doctrinal terms", published by Ambassador-Emerald International, 2002, p. 242

Foxe's Book of Martyrs
http://www.ccel.org/ccel/f

AMERICAN OVERSIGHT

oxe/martyrs/files/martyrs.html
[Have you read Foxe's Book of Martyrs ? Do you know that English Roman Catholic **Thomas More** opposed and persecuted Bible-translator and Christian hero, William Tyndale, contributing significantly to what eventually resulted in the arrest, imprisonment, and eventual martyrdom of William Tyndale, by strangulation and burning at the stake !!!]

The Westminster Confession of Faith
http://www.reformed.org/documents/wcf_with_proofs/
[CCL: emphasis added]

Table of Contents
25. Chapter XXV Of the Church
VI. There is no other head of the Church but the Lord Jesus Christ. [13] Nor can **the Pope of Rome,** in any sense,
be head thereof; but **is that Antichrist,** that man of sin, and son of perdition, that exalts himself, in the Church, against Christ and all that is called God. [14]

AMERICAN OVERSIGHT

'The Papacy Is The AntiChrist'

- A Demonstration

http://christianlifeandliberty.net/2015-08-22-(1888)-'The-Papacy-Is-The-AntiChrist'-A-Demonstration-Dr-J-A-Wylie-Protestant-minister-Free-Church-of-Scotland.pdf

by Dr. J A Wyle, Protestant minister, Free Church of Scotland

52 pages

Preface - "We conclude, therefore, that if Jesus of Nazareth be the Christ, the Roman Papacy is the Antichrist."

Chapter XIV - "The Roman Church has made it the solemn duty of all her members to destroy all Protestants when they are able to do so without danger to themselves."

Chapter XV - "Antichrist ... could "sit," that is, establish himself and exercise jurisdiction, nowhere but in the professedly Christian Church."

Chapter XVI - "Everything that Popery touches it converts into sin."

[e.g., Popery's ecumenical and legislatively incremental perversion of the "Pro-Life Movement"]

Chapter XVIII- "We do not hesitate to say, that we have nearly as full and convincing evidence that the

AMERICAN OVERSIGHT

Roman Papacy is the Antichrist, as we have that Jesus of Nazareth is the Christ."

The Pope is the Antichrist
http://www.ianpaisley.org/antichrist.asp
A Demonstration from Scripture, history, and his own lips.
Being a Precis of Dr. J. A. Wylie's Classic, "The Papacy is the Antichrist"
By Ian R. K. Paisley M.P., M.E.P.

(Audio / Transcript) Sermon:

"The [Anti-Christ] Pope and the Papacy" - John MacArthur, pastor
http://www.gty.org/resources/sermons/90-291/the-

AMERICAN OVERSIGHT

pope-and-the-papacy

Excerpts [emphasis added]:
"In the long war on the truth, the most formidable, relentless and ***deceptive*** **enemy** has been **Roman Catholicism.**
It is an apostate, corrupt, heretical, false Christianity, it is [a front] for the kingdom of Satan. The true church of the Lord Jesus Christ has always understood this. And even through the Dark Ages from 400 to 1500, prior to the Reformation, **genuine Christian believers set themselves apart from that system,** and were brutally punished and executed for their rejection of that system."

"The **Westminster Confession** was written in 1647, the Westminster Confession, the Confession of the **Reformers** says, "There is no other head of the church but the Lord Jesus Christ, nor can **the Pope of Rome** in any sense be head thereof, but **is that Antichrist,** that man of sin and son of perdition that exalted himself in the church against Christ and all that is called God."
http://www.gty.org/resources/sermons/90-291/the-pope-and-the-papacy

AMERICAN OVERSIGHT

Free Presbyterian Church (2010)

The Papal Visit: *Why We Oppose It* [Printed booklet - 16 pages]
(Pope Joseph Ratzinger, aka Benedict XVI visit to UK - England, Scotland)
The Papal Visit: *Why We Oppose It*
- The Man: Peter's Successor or Papal Usurper?
- The Mediator: Jesus Christ Alone
- The Message: Justification by Faith
- The Mass: Sham not Sacrifice
- The Mandate: Exposing Error
- Conclusion
http://christianlifeandliberty.net/Free-Presbyterian-Church-2010-Great-Britain-Papal-Visit-Why-We-Oppose-It.pdf

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The Roman Catholic Institution ("Church") is the Great Whore of Revelation chapter 17 (KJV)

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Who is the Woman Who Rides The Beast in Revelation 17?
https://www.chick.com/information/religions/catholicism/sevenhills.asp

"A Woman Rides the Beast"
https://www.thebereancall.org/content/woman-rides-beast-1

"Smokescreens" - Chapter Four: The Whore of Revelation
https://www.chick.com/reading/books/153/153_04.asp
http://www.chick.com/catalog/catholicism.asp
http://www.chick.com/catalog/books/0153.asp
©1983 by Jack T. Chick.

The **Babylonian** - **based** Roman Catholic system is drunken with the blood of the Bible-believing saints, and with the blood of the martyrs of Jesus, over centuries of ***ongoing*** **Crusades, Inquisitions,** and other **persecutions, wars,** and **bloodletting** of

AMERICAN OVERSIGHT

Bible-believing Christians and other non-Roman Catholics.

Video - The Biblical Uncovering of the Pope and the Papacy
Sermon message by Jesuit-educated, former Roman Catholic priest, now born-again Christian, Richard Bennett
"... the papacy is the antichrist ..."
Video (56:56)
http://christianlifeandliberty.net/2009-08-07-Video-Richard-Bennett-Biblical-Uncovering-of-Pope-and-Papacy.doc

Revelation 17:1, 2, 4-7, 9, 18 (KJV)

"Come hither; I will show unto thee the judgment of **the great whore** that sitteth upon many waters;
with whom the kings of the earth have committed fornication, and the inhabitants of the earth have
been made drunk with the wine of her fornication."

"And the woman was arrayed in purple and scarlet color, and decked with gold and precious stones and pearls,
having a golden cup in her hand full of

AMERICAN OVERSIGHT

abominations and filthiness of her fornication: and upon her forehead *was* a name written, **MYSTERY, BABYLON THE GREAT, THE MOTHER OF HARLOTS AND ABOMINATIONS OF THE EARTH. And I saw the woman drunken with the blood of the saints, and with the blood of the martyrs of Jesus: ..."**

"And the angel said unto me, Wherefore didst thou marvel? I will tell thee the mystery of the woman, and of the beast that carrieth her, which hath the seven heads and ten horns."

"And here *is* the mind which hath wisdom. The seven heads are **seven mountains,** on which the woman sitteth."

"And the woman which thou sawest is that great city, which reigneth over the kings of the earth."

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AMERICAN OVERSIGHT

Note: E-mail below sent August 23, 2013

[Edited / Revised]

Date: Fri, 23 Aug 2013 13:42:19 -0400
From: Columbia Christians for Life
Subject: 441st Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal

AMERICAN OVERSIGHT

St. Bartholomew's Day Massacre of French Protestants (Huguenot Calvinists)

Columbia Christians for Life (CCL)
Columbia, SC
August 23, 2013

441st Anniversary: August 24, 1572 - Roman Catholic / Jesuit / Papal St. Bartholomew's Day Massacre of French

AMERICAN OVERSIGHT

Protestants (Huguenot Calvinists)

Roman Catholic slaughter of 75,000 French Protestant Huguenots in Paris and France in 1572

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And what about Jesuitical / Papal Roman Catholic treachery in America in 19th, 20th, and 21st centuries ?

ROME suppo

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rts: 1. Obama Gun Control, 2. Universal Health Care, 3. Amnesty for Illegal Aliens, 4. Evolution, 5. Ecumenism, 6. Incremental "Regulation" Legislation *Perpetuating* Child-Murder-by-"Abortion" in America; while

AMERICAN OVERSIGHT

ROME *Opposes* State Personhood Legislation and ROME is *Not Supporting* Federal Personhood Bills to END "Abortion" in America, 7. Jesuitical Papacy's New World Order.

"ROMANISM: A Mena

AMERICAN OVERSIGHT

ce to the Nation" (1912), by Jeremiah J. Crowley [and more ...]

- Jeremiah J. Crowley, former Roman Catholic priest of the Roman Catholic Archdiocese of Chicago

August 18, 2013

"Rome, controlled by the Jesuits, took the American government away from

AMERICAN OVERSIGHT

the Americ an people in the early 1900s, *and have kept it !* Since that time the Jesuits have used the militar y and financi al might of their **Fourte enth Amen dment "Holy Roma n" Ameri can Empir e** as "*the Sword of the Church* ," to subordi nate the nations of the world to the **Tempo ral Power**

AMERICAN OVERSIGHT

of the cannibalistic ***Papal Caesar***. May ***God*** help us to repent that He may forgive us!!!" [Emphasis in original]

Source: ***Vatican Assassins***, by Eric Jon Phelps (June 2004 ed.), p. 427 [**Vatican Assassins: "Wounded In The House Of My Friends"** (eBook CD-Rom) - http://vaticanassassinsarchive.com/ie_orders.html] http://christianlifeandliberty.net/2013-08-22-ROMA

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NISM-A-Menace-to-the-Nation-1912-by-Jeremiah-J-Crowley-and-more-Aug-18-2013.docx

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Note:
E-mail
below
sent
August
24,
2012

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Date: Fri, 24 Aug 2012 From: Columbia Christians for Life S

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Jesuit/PapalSt.BartholomewsDayMassacreofFrenchProte

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stants (Huguenot Calvinists)

CCL Columbia Christians for L

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AMERICAN OVERSIGHT

-
Roman Catholic/Jesuit/Papal St. Bartholomew's Day

AMERICAN OVERSIGHT

Massacre of French Protestants (Huguenots) and Calvinists

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RomanCatholicslaughterof75,000FrenchProtesta

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dsofCatholicsbeganinParis.[CCL:440thAnniversar

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CCL Release: August 24, 2

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low) Edited/Revised (third) version previously publicized

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August 26, 2011 (see e-mail below)

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Original version previously publicized: August 23, 2000

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9/RevisedAugust24,2009:

437thAnniversary:Augusst24,15

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72 - Roman Catholic / Jesuit / Papal St . Bartholomew's Day Mass

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acreofFrenchProtestants(HuguenotCallvinists)

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sandFrance in 1572 August 23, 2009/Revised August 24, 2009 ht

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http://christianlifeandliberty.net/2009-08-23-437th-Annniv-Aug-24

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Date: Fri, 26 Aug 2011 14:31:52 -0400
From: Columbia Chri

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stiansforLifeSubject:439thAnniversary:August24,1572-

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Roman Catholic/Jesuit/Papal St. Bartholomew's Day Massacr

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e o f F r e n c h P r o t e s t a n t s (H u g u e n o t C a l v i n i s t s)

C C L R e l e a s e :

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AMERICAN OVERSIGHT

iversary: August 24, 1572 - Roman Catholic/Jesuit/Pa

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palSt.Bartholomew'sDayMassacreofFrenchProtesta

AMERICAN OVERSIGHT

nts(HuguenotCalvinists)

RomanCatholicslaughter

AMERICAN OVERSIGHT

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Original version previously publicized: August 23, 2

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AMERICAN OVERSIGHT

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R o m a n C a t

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holicslaughterof75,000FrenchProtestantHuguenotsinPar

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isandFrancein1572August23,2009/RevisedAugust24,2009h

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http://christianlifeandliberty.net/2009-08-23-437th-Annniv-Aug-2

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- Huguenots.doc

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Introduction to 439th Anniversary (2011) report:

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For those who erroneously believe that this persecuti

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on, execution, and murder of Protestants and others non

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-Catholicsisonlyapracticeoftheroman Catholic Chu

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twas also practiced for centuries in various forms ***before***

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o r e the Reformation, against pre-Reformation Christ

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i a n s a n d n o n - R o m a n - C a t h o l i c s , ***a n d i t i s p r a c t i c e d b y R***

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o m e u n d e r t h e g u i s e o f v a r i o u s s t r a t e g i e s : t a c t i c s : m e

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***t h o d s* , *a n d n a m e s t o d a y* .**

P r e - R e f o r m a t i o n P e r s e c u t i

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onofChristiansbyRomanCatholicChurch:

For example

AMERICAN OVERSIGHT

, the Roman Catholic Church's crusade against the Albigenses

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in the 13th Century, followed by the institutionalization of

AMERICAN OVERSIGHT

the Roman Catholic Medieval Inquisition. Later Roman Catholi

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icInquisitionsagainstnon-Catholicswere:"the Roman Inqu

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isitionofthe16thcenturyonwards,...the Spanish Inquisit

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ion, which was under the control of the Spanish monarchy, thou

ghusinglocalclergy."and"The Portuguese Inquisition and v

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a r i o u s c o l o n i a l b r a n c h e s " w h i c h " f o l l o w e d t h e s a m e p a t t e r n .

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"[source: MedievalInquisition, retrieved 8/25/2011]. The

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Bible-believing Waldenses were persecuted by the Roman Cath

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olic Church for centuries: "They were persecuted as heretica

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in the 17th century." Heretical to Rome means non-Catholic. A

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according to the largely-Jesuit-dominated Council of Trent (

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nterReformation, herethics are accursed, and the ma. Accordi

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ng to the *Jesuit Extreme Oath of Induction*, heretics (which in

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cludesProtestants)canbeexterminated.

RomanCatholicIn

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q u i s i t i o n a n d T h e T o r t u r e T o o l s (V i d e o) www.youtube.com/watch

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"The Inquisition... "...the 605 Years of

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Torture and Murder that was Inflicted on Bible-believing Chr

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Video(58:28)340,186vie

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the soil of our own country of the slaughter by Spanish Roman Ca

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(shipwreckedFrenchsailorswhohadsurrenderedtothe Spani

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shRomanCatholics)" at a place now known as Matanzas ("massac

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f Jamestown, VA in 1607)?

Persecution of Orthodox (non

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-Roman-Catholic)Serbsby RomanCatholicFascistSta

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teinCroatiaduringWorldWar2:

Inthe20thCenturyduri

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ngWW2, the Roman Catholic Fascist State of Croatia (the Ustas

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ethnicSerbs, exterminating hundreds of thousands, including

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ng Orthodox (non-Roman Catholic) Serbs." During the Second W

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being incompatible with the principles, ... the forcible

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onversion, explusion and murder of Serb people was a key strat

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egy."

Serbian Orthodox Christians were persecuted by the Rom

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anCatholicFascistUstahidurin gWW2, facingachoiceofeith

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erforcible conversion or death.

Read more, and see **photos** of

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the Roman Catholic connection with the Ustashi, and Ustashia

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trocities (including "Ustashi carrying the head of a Serbian

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Orthodoxpriest" and "Corpsesofchildrenstarvedtodeathin

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the concentration camp of Jasenovac, where "Serbs constitut

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edtheabsolutemajorityofinmatesinJasenovac", in "Smokes

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creens", by Jack T. Chick (1983). Read "Smokescreens" on-lin

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e, Chapter 3, page 25 and page 25-32. These atrocities occurre

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read," The Vatican's Holocaust" by Avro Manhattan."

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eandrecordofAdolphHitler'sThirdReichNazirregime

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Evenmoreincrediblyinthe WW2eraisthetrueaccountande

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extensive documentation of the involvement of the Roman Catho

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lic Church in the rise and historical record of the Third Reich

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Nazi regime of Adolf Hitler," son of the Catholic Church" (asr

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anCatholicism." [See "Smokescreens", by Jack T. Chick (1983

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"
Behind the scenes, the Jesuits controlled the

Gestapo. All this is ***fully documented*** in **THESECRETHISTORYOF**

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THE JESUITS, . . . " (translated from the French 1975) by Edmond

AMERICAN OVERSIGHT

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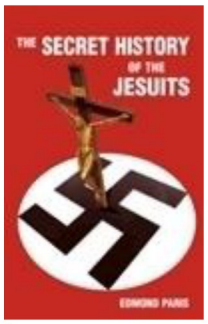

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phRatzinger, nowGermanPopeBenedictXVI, criticized by Isr

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aeli Jews overhis words May 11, 2009 at Holocaust Memorial in J

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[Vatican-Nazi Connection historical documentati

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onsectioninclude d] http://christianlifeandliberty.net/2009-0

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5-15-Ratzinger-Pope-words-criticized-by-Jews-Holocaust-Memoria

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Extermination of Mus

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s-the bogus "War on Terror"/modern Papal Crusade:

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tan's false Church of Rome has been persecuting, exterminati

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entnames, andstrategies, tactics, andmethods, thepersecu

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tion, extermination, and murder of non-Roman-Catholics con

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tinuestothisday!

Forexample,theongoingbogus"WaronTer

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illegal [Pope/Bishops-supported, largely Roman Catholic]

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Latin Americans invaded the USA), is part of the Rome/Vaticano/

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Jesuit General / Papal " Tenth Crusade " New World Order agenda

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. On the South Lawn of the White House, September 16, 2001, Skul

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landBonesmasonicsecretsocietymember, NWOPapalServant,

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President George W. Bushevenreferred to the "war on terroris

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/Crusadeagainstunbornnnon-Roman-Catholics-Rome'

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a, Colorado, Montana, North Dakota, Florida, and Mississouri]

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s e v i d e n c e o f ***t h e m o n u m e n t a l f r a u d b e i n g p e r p e t r a t e d u p o n t h e***

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people of the United States, including not only upon Christia

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hyisnotPro-Lifefor*all*unbornnchildren!

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why, while promoting a so-called "Culture of Life", the Roman

AMERICAN OVERSIGHT

Catholic Church also in effect perpetuates "legal" child-mu

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formedconsent/24hourwait/etc.,adnauseam),whichsays"d

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o t h i s , o r d o t h a t , ***a n d t h e n y o u c a n k i l l t h e b a b y*** " . V a t i c a n " p r o

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-life"/sic/frontorganizationssuchas**NationalRightto"L**

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the National Conference of [Roman Catholic Bishops) and

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CFR/Jesuit-advised **AmericansUnitedfor"Lifee"[*sic*]arebo**

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thincrementalist," abortion" regulationlegislationprop

AMERICAN OVERSIGHT

o n e n t s , a n d ***t h e l e a d a t t o r n e y s o f b o t h*** ***N a t i o n a l R i g h t t o*** " ***L i f e***

AMERICAN OVERSIGHT

"[sic] and Americans United for "Life" [sic] have each attack

AMERICAN OVERSIGHT

edState-LevelPersonhoodLegislation, which is designed to

AMERICAN OVERSIGHT

recognize the God-given, unalienable right to life of every h

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er-by-"abortion" couldhavebeen **ENDED** inAmericaover38yea

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on, with NO "exceptions".

The influence of the Roman Catholi

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, is a fraud. The Roman Catholic Church hierarchy (Pope and Rom

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anCatholicArchbishopsandRomanCatholicBishopsintheUni

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tedStates)andthevariousVatican"pro-life"[*sic*]fronto r

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ganizations (e.g., National Right to "Life" [*sic*] and Americ

AMERICAN OVERSIGHT

ansUnitedfor"Life"[*sic*],andothers),*are*theBiggestObst

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a c l e s t o **E N D I N G** (n o t j u s t r e g u l a t i n g) c h i l d - m u r d e r - b y - " a b o

AMERICAN OVERSIGHT

rtion" in the USA. However, Rome's "greater" goal is the *Roman*

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ization (domination) of the United States, and so, for the Rom

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an Catholic Church Institution's hierarchy (*not* for those wh

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uationof"abortion"isaneffective**20th/21stcenturyInqui**

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sition/Crusade against non-Roman-Catholics in the womb. So

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he past by Rome's earlier, more obvious, Crusades and Inquisi

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tions. Romeis about global domination (the New World Order) f

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or Rome. For the satanic Church of Rome, the "ends" justify the

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gemony, World Domination:

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the Jesuits to Romanize America. Rome's plan today is still to

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takeoverthiscountry(andtheworld),andhasmadeincredibl

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AMERICAN OVERSIGHT

determination of Bible-believing Christians in the past. E

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venaquickreadofportionsof"Foxe's Book of Martyrs" would b

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eagoodintroductiontothishistory.

However today, many Ch

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i s p e r s e c u t i o n o f C h r i s t i a n s b y R o m e w a s s o m e t h i n g t h a t h a p p e

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needonlyinthedistantpast,andthatitwon'thappentoday.So

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y-"abortion", putting their desire to fight the holocaust of

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unborngenocidewhichisbringingGod's judgmentuponthisna

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tion(e.g., Psalm 106:37-44, 2 Kings 24:1-4, KJV), a headof be

AMERICAN OVERSIGHT

ingobedientto God ***first***, and fighting the good fight ***God's wa***

AMERICAN OVERSIGHT

y. For the Christian, the "ends" do not justify the "means". For

AMERICAN OVERSIGHT

r God, the "means" are part of His "end". God desires to be glori

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fiedinandthroughHistruechurch.

ThePulpitsofAmeri

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cahavelargelyfailedtheChurchofJesusChrist,andt

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have not sufficiently preached the whole counsel of God's Wor

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AMERICAN OVERSIGHT

and martyrdom of the Christians saints of generations and cent

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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e i n g h e a r d i n t h e c o n g r e g a t i o n . T h e p r o p h e t s a r e n o t w e l c o m e .

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We are receiving erroneously taught by false teaching preachers th

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AMERICAN OVERSIGHT

in Ephesians 4:11-16, 1 Corinthians, chapter 12, and 1 Corint

AMERICAN OVERSIGHT

hians, chapter 14, KJV). It is no wonder the Body of Christ has n

AMERICAN OVERSIGHT

o t b e e n p r o p e r l y e d i f i e d a n d e q u i p p e d (E p h e s i a n s 4 : 1 2 , K J V) .

AMERICAN OVERSIGHT

A new "Reformation" is needed, 500 years after the heroic, but

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AMERICAN OVERSIGHT

lies of believers.

May we remember the facts of history about t

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Rome's persecution of the Bible-believing churches and Chri

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stiansoverthecenturiespresentedabove,andbetterunders

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angedher"spots". While her strategies, tactics, methods, a

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AMERICAN OVERSIGHT

, and of either destroying or converting (even by force) Bible

AMERICAN OVERSIGHT

-believingchurchesandBible-believers,hasnotchanged.

AMERICAN OVERSIGHT

Top paraphrase Psalm 88:12, KJV - **Righteousness cannot**

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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No King but King Jesus! (**Yeshua Messiah**) Declarations and Evi

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andlibertty.net/NoKingbutKingJesus.doc

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t i o n s ! P s a l m 2 ; P s a l m 2 4 : 1 ; P s a l m 4 7 : 7 , 8 ; P s a l m 5 0 : 1 2 ; 1 T i m o t

AMERICAN OVERSIGHT

hy6:15, KJV "For the kingdom *is* the LORD's: and he *is* the gover

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AMERICAN OVERSIGHT

h u r c h ; a n d t h e g a t e s o f h e l l s h a l l n o t p r e v a i l a g a i n s t i t . "

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thew16:18JesusChrist(YeshuaMessiah)

Hallelu-Yah!

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www.ChristianLifeandLiberty.net

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Right to Life act of SC. net www. Lefemine For Life. net August 26, 2011

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holomew's Day Massacre of French Protestants (Huguenot Calv

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CCLRelease:August24,2010 Originalversionprev

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iouslypublicized: August 23, 2009

438th Anniversary:

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August 24, 1572 - Roman Catholic/Jesuit/Papal St. Bar

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tholomew's Day Massacre of French Protestants (Hugue

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notCalvinists)

RomanCatholicslaughterof75,000F

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hat75,000Protestantswereremassacred,thenightandf

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

tianandleftRomanCatholicism)*FiftyYearsintheChurchofR*

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o m e **(** www.chick.com/catalog/cathpolicism.asp **)**

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AMERICAN OVERSIGHT

tical power. **Admiral Gaspar dde Coligny** was their leader. The

AMERICAN OVERSIGHT

Jesuits with that she-wolf, **Catherine de Medici**, [*Catholic*]

AMERICAN OVERSIGHT

Queen Regent of France, plotted their destruction. On **August**

AMERICAN OVERSIGHT

24,1572 themurderousfrenzybegan.Admiral Coligny bravely

AMERICAN OVERSIGHT

resistedhisassassinsbuttonoavail. Hewasmurderedandhis

AMERICAN OVERSIGHT

h e a d w a s s e n t a s a t r o p h y t o t h e [*R o m a n C a t h o l i c*] **C a r d i n a l o f L o**

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AMERICAN OVERSIGHT

s u i t s i n F l a n d e r s . **R o m e c e l e b r a t e d , s t r u c k a c o i n** c o m m e m o r a t

AMERICAN OVERSIGHT

ingthee"greatvictory"andsanghher"**TeDeums**."

[selectedemp

AMERICAN OVERSIGHT

has is added]

Vatican Assassins, by Eric Jon Phelps (June 2004e

AMERICAN OVERSIGHT

d.), pp. 108-111. Block I-(1540-1773), Chapter 2, The Jesuit

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s - 1 5 7 2 ***St. Bartholomew's Massacre Assassination of Admiral***

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Gaspar de Collignywww.VaticanAssassins.org

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assacreinParis,France-August24,1572

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François Dubois (1529-1584) Reproduction of

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La Saint-Barthélemy, ca. 1572-84 Photo: J. C. Ducret, Musée cantonal des

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Beaux-Arts de Lausanne

The famous painting of the **Saint Bartholomew's D**

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

using identity in the French wars of religion and one of the most striking examples

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ples of the extremes of religious intolerance in the age. **The Huguenot (Fr**

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enchCalvinist)painter,FrançoisDuboisisreputedtohavebeenananeyewi

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www.folger.edu/html/exhibitions/tolerance/Massacree.asp

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Painting by François Dubois, a Huguenot painter, . . . **"hedepi**

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AMERICAN OVERSIGHT

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o m t h e L o u v r e t o i n s p e c t a h e a p o f b o d i e s . " ^ K n e c h t , p p . 5 1 - 2 ; R o b e

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rt Jeann Kniecht in *The French Religious Wars 1562-1598*, Osprey Publishing

AMERICAN OVERSIGHT

, 2002, ISBN 1841763950 http://en.wikipedia.org/wiki/St._Barthólom

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French history who is not familiar with the steps taken by this

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yinthatinfamoustransaction.**Theyneededsuchbloodyworkt**

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o g i v e t h e m t h e m a s t e r y o v e r F r a n c e ; a l t h o u g h t h e y h a v e s i n c e t

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h e n b e e n m o r e t h a n o n c e e x p e l l e d i n d i s g r a c e f r o m F r e n c h s o i l ,

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they have returned again and again to torment the people, whos

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t i l l c o n t i n u e t o r e a l i z e , u n d e r t h e i r [*T h i r d*] R e p u b l i c , h o w u

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r [*as it applies*], do you see how a **Cardinal** working in conjunct

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l l e a d e r ?

[*A s e x p l a i n e d a n d d e m o n s t r a t e d i n* ***" V a t i c a n A s s a s s***

AMERICAN OVERSIGHT

ins: Wounded In The House Of My Friends"], in **1963**, a **Cardinal** w

AMERICAN OVERSIGHT

orkingin conjunctionwiththe **Jesuits** wasinvolvedinthe **mur**

AMERICAN OVERSIGHT

derofanAmericanpoliticalleader. The**Cardinal**was**Francis**

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Spellman, *who had a special parlor* (Room number three) at the **J**

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vania. The political leader was our President **John Fitzgeral**

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dKennedy(JFK), *wounded in the house of his friends*."

[emphas

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AMERICAN OVERSIGHT

), pp. 108-111. Block I-(1540-1773), Chapter 2, The Jesuits -

AMERICAN OVERSIGHT

1572 St. Bartholomew's Massacre Assassination of Admiral Ga

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www.VaticanAssassins.org

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Bartholomew's Day



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AMERICAN OVERSIGHT

/153/153_02.asp

"Francis Borgia, the 3rd **Jesuit General** (156

AMERICAN OVERSIGHT

5-1572), having been in secret counsel with the **Monarchs of Fr**

AMERICAN OVERSIGHT

a n c e , l a i d t h e p l a n f o r t h i s **m a s s - m u r d e r** o f t h e r i g h t e o u s **F r e n**

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chProtestantCalvinistsincludingtheirgreatleader,Admi

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ralGasparddeColigny.PopePiusV, formerly "**BrotherMichae**

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rongs, but those of Almighty God /sic/; **to pursue and destroy t**

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ngth, but also the very fibers of the roots. . . **Undernocircums**

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tances, and from no consideration, ought the enemies of God /

AMERICAN OVERSIGHT

sic/**to be spared.**" This was done in obedience to the [**Jesuit**] O

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pal Caesar **[Pope]."** ***Rid path's Universal History***, John Clark

AMERICAN OVERSIGHT

Ridpath, (New York: Merrill & Baker, 1901) Vol. XIII, p. 253. ***T***

AMERICAN OVERSIGHT

The Counter-Reformation in Europe, Arthur Robert Pennington

AMERICAN OVERSIGHT

,(London:ElliotStock),1899)p.162.

[internetlinks,emphas

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is added]

Vatican Assassins, by Eric Jon Phelps (June 2004 ed.

AMERICAN OVERSIGHT

), pp. 108-111. Block I-(1540-1773), Chapter 2, The Jesuits -

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1572 St. Bartholomew's Massacre Assassination of Admiral Ga

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s p a r d d e C o l i g n y www.VaticanAssassins.org

P o p e : R o m a n C a t h o l

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rmoftheancientpaganreligionofhistoricalBabylon.www.ch

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The Roman Catholic Cardi

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nalofLorraine,1572 Receivingthe**H**eadofFrenchProt

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http://i303.photobucket

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"The **Huguenots** had been victorious in three Civil Wars again

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other, Catherine de Medici. They had obtained **religious libe**

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h e e y e o f ***t h e B l a c k P o p e*** [***J e s u i t G e n e r a l***] , **a t r a p w a s s e t l u r i n g**

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all of the Protestants to a royal wedding in Paris. After the pa

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droom. After the savage and ghoulish massacre of 75,000 [*Fren*

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ch]Protestant Huguenots, the Medicis sent his [Admiral Coli

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g n y ' s] h e a d a s a t r o p h y t o t h e J e s u i t - t r a i n e d [***R o m a n C a t h o l i c***

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]**Cardinal of Lorraine** picture d above. ***Ridpath's Universal H***

AMERICAN OVERSIGHT

i s t o r y, John Clark Ridpath, (New York: Merrill & Baker, 1901)

AMERICAN OVERSIGHT

Vol. XIII, p. 255. [emphasis added]

Vatican Assassins, by Eri

AMERICAN OVERSIGHT

cJonPhelps(June2004ed.),pp.108-1111.BlockI-(15400-1773

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www.reformation.o

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rg/bart.html

"When news of the Massacre reached the Vatican

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there was jubilation! Cannons roared, bells rung and a **special**

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l c o mm e m o r a t i v e m e d a l w a s s t r u c k t o h o n o r t h e o c c a s i o n ! T h e P o

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pecommissionedItalianartistVasaritopaintamuralofthe M

AMERICAN OVERSIGHT

assacre which still hangs in the Vatican!"



Med

AMERICAN OVERSIGHT

alstruckbyEmperorGregoryXIII(1572-85)tocommemorateth

AMERICAN OVERSIGHT

eslaughterofover100,000FrenchChristians!!

Editor-

AMERICAN OVERSIGHT

s N o t e " P r e s i d e n t C l i n t o n h a s b e e n c a l l e d t h e m o s t *a n t i* -

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gun President in history. He is a '68 graduate of George to

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cializes in placing its graduates in high positions with

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in the U.S. Government and the foreign diplomatics service

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CC: Ronald Rea

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gan***,GeorgeH.W.Bush,BillClinton,GeorgeW.Bush,a

AMERICAN OVERSIGHT

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Order's Vatican/Pope/Jesuit General.



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Video - Obama Senior Official Kissing

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the Pope's Ring at the Vatican: Obama's Deputy National Secur

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tory?id=804930 8&page=1 July 10, 2009 www.christianlifeandlib

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OTUSmeetshismasterthePOPE:ObamaistheservantoftheNWO'-

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s B e n e d i c t X V I a n d J e s u i t G e n e r a l The relationship of the Pope

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to the President of the United States (POTUS) is that of Master

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to Servant; so it was with Joseph Ratzinger and George W. Bush,

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and so it is between Joseph Ratzinger and Barack Hussein Obama

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Both Pope and Obama are servants of the NWO's Jesuit General,

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its/JesuitGeneral-theNEWWORLDORDER July 10, 2009 www.chri

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stianlifeandlibertyt.net/2009-07-10-POTUS-meets-his-master-the-

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POPE - Obama - servant - NWOs - Benedict - XVI - and - Jesuit - General .doc

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arxist Pope Proposes New World Financial Order, Re-distribu

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t i o n o f W e a l t h : t o m e e t V a t i c a n s e r v a n t , f e l l o w M a r x i s t O b a m a

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The relationship of the Pope to the U.S. President is that of Ma

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r a l , a . k . a . t h e " B l a c k " P o p e . July 8, 2009 www.christianlifeand

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liberty.net/2009-07-08-Marxist-Popes-New-World-Financial-Order-

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Re-distribution-of-Wealth-Vatican-servant-Marxist-Obama.doc

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http://www.vaticanassassins.org/2009/0

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8/white-paper-masters

Romeand USPresidentialCandidat

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ation-"HiddeninPlainView"-Vatican'sRomanCatholicArch

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bishopofNewYorkCardinalEdwardEgan-Pro-Abort,Pro-Sodo

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mite, NWO Globalist, CFR-member, John "McAmnesty" McCain-P

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tizen of the World" Obama http://lefemineforlife.blogspot.com/2

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October 16, 2008 Obama And McCain Attended Alfred E. Smith Memor

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risatraditionforpresidentialcandidates,withbothmajor

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nominee's usually attending during the election year. (Photo b

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yAndrewTheodorakis-Pool/GettyImages)***LocalCaption***BarackOb

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a m a ; E d w a r d E g a n ; J o h n M c C a i n (P h o t o b y G e t t y I m a g e s N o r t h A m e r i c a) P h o t o

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www.zimbio.com/pictures/T6CEASROP9z/Obama+McCain+Attend+Alfr

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Democratic presidential nominee U.S. Sen. **Barack Obama** (D-

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IL) (R) shakes hands with Republican presidential nominee Sen. **John McCain** (R-AZ) (L) as the **Archbishop of New York, Cardinal Edward Egan** (C) looks on at the 2008 Alfred E. Smith Dinner at the Waldorf Astoria Hotel October 16, 2008 in New York City. Appearing at the Alfred Smith dinner is a

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tradition for presidential candidates, with both major nominees usually attending during the election year. (Photo by Getty Images North America)

Photo #23

www.zimbio.com/pictures/T6CEASROP9z/Obama+McCain+Attend+Alfred+E+Smith+Memorial/02gJTClfAM9/Barack+Obama

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Kissing the Slippered Toe of the Pope : Will George W. Bush do in real life what he acted out as a Skull and Bones initiate?

Pope to visit George W. Bush in the White House on Wednesday, April 16, 2008. http://lefeminefoforlife.blogspot.com/2008/04/kissi

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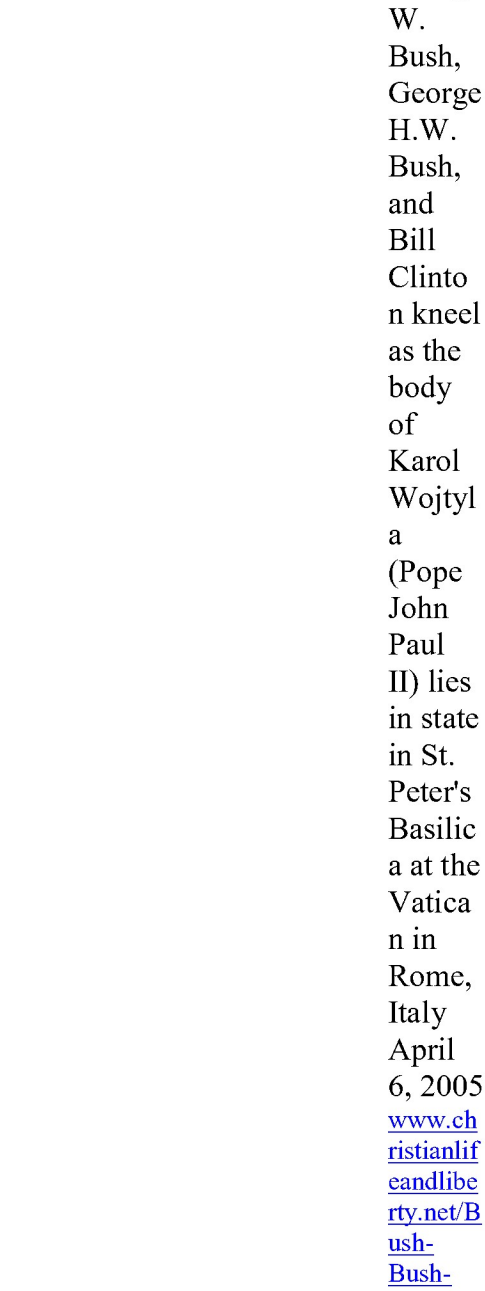
ng-slippered-toe-of-pope.html

Three United States presidents pay public homage to Rome



George W. Bush, George H.W. Bush, and Bill Clinton kneel as the body of Karol Wojtyla (Pope John Paul II) lies in state in St. Peter's Basilica at the Vatican in Rome, Italy April 6, 2005

www.christianlifeandliberty.net/Bush-Bush-

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Clinton-%20pay-homage-to-%20Rome-JPII-Apr-20053.doc

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President Reagan re-established full diplomatic relations with the Vatican in 1984, for the first time since 1867. www.americanambassadors.org/index.cfm?fuseaction=Publications.article&articleid=44

Jan 10, 1984 - The United States and the Vatican established full

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diplomatic relations for the first time in 117 years. (AP, 1/10/98)(HN, 1/10/99) http://timelines.ws/20thcent/1984.HTML

U.S. Diplomatic relations were broken in 1867 after Roman Catholic involvement in the assassination of President Abraham Lincoln.

50 Years in the

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Church of Rome
Charles Chiniquy French-Canadian Ex-Catholic Priest (became born-again Christian and left Roman Catholicism)
www.chick.com/catalog/books/0180.asp#contents

Chapter 55
• My first visit to Abraham Lincoln to warn him of the plots I knew against his life
• The priests circulate the news that Lincoln was born in the Church of Rome

AMERICAN OVERSIGHT

• Letter of the pope to Jeff Davis
• My last visit to the president
• His willingness to die for his nation's sake

Chapter 56

• Abraham Lincoln a true man of God
• The assassination by Booth, the tool of the priests
• Mary Surratt's house the rendezvous of the priests
• John Surratt secreted away by the priests
• News of the assassination known in St. Joseph, Minnesota, three hours before it occurred

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President Ronald Reagan and wife Nancy meeting with Roman Catholic Pope John Paul II at the Vatican

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http://wikicompany.org/wiki/Image:Reagan_pope6.jpg

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Additional resources:

FOX'S BOOK OF MARTYRS
CHAPTER IV
Papal Persecutions
www.ccel.org/f/foxe/martyrs/fox104.htm
The Bartholome

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w Mass acre at Paris, etc.

"At Rome the horrid joy was so great, that they appoin ted a day of high festiva l, and a jubilee, with great indulge nce to all who kept it and showe d every express ion of gladne ss they could devise! and the man who first carried the news receive d 1000 crowns

AMERICAN OVERSIGHT

of the cardinal of Lorraine for his ungodly message. The king also commanded the day to be kept with every demonstration of joy, concluding now that the whole race of Huguenots was extinct."
[emphasis added]

Saint Bartholomew's Day
Catholic Encyclopedia
http://www.n

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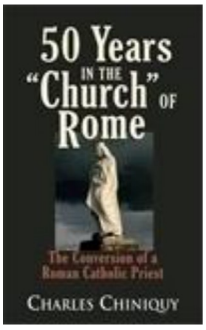
ewadvent.org/cathen/13333b.htm

St. Bartholomew's Day massacre
http://en.wikipedia.org/wiki/St._Bartholomew's_Day_massacre#cite_note-0



50 Years in the Church of Rome
Charles Chiniquy
French

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- Canadian Ex-Catholic Priest (became born-again Christian and left Roman Catholicism) pages - Paperback www.chick.com/catalog/catholicism.asp

Vatican Assassins - eBook [Revised - August 24, 2016]

http://vaticanassassins.org/va-store/#!/VA-III-CD-ROM/p/5017452/category=861614

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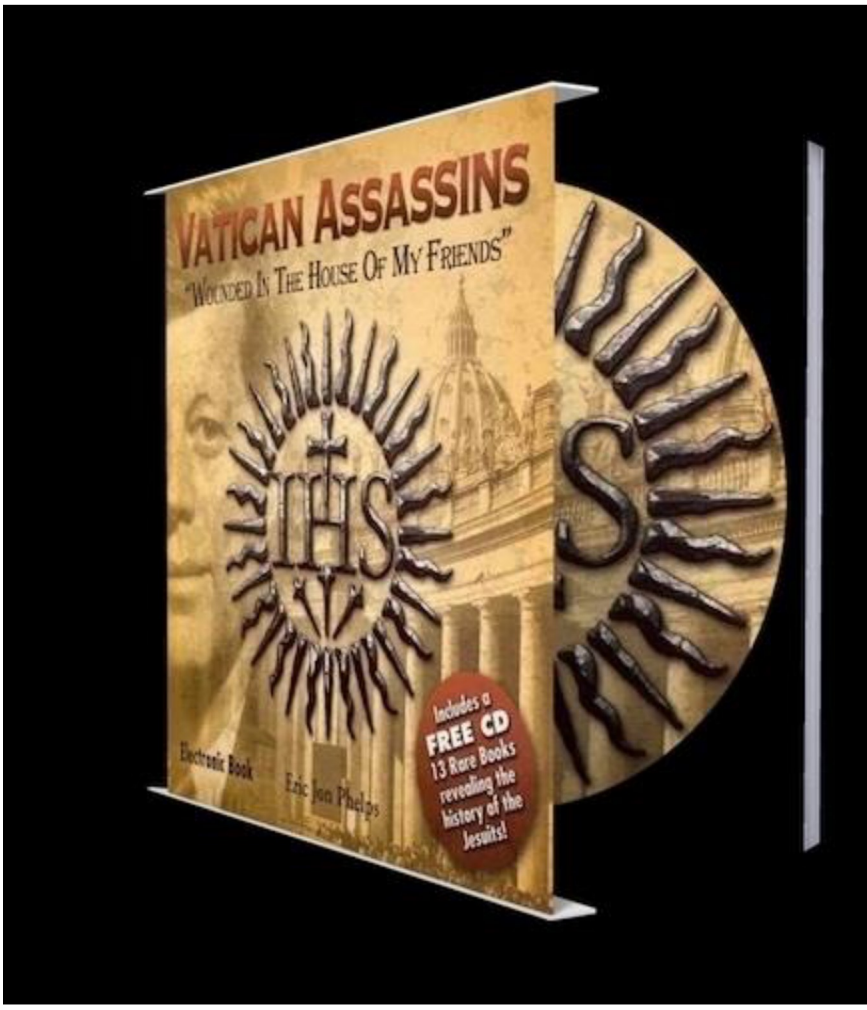
VA III (CD-ROM)



Vatican Assassins: "Wounded In The House Of My Friends"

The wicked history of the Jesuit

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Order is covered from its inception in 1534 to 2007. This history includes the terrible manslaughter of WWI and WWII--the Black Pope's Second Thirty Years' War (1914-1945). The Cold War Hoax is also detailed, including the attempt of President Kennedy to end that papal crusade against the

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Asian Buddhists of the Far East. Francis Cardinal Spellman is proven to be the master mind behind the murder of Kennedy. The Cover-up continues today at the hands of the Pope's American Roman Hierarchy and Knights of Malta ruled by Jesuit Provincials.

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See related

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reports at: www.ChristianLifeandLiberty.net, "News" and www.LefemineForLife.net

New World Order's Roman Catholic Pope called for One-World Government: "A True World Political Authority"

Pope Benedict XVI - "There is urgent need of a true world political

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authority" Globalist Papal Encyclical published July 7, 2009 www.christianlifeandliberty.net/2009-08-19-NWO-RC-Pope-One-World-Government-True-World-Political-Authority-July-09.doc

Pope calls for a new world order [CNN] (Pope John Paul II, 2004) www.scribd.com/doc/2905949/cnn

Pope calls for a new world order

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(Pope John Paul II, 2004)
www.guardian.co.uk/world/2004/jan/02/catholicism.religion
"Pope John Paul II launched one of the most important diplomatic initiatives of his long papacy ... when he called for a **new international order** to replace the one that emerged from the second world war." "The Pope called ... for the

AMERICAN OVERSIGHT

reform of world institutions and deplored any failure to respect international law."

"

"More than ever, we need a **new international order** that draws on the experience and results achieved in these years by the **United Nations,**" he [the Pope] declared..."

Roman Catholicism is

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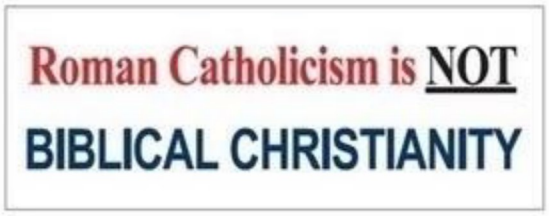
NOT Biblical Christianity
http://lefemineforlife.blogspot.com/2008/04/roman-catholicism-is-not-biblical.html



Five Reasons Why Roman Catholicism is not Biblical Christianity
www.ianpaisley.org/tiara.asp?printerfriendly=true

Evangelism to

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Roman Catholics by a former Roman Catholic priest: The www.bereanbeacon.org/ website is the ministry outreach of former Catholic priest Richard Bennett.

Pope Benedict XVI: True or False Shepherd? www.sermonaudio.com/sermoninfo.asp?SID=42608108410 4/20/2008 (SUN) | John 10 (57:04)

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Sermon by Mr. John Wagner, pastor Covenant Free Presbyterian Church, Lexington, South Carolina

Romanism and Islam are both rooted in the pagan religion of ancient Babylon. Roman Catholicism is <u>NOT</u> Biblical Christianity.

The Pope Kissing The Koran

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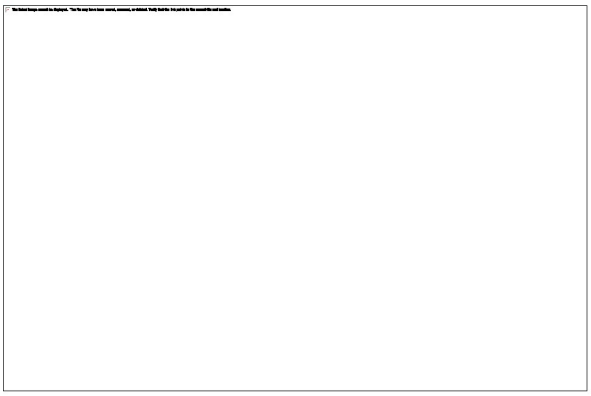
(Karol Wojtyla - "Pope John Paul II") www.deceptionisnthechurch.com/popekiss.html



Here is a photo of the Pope at the end of an audience with Patriarch Raphael I of Iraq where **"the Pope bowed to the Muslim holy book the Qu'ran presented to**

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him by the delegation and kissed it as a sign of respect".

"The Two Babylons - Romanism and Its Origins," by Alexander Hislop (1916): www.chick.com/catalog/books/0185.asp "Where did the practices and beliefs of **Roman Catholicism** come from? In this scholarly classic, first published over eighty years ago,

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Alexander Hislop reveals that **many Roman Catholic teachings did not originate with Christ or the Bible, but were adopted from ancient pagan Babylonian religion, and given Christian names."**

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The Vatican / Papal / Jesuit New World Order is about:

1) one-world government (UN, G-20, G-8, EU, NATO, NAFTA, WTO, CAFTA, SPP, NAU, ad nauseam)

2) one-

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world money (Euro, Amero, Federal Reserve, World Bank, IMF, ad nauseam)
3) one-world religion (**Ecumenism** - all the world's false religions under **Rome's Vatican**)
4) global population reduction (abortion, birth control, disease, famine, and war are all

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"instruments" of this satanic policy objective - by possibly 90% - www.radioliberty.com/stones.htm / www.radioliberty.com/pca.htm)

ROME is the New World Order.

The **New World Order** is a plan for global, one-world socialist tyranny, where the

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God-given, unalienable rights of Americans that were protected by the United States Constitution and the Bill of Rights, will no longer be protected, but superseded by an Anti-Christian, Anti-Bible, Anti-Messiah Global Government. **Bible-**

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believing *Christians are called to <u>RESIST</u> Rome's New World Order, in the Name of the Lord !*

"They that forsake the law praise the wicked**:** but such as keep the law **<u>contend</u>** with them." Proverb 28:4, KJB

"... where the Spirit

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of the Lord is, there is <u>liberty</u>." 2 Corinthians 3:17b, KJB

... and where the Spirit of the Lord is absent, there is **<u>chaos</u>,** and then **<u>tyranny</u>.**

Steve Lefemine
April 3, 2009 / Revised May 14, 2009

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The Vatican / Pope / Jesuit - General are leaders in the New World Order: (one-world government, one-world money, one-world religion, global population reduction)
www.vaticanassassins.org
www.spirituallysmart.com/p

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ics.htm [internet link no longer functional]

Rome's Desire for World Domination by Tom Friess

www.youtube.com/watch?v=4_eu7uo10zI [YouTube alert: "This video has been removed by the user." (?)]

Video (1:55:59) Views: 7,396 Berean Beacon June

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19, 2008

THE U.S. CONSTITUTION VS. CANON LAW.... FREEDOM VS BONDAGE Tom filling in for Greg Szymanski on http://www.libertyradiolive.com Program Schedule - http://libertyarchives.com/schedule.html Will the World give Rome total control? Tom presents the case for alarm

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as Americ a slides into the clutche s of the Vatica n.

My first time as guest host on GSIJ. In the first half hour I tell how my investi gation into the Catholi c church began, my amateu r radio activiti es, **the Jesuits and the Vatica n's heads hip over the N.W.O ., how the Vatica n has usurpe d**

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our government, the Catholicization of America, Democracy vs Constitutional Republic, what is uniquely Protestant about our Constitution, **Roman Catholic Canon Law vs our Protestant Constitution,** the Protestant Reformation and how it inspired our Protestant Constitution, the Roman "Vicar of

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Christ" vs the REAL Vicar of Christ, President G.W. Bush's close ties to the Pope, how our Protestant Constitution is being systematically destroyed and replaced with Roman Catholic Canon Law, "as goes God's people, so goes the nation", **the direconsequences for Protestant apostasy,** the coming Babylonian captivit

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y, **the coming American Inquisition, the Global Roman N.W.O. Empire.**

Roman Catholic Inquisition and The Torture Tools (Video)
www.youtube.com/watch?v=Rx8PdvOELvY&eurl
"The Inquisition ..."
"... the 605 Years of Torture and Murder that was Inflicted on Bible-

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believing Christians [by Rome] because they refused to compromise their faith." Posted to YouTube March 07, 2007 (58:27)
(Report prepared February 25, 2009)
www.christianlifeandliberty.net/2009-02-25-Roman-Catholic-Inquisition-Torture-Tools-Video.doc
Video (58:27)
310,266 views

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AMERICA - A NATION

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UNDER NATIONAL DIVINE JUDGMENT FOR NATIONAL SIN.

Foreign invasion (10-20 Million Illegal Aliens) and War (Iraq, Afghanistan) are divine consequenc

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es upon a natio n, *any natio n*, for the shedd ing of innoc ent blood (e.g., Jerem iah 19:3-7; 2 Kings 24:1-4). Econ omic collap se, advan cing Social ism / Marxi sm, and loss of Liber ty, ... these are all signs of God's Judg ment upon Amer

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ica ...

Amer ica kills 3,000 childr en in the womb s of their mothe rs each day by surgic al aborti on alone, and many more by chemi cal aborti on (e.g., throu gh the aborti facien t mech anism of birth contr ol pills). Their shed innoc

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ent blood cries from the groun d for venge ance, and God hears their cry (Gen. 4:10), and He is repay ing Amer ica for our wicke dness.

Our natio nal sin of child- murd er-by- aborti on is alrea dy being recom pense d (e.g., Colu mbin e, 9-

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11, VA Tech), and without repentance, will be calamitously, horrifically recompensed by God in blood for Millions aborted: ours. (Num. 35:33; Jer. 19:3-5; Ezek. 35:5,6; Hos. 4:2; Ps. 106:37-44 (God turns a nation of child-

AMERICAN OVERSIGHT

murd erers over to tyran ny); 2 Kings 24:1-4. *Our only hope* as a natio n, is Repe ntanc e befor e a Holy and Just God, Who m we have offen ded greatl y (e.g., Leviti cus 20:3).

CHI LD-SA CRI FIC E (AB

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OR TIO N) => => => => TY RA NN Y (Psa lm 106: 37- 44)



www.operationsaveamerica.org/articles/articles/wtc-anniversary.htm [CCL Note: OSA is unfortunately another one of many

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ecumenical pro-life organizations, despite the repeated, documented opposition of US Catholic Bishops (who report directly to the Vatican's Pope) to passing state-level PERSONHOOD legislation to END abortion (which OSA supports).]

Christians,

AMERICAN OVERSIGHT

the hour is late for America...

Repentance and Obedience are crucial...

1) Come present your witness for Christ against the murder of children publicly outside your city's

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abortion center(s)...

www.lifedynamics.com/DeathCamps/DeathCamps.cfm

2) Support "personhood" legislation *in your state* to ESTABLISH JUSTICE and END abortion [Ignore the Vatican's "pro-life" front groups,

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nhoo d Legisl ation Effort s Filed in State Legisl atures or as Ballot Initia tives

Summ ary Report : 14 States have curren t Person hood Legisl ation efforts filed:
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- a/o Decem ber 3, 2009 / Revise

AMERICAN OVERSIGHT

d April 7, 2010 www.christianlifeandliberty.net/2009-12-03-Summary-Report-14-States-current-Personhood-Legis-efforts-filed.doc

2009-2010 State-Level Personhood (and other selected) Legislation: - Including State-Level Personhood Bills and Constitutional Amendments **- ALA, ALASK, CA, CO, FL, GA, MD, MICH,**

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MISS, MO, MONT, ND, NV, OR, SC, VA Updated December 3, 2009 / Revised April 7, 2010 www.christianlifeandliberty.net/2009-12-03-2009-2010-State-Level-Personhood-and-other-selected-Legislation.doc

Personhood State Constitutional Amendment introduced In Iowa Legislature

Iowa is one of **16 States** which have

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had **Personhood Legislation** filed in **2009-2010.** January 20, 2010 http://christianlifeandliberty.net/2010-02-19-Personhood-State-Const-Amend-intro-in-Iowa-Leg-Jan-20.doc

Personhood State Constitutional Amendment Re-introduced in Maryland Legislature

Maryland is one of **16 States** which have had **Personhood Legisl**

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ation filed in **2009-2010.** February 17, 2010 http://christianlifeandliberty.net/2010-02-24-Personhood-State-Const-Amend-Re-intro-in-Maryland-Leg-Feb-17.doc

Personhood Amendment Certified for Colorado Ballot for November 2010

Colorado Secretary of State has certified the Personhood Amendment, called Amendment 62

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March 26, 2010 http://christianlifeandliberty.net/2010-03-30-Personhood-Amendment-Certified-for-Colorado-Ballot-for-Nov-2010-Mar-26.doc

Mississippi Personhood Amendment Officially on 2011 Ballot

Mississippi Secretary of State gives notice of sufficient certified voter signatures to be on 2011 Ballot April 1, 2010 http://christianlifeandlibe

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rty.net/2010-04-05-Mississippi-Personhood-Amendment-Officially-on-2011-Ballot-Apr-1.doc

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2 Chronicles 7:14 - God's remedy for America to be healed is for we

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who are CHRISTIANS to REPENT !

"If My people [Christians], **which are called by My Name, shall humble themselves, and pray, and seek My Face, and turn from their wicked ways** [sins of commission and omission]; **then will I hear from heaven, and will forgive their sin, and**

AMERICAN OVERSIGHT

will heal their land [America, or any nation]."

2 Chronicles 7:14

"America Repent" (music video) Contemporary Christian Artist: Tim Juillet

www.youtube.com/watch?v=hLlOdkO9jak Video (4:34) Views: 434

www.youtube.com/watch?v=pvu6hHLSpzk Video (4:32)

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Views: 4,040

"The wicked shall be turned into hell, and all the nations that forget God."

Psalm 9:17, KJB

"But judgment shall return unto righteousness: and all the upright in heart shall follow it."

Psalm 94:15, KJB

"Blessed is the nation whose God is the

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LORD ;..."

Psalm 33:12, KJB

Biblical "Separation" for a Nation

"Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrightеousness? and what communion hath light with darkness? And what concord hath Christ with Belial? or what

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part hath he that believe th with an infidel ? And what agreem ent hath the temple of God with idols? for ye are the temple of the living God; as God hath said, I will dwell in them, and walk in them; and I will be their God, and they shall be my people. Wheref ore come out from among them, and be ye separat

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e, saith the Lord,..." 2 Corinthians 6:14-17a (KJB)

THE DECLARATION OF INDEPENDENCE - IN CONGRESS, JULY 4, 1776

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers

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of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. **The Declaration of Independence is part of the organic law of the United States of**

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America United States Code Annotated
http://uscode.house.gov/search/criteria.shtml
http://lefeminefor life.blogspot.com/2007/10/biblical-separation-for-nation.html

No King but King Jesus!
(Yeshua Messiah)
Declarations and Evidences of Christian Faith in America's Colonial Charters, State Constitutions, and

AMERICAN OVERSIGHT

other Historical Documents during over 375 Years of American History: 1606 to 1982
www.christianlifeandliberty.net/NoKingbutKingJesus.doc

The Sixth President of the United States, **John Quincy Adams** (son of John Adams, the Second US President, and a signer of the Declaration of Independence

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), said: "The highest glory of the American Revolution was this; it connected in one indissoluble bond the principles of civil government with the principles of Christianity." and "From the day of the Declaration... they (the American people) were bound by the laws of God, which they all, and by the laws of The Gospel

AMERICAN OVERSIGHT

, which they nearly all, acknowledge as the rules of their conduct."

Tragically, today in 2008, American law has become exceeding ly anti-Christian. Witness the government-protected murder of One Million pre-birth human beings each year, <u>over 50 Million</u> surgical abortions since 1973 !

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(www.ldi.org).

The Constitution of the United States should be amended as first proposed by the National Reform Association in 1864, with a Christian Amendment:

Confession of the Saviour (Messiah) as the Ruler of Nations, including America, by amending the Preamble to the United States Constitution

In 1864, the National Reform Association advocated amending the Preamble of the Constitution of

AMERICAN OVERSIGHT

the United States to read, in substance: **"We, the people of the United States, humbly acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, his revealed will as the supreme law of the land, in order to constitute a Christian government, and in order to form a more perfect union, establish justice, insure domestic**

AMERICAN OVERSIGHT

tranquility, provide for the common defense, promote the general welfare, and secure the inalienable rights and the blessings of life, liberty, and the pursuit of happiness to ourselves, our posterity, and all the people, do ordain and establish this Constitution for the United States of America."
http://candst.tripod.com/nra.htm

Explicitly Christian Politics: The Vision of the National Reform

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Association
www.crownandcovenant.com/product_p/ds380.htm
"Since 1864 the National Reform Association has advocated an explicitly Christian approach to politics. In this book their vision of politics, based on the mediatorial reign of Jesus Christ over the nations, is explained for a new generation."

Christ is Ruler of the Nations ! Psalm 2; Psalm 24:1; Psalm 47:7,8; Psalm 50:12;

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1 Timothy 6:15, KJB

"For the kingdom *is* the LORD's: and he *is* the governor among the nations."
Psalm 22:28, KJB
www.bartleby.com/108/19/22.html#S22

"... I will build My church; and the gates of hell shall not prevail against it."
Matthew 16:18 Yeshua Messiah

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Hallelu
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Christians for Life and Liberty

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Message

From: Eighth Circuit U.S. Court of Appeals Clerks Office [via_no_reply@ca8.uscourts.gov]
Sent: 8/30/2021 10:00:21 AM
To: Sauer, John [/o=MO AGO/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f134eb2c5f6846bdb89d9c697c5ff5c5-Sauer, John]
Subject: Opinion Descriptions for 08/30/2021

Opinions Descriptions For: 08/30/2021

DISCLAIMER: The following unofficial case summaries are prepared by the clerk's office as a courtesy to the reader. They are not part of the opinion of the court.

http://media.ca8.uscourts.gov/opndir/21/08/192554P.pdf 08/30/2021 Jo Ann Howard & Associates v. National City Bank
U.S. Court of Appeals Case No: 19-2554
and No: 19-3662
and No: 20-1438
U.S. District Court for the Eastern District of Missouri - St. Louis
[PUBLISHED] [Colloton, Author, with Wollman and Shepherd, Circuit Judges]
Civil case - Trusts. In action alleging defendant PNC's predecessor, Allegiant, breached its fiduciary duties and abetted fraud in the handling of pre-paid funeral policy funds, a jury awarded the plaintiffs $355.5 million in compensatory damages and $35.5 million in punitive damages. On appeal, this court determined that the plaintiffs' claims arose under trust law rather than tort law and should have been tried to the court. Jo Ann Howard & Assoc., P.C. v. Cassity, 868 F.3d 637 (8th Cir. 2017). On remand, the district court held a bench trial and concluded Allegiant had breached its fiduciary duties to the beneficiaries of the plans and that PNC's defenses failed to relieve Allegiant of liability. The court awarded damages for losses to the trusts under Restatement (Second) of Trusts, Sec. 205(a), but declined to award damages for profits made from the breach under Sec. 205(b). The court awarded compensatory damages, punitive damages, prejudgment interest, and attorneys' fees. The district court did not err in calculating the amount of compensatory damages to be awarded to plaintiffs; assuming that Missouri law does require damages to be readily ascertainable to award prejudgment interest in a matter in equity, the damages here were readily ascertainable and the court did not err in awarding prejudgment interest or in correcting a mistake in the calculation; the evidence supported an award of punitive damages; award of attorneys' fees affirmed.

http://media.ca8.uscourts.gov/opndir/21/08/192898P.pdf 08/30/2021 City of Council Bluffs v. U.S. Dept. of the Interior
U.S. Court of Appeals Case No: 19-2898
U.S. District Court for the Southern District of Iowa - Council Bluffs
[PUBLISHED] [Colloton, Author, with Smith, Chief Judge, and Erickson, Circuit Judges]
Civil case - Indian law. The district court concluded that the National Indian Gaming Commission correctly determined that the Ponca Restoration Act, 104 Stat. 1167 (1990) does not preclude gambling on a parcel of land in Iowa that is held in trust by the United States for the Tribe because the land is eligible as part of the restoration of lands for an Indian tribe that is restored to federal recognition; however, the court also concluded that the Commission failed to consider a relevant factor in evaluating whether the parcel is restored land for the Tribe and remanded the matter to the Commission for further consideration. The district court's decision is affirmed.

http://media.ca8.uscourts.gov/opndir/21/08/202029P.pdf 08/30/2021 Selective Insurance Co. of SC v. Amit Sela
U.S. Court of Appeals Case No: 20-2029
U.S. District Court for the District of Minnesota
[PUBLISHED] [Kobes, Author, with Shepherd and Erickson, Circuit Judges]
Civil case - Insurance. The district court did not, under the circumstances presented, err in permitting defendant's claim for taxable costs under Minn. Stat. Sec. 604.18 to proceed; nor did it err in awarding taxable costs under Sec. 604.18, subdivision 2(a), based on its determination that no reasonable insurer would have relied on any of Selective's proposed bases to deny defendant's hail claim for fraud; award of prejudgment interest affirmed.

http://media.ca8.uscourts.gov/opndir/21/08/202103P.pdf 08/30/2021 Westfield Ins. Company v. Carolina Casualty Ins. Company
U.S. Court of Appeals Case No: 20-2103

AMERICAN OVERSIGHT

U.S. District Court for the District of Minnesota
[PUBLISHED] [Colloton, Author, with Gruender and Grasz, Circuit Judges]
Civil case - Insurance. Under the facts of the case, the insureds were not covered for the accident in question because the activity in which they were engaged at the time the accident occurred fell within a provision which excluded coverage for someone using an otherwise covered vehicle while he or she is working in a business of selling, servicing or repairing autos; an exception to the exclusion for work done as part of the owner's "garage operations" did not apply.

http://media.ca8.uscourts.gov/opndir/21/08/202192P.pdf 08/30/2021 James Dowden v. Cornerstone National Insurance
U.S. Court of Appeals Case No: 20-2192
U.S. District Court for the Western District of Arkansas - Hot Springs
[PUBLISHED] [Smith, Author, with Wollman and Stras, Circuit Judges]
Civil case - Insurance. The bankruptcy trustee for the insured brought this action against Cornerstone, alleging it breached its duty to defend the insured by failing to timely file an answer to a complaint filed against the insured arising out of a traffic accident; the district court did not err in granting Cornerstone's motion for summary judgment because Cornerstone had no duty to defend the insured when he failed to strictly comply with a condition precedent to coverage - promptly forwarding the complaint and summons to Cornerstone; the actions of Cornerstone's claims representative did not waive this requirement and Cornerstone was not estopped from asserting it.

http://media.ca8.uscourts.gov/opndir/21/08/202334U.pdf 08/30/2021 Marcos Antonio Lara-Alvarez v. Merrick B. Garland
U.S. Court of Appeals Case No: 20-2334
Petition for Review of an Order of the Board of Immigration Appeals
[UNPUBLISHED] [Loken, Author, with Wollman and Stras, Circuit Judges]
Petition for Review - Immigration. The court lacked jurisdiction to review the agency's discretionary decision to deny cancellation of removal as petitioner only challenges the weight the IJ and BIA gave certain factors in deciding the "exceptional and extremely unusual hardship" issue and presents no legal or constitutional issues.

----------VIA TRANSMISSION----------

United States Court of Appeals for the Eighth Circuit
Circuit Clerks Office
Voice: 314-244-2400 Fax: 314-244-2780

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AMERICAN OVERSIGHT

No. 21-40618

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF LOUISIANA
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A STAY PENDING APPEAL

BRIAN M. BOYNTON
Acting Assistant Attorney General

JENNIFER B. LOWERY
Acting United States Attorney

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AMERICAN OVERSIGHT

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INTRODUCTION AND SUMMARY

The district court entered an intrusive and burdensome preliminary injunction that prohibits the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) from implementing interim immigration-enforcement priorities that have successfully focused scarce resources on the most pressing threats. In doing so, the court asserted sweeping authority to micromanage the government's enforcement efforts. The injunction's terms are legally unjustified and practically untenable. And they will immediately destabilize the Nation's immigration-enforcement apparatus, with potentially severe consequences for public safety, national security, and border security. The government respectfully requests that this Court stay the injunction pending appeal or until DHS issues final enforcement priorities, whichever is earlier. The undersigned counsel has been informed by DHS that it intends to issue those priorities by the end of September. The government further requests that the Court provide relief by 12:00 p.m. on Monday, August 30, when the preliminary injunction will take effect. If the Court denies the motion, the government respectfully requests a 7-day administrative stay to allow the Solicitor General to consider seeking relief from the Supreme Court

"A principal feature of" the Nation's immigration laws "is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). This discretion derives from the Framers' constitutional design and from the immigration laws themselves. *E.g.*, 6 U.S.C. § 202(5) (vesting the Executive with

AMERICAN OVERSIGHT

authority to "[e]stablish[] national immigration enforcement policies and priorities"). This authority reflects the reality that the Executive must allocate scarce resources among many aspects of immigration enforcement.

Earlier this year, DHS and ICE issued memoranda to guide agents' exercise of that discretion. The memoranda adopted interim priorities to focus limited resources on detaining and removing noncitizens who pose the greatest threat to public safety, national security, and border security. Texas and Louisiana challenged these priorities, contending that the Immigration and Nationality Act (INA) requires the government to arrest and detain every noncitizen whom the INA classifies as a "criminal alien[]," 8 U.S.C. § 1226(c), and to arrest and detain every noncitizen with a final order of removal during the 90-day removal period, *id.* § 1231(a)(2). The district court improperly accepted both those arguments, as well as plaintiffs' procedural challenges under the Administrative Procedure Act (APA), Add.105-44.

A stay is warranted because plaintiffs are unlikely to prevail on the merits. At the outset, their claims are not amenable to judicial review. Plaintiffs lack standing to challenge the interim priorities. And the priorities are otherwise unreviewable because enforcement decisions are committed to agency discretion by law and because the priorities are not final agency action. Moreover, plaintiffs are not within the zone of interests of the statutory provisions they seek to enforce. Even if plaintiffs could clear these hurdles, their claims would fail on the merits. Neither § 1226(c) nor § 1231(a)(2) eliminates the government's enforcement discretion. Indeed, Congress has never

AMERICAN OVERSIGHT

appropriated sufficient resources to permit DHS and ICE to fulfill these supposed statutory mandates. With respect to the APA, the district court improperly disregarded the agencies' reasoning and substituted its policy judgment for the agencies'.

Leaving the injunction in place would irreparably harm the government and the public. The injunction prohibits the government from implementing a policy that has successfully focused enforcement on the most pressing threats to national security, border security, and public safety. Conversely, plaintiffs' principal asserted injury is that the priorities will cause some unspecified fiscal injury. This injury, which is insufficient even to support standing or give rise to a cause of action under the APA, cannot justify the damage that the injunction will inflict upon the United States and the public.

STATEMENT

A. Statutory Background

The INA, 8 U.S.C. § 1101 *et seq.*, sets forth procedures for removal of noncitizens. The process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a), a discretionary decision that requires DHS to consider the enforcement priorities that Congress has authorized the Secretary to establish, *cf.* 6 U.S.C. § 202(5). An immigration judge determines whether the noncitizen is removable and, if so, whether to enter a removal order. 8 U.S.C. § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. The noncitizen can obtain administrative and judicial review of such an order.

AMERICAN OVERSIGHT

The INA also sets forth the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether [he] is to be removed." 8 U.S.C. § 1226(a). That provision "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies generally to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c) provides that DHS "shall take into custody any alien," 8 U.S.C. § 1226(c)(1), who "falls into one of several enumerated categories involving criminal offenses and terrorist activities," *Jennings*, 138 S. Ct. at 837, and "may release [such] an alien . . . only if" a specified condition not relevant here is satisfied, 8 U.S.C. § 1226(c)(2).

Once an order of removal becomes administratively final and other conditions are satisfied, the noncitizen can be removed by DHS. Section 1231 sets a "removal period" of 90 days and provides that the Secretary generally shall detain and remove the noncitizen during that period. 8 U.S.C. § 1231(a).

Both § 1226 and § 1231 contain provisions insulating the Secretary's enforcement of those sections from judicial review. Section 1226 states that the Secretary's "discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision" taken under that section "regarding the detention or release of any alien." 8 U.S.C. § 1226(e). And § 1231 provides that "[n]othing" in that section "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any

AMERICAN OVERSIGHT

party against the United States or its agencies or officers or any other person." *Id.* § 1231(h).

The Executive has broad authority to administer and enforce the Nation's immigration laws. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483-84 (1999); 6 U.S.C. § 202(5). For decades, the Executive has exercised its enforcement discretion to prioritize which noncitizens to arrest, detain, or remove, and no administration has ever arrested, detained, and pursued removal of every noncitizen who could be covered by §§ 1226(c) and 1231(a)(2). Nor has Congress ever appropriated funds sufficient to allow the Executive to do so.

B. Factual Background

This appeal concerns two memoranda that establish interim priorities to guide DHS's and ICE's enforcement decisions.

1. The DHS Memorandum

The first memorandum was issued by DHS on January 20, 2021. Add.161 (DHS Memorandum). The memorandum called for a "Department-wide review of policies and practices concerning immigration enforcement" and adopted interim enforcement priorities pending that review. Add.163. It recognized that, "[d]ue to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States" but instead must adopt "sensible priorities" to "implement civil immigration enforcement." *Id.* Accordingly, the memorandum urged components to focus enforcement on noncitizens whose apprehension is

AMERICAN OVERSIGHT

"necessary to protect the national security of the United States"; individuals apprehended "while attempting to unlawfully enter the United States on or after," or who were not present in the country before, November 1, 2020; and "[i]ndividuals incarcerated within federal, state, and local prisons and jails . . . who have been convicted of an 'aggravated felony'" as defined by 8 U.S.C. § 1101(a)(43) and who pose a threat to public safety. *Id.*

Importantly, "nothing" in the memorandum "prohibits the apprehension or detention of" noncitizens "who are not identified as priorities." Add.164. Furthermore, the priorities "are not intended to, do not, and may not be relied upon to create any" enforceable "right or benefit." Add.165. The interim priorities will "remain in effect until superseded by revised priorities developed in connection with the review" discussed above. Add.164. The issuance of those final priorities will render the preliminary injunction moot.

2. The ICE Memorandum

ICE issued the second memorandum, implementing the DHS Memorandum and offering further guidance with respect to the removal priorities, on February 18, 2021. Add.167 (ICE Memorandum). The memorandum recognized that "ICE operates in an environment of limited resources," and that, as a result, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." Add.169. The memorandum further explained that ICE's mission has been rendered "particularly complex" due to "several other factors,"

AMERICAN OVERSIGHT

including ongoing litigation, health and safety needs, foreign-relations concerns, and other legal requirements. *Id.* "[T]o most effectively achieve" its mission to protect "national security, border security, and public safety" in light of these factors, ICE determined that it was necessary to "exercise its well-established prosecutorial discretion." Add.170. The memorandum instructed officers to focus enforcement on the categories of noncitizens specified in the DHS memorandum. Add.171-72. The memorandum also stated that, at ICE's request, DHS had expanded the public-safety category to include "qualifying members of criminal gangs and transnational criminal organizations." Add.168.

Like the DHS Memorandum, the ICE Memorandum does not "prohibit the arrest, detention, or removal of any noncitizen." Add.170. It simply requires preapproval of enforcement actions against individuals who fall outside the presumed priorities unless an exigency makes preapproval "impracticable"—in which case approval may be requested after the action. Add.173.

C. Prior Proceedings

On August 19, 2021, the court entered a nationwide preliminary injunction prohibiting the agencies from implementing the priorities. Add.1. In the same order, the district court also imposed onerous reporting requirements. *See infra* p. 22. The government appealed the preliminary injunction to this Court. Dkt. 81. The government also asked the district court to stay the injunction pending appeal and to enter an administrative stay while the court considered the government's stay motion.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005230

Dkt. 82. The district court declined to stay the injunction pending appeal but entered a seven-day administrative stay to allow this Court to consider the government's motion. Dkt. 90.

ARGUMENT

In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). In cases involving the government, the harm to the government and the public interest merge. *Id.* at 435. Every factor strongly favors staying the preliminary injunction pending appeal.

I. The Government Is Likely To Prevail On The Merits.

The government's appeal is likely to result in vacatur of the preliminary injunction because plaintiffs' challenges to the interim priorities are not amenable to judicial review. Even if they were, plaintiffs have failed to demonstrate that the priorities are unlawful.

A. Plaintiffs' Claims Are Unreviewable.

1. Plaintiffs lack standing to sue. Notwithstanding that a litigant "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), the district court found standing (Add.20-

AMERICAN OVERSIGHT

46). The court first stated that the interim priorities would result in the release into plaintiffs' borders of an unspecified number of noncitizens whom the court believed would otherwise be detained or removed, and that some subset of these noncitizens might then commit crimes. Relying on that predicate, the court found that the States would spend money to detain released noncitizens who later reoffend. Add.27-28 (stating that Texas spends an average of approximately $60 daily per inmate). The court also found that such crimes would harm plaintiffs' "quasi-sovereign" "*parens patriae*" interest in protecting their citizens. *Id.* at 33-34.

This analysis fails at every step. To begin, the court identified no evidence that the memoranda will have the "*certainly impending*" effect of increasing criminal activity. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quotation omitted); *see California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (standing is "ordinarily substantially more difficult to establish" when the asserted injury rests on "the decision of an independent third party") (quotation omitted). The court relied (Add.23, 38-39) on anecdotes about particular noncitizens whom DHS has not detained and on generalized assertions about recidivism. But that does not support the counterintuitive proposition that crime will rise as a result of priorities that focus enforcement on noncitizens who pose the greatest risks to national security, border security, and public safety. Indeed, the record confirms that the agency's efforts to target the most dangerous noncitizens are succeeding. Add.181-82. And given ICE's limited detention resources, detaining all individuals covered by §§ 1226(c) and

AMERICAN OVERSIGHT

1231(a)(2)—a group that includes not just every individual in the removal period regardless of criminal history but also many individuals still in the removal process with only nonviolent criminal convictions—may preclude the agency from detaining more serious threats to public safety, such as gang members or noncitizens who have been charged but not yet convicted of violent offenses.

The court likewise failed to substantiate its conclusion that any marginal increase in criminal activity would cause harm to plaintiffs, much less that the incidental effects of federal enforcement decisions are judicially cognizable. The court cited no evidence that either State has incurred or will imminently incur any financial cost. Indeed, the district court's finding that Texas's "budget for detention facilities has been set months or years in advance," Add.45 (quotation omitted), belies its conclusion that the priorities will require Texas to spend more money. And the court's reliance on plaintiffs' alleged *parens patriae* injury cannot be reconciled with the settled principle that a State cannot assert any such injury against the United States. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

2. a. Plaintiffs' claims are also unreviewable as a statutory matter. The decisions that they challenge are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Decisions about how to allocate limited resources—particularly in the enforcement context—are "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions require the "complicated balancing of a number of factors" within the agency's expertise, including "whether

AMERICAN OVERSIGHT

agency resources are best spent on this violation or another" and "whether the particular enforcement action requested best fits the agency's overall policies." *Id.*

Those concerns "are greatly magnified in the deportation context." *Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (quotation omitted). Congress has charged the Executive with deciding "whether it makes sense to pursue removal at all," *Arizona v. United States*, 567 U.S. 387, 396 (2012), and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. 471, 483 (1999). That is because, in addition to the usual factors governing the exercise of discretion, immigration policy can "affect trade, investment, tourism, and diplomatic relations for the entire Nation." *Arizona*, 567 U.S. at 395; *accord Jama v. ICE*, 543 U.S. 335, 348 (2005) (explaining that removal decisions touch on "our relations with foreign powers" and implicate the "customary policy of deference to the President in matters of foreign affairs") (quotation omitted).

The district court ruled (Add.61-81) that §§ 1226(c) and 1231(a)(2) withdraw the Executive's enforcement discretion because both provisions use the word "shall." Add.70-81. But enforcement discretion has "long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). The "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Id.* The Supreme Court has thus rejected the idea that enforcement discretion can be eliminated simply because a statute uses the word "shall." *Id.* at 761; *see City of Chicago v. Morales*, 527 U.S. 41, 47

AMERICAN OVERSIGHT

n.2, 62 n.32 (1999); *Heckler*, 470 U.S. at 835. A "stronger indication" of congressional intent is required before a court may hold that Congress circumscribed Executive authority. *Gonzales*, 545 U.S. at 761.

The INA evinces no such intent. To the contrary, the traditional tools of statutory interpretation confirm that Congress did not intend either § 1226(c) or § 1231(a)(2) as a judicially enforceable mandate. Most obviously, the INA precludes enforcement decisions under both provisions from judicial review. *See* 8 U.S.C. §§ 1226(e), 1231(h). And any inference that Congress intended those provisions to be judicially enforceable is further undermined by the fact that each is itself contingent on a separate discretionary exercise of the Secretary's authority: § 1226(c) authorizes detention of the described noncitizens only "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018), while § 1231(a)(2) authorizes detention only following a final order of removal. But the decisions whether to initiate and pursue removal proceedings, to seek a final order of removal, and to take steps to execute that order are themselves separate, discretionary, unreviewable decisions of the Secretary. *Cf. AADC*, 525 U.S. at 483.

Other INA provisions likewise confirm Congress's desire to "protect[] the Executive's discretion from the courts" and in particular from "attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485-86, 485 n.9 (discussing 8 U.S.C. § 1252(g)). And Congress's appropriations decisions further undermine the district court's reasoning. Congress has consistently declined to

AMERICAN OVERSIGHT

appropriate enough funds to allow the Executive to detain all noncitizens described in §§ 1226(c) and 1231(a)(2). For example, ICE estimates that approximately 1.2 million noncitizens in the United States are subject to a final order of removal. Add.185. Many more noncitizens are subject to detention under other INA provisions. Yet Congress has only appropriated enough funds to operate approximately 34,000 detention beds nationwide. Add.179.

The cases cited by the district court (Add.64-69) do not hold that §§ 1226(c) and 1231(a)(2) eliminate the Executive's enforcement discretion. None involved a challenge to the Executive's exercise of enforcement discretion, and none presented the question whether either provision creates a judicially enforceable duty. *E.g.*, *Johnson v. Guzman-Chavez*, 141 S. Ct. 2271 (2021) (addressing which provision of the INA governs detention of certain noncitizens). It is improper to "extend[] a judicial decision beyond its holding, parsing the opinion as if it were a statute." *Mays v. Chevron Pipe Line Co.*, 968 F.3d 442, 448 (5th Cir. 2020).

b. Plaintiffs' claims are also not cognizable because they fall outside the zone of interests of §§ 1226(c) and 1231(a)(2). That inquiry asks whether Congress intended for a particular plaintiff to invoke a "particular provision of law" to challenge agency action, *Bennett v. Spear*, 520 U.S. 154, 175-76 (1987), or whether, instead, that 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, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

AMERICAN OVERSIGHT

As noted, third parties do not have a cognizable interest in the removal of a noncitizen, and the incidental financial effects of federal enforcement decisions on plaintiffs are not judicially cognizable under the INA. Nothing in §§ 1226(c) and § 1231(a)(2) suggests that Congress intended to permit States to rely on them to challenge federal immigration enforcement decisions that incidentally impact State finances.

c. Finally, plaintiffs' claims are unreviewable because the interim priorities are not final agency action. 5 U.S.C. § 704. An action is "final" only if, among other things, it determines legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). The interim priorities do not "require" any State or noncitizen "to do anything" and do not "prohibit" any State or noncitizen "from doing anything." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). They simply offer guidance to federal officers charged with exercising enforcement discretion in individual cases.

In concluding otherwise, the court suggested (Add.57-58) that the priorities altered legal obligations by directing line-level officers to make enforcement decisions that the court concluded were incompatible with the court's interpretations of §§ 1226(c) and 1231(a)(2). Those interpretations are mistaken, as explained above. But the court's reasoning is also mistaken because an action with no legal effect "on regulated entities" does not become final simply because it provides "instruction[s] to [agency] staff." *National Mining Ass'n*, 758 F.3d at 250-52. And here, the priorities

AMERICAN OVERSIGHT

confer no rights or obligations on third parties. Finally, the court emphasized (Add.59-61) that any noncitizen spared from enforcement action as a result of the memoranda could become eligible for Emergency Medicaid or for release into the United States. But those speculative downstream consequences are the result of the independent operation of other sources of law, not "direct and appreciable legal" consequences of the memoranda, *Bennett*, 520 U.S. at 178.

B. The Interim Priorities Are Lawful And Reasonable.

Even assuming that the interim priorities are reviewable, the district court's reasons for finding them unlawful do not withstand scrutiny.

1. First, the district court ruled (Add.105) that the interim priorities violate §§ 1226(c) and 1231(a)(2). As explained, however, those provisions do not override the Executive's immigration-enforcement discretion. *See supra* pp. 11-14. Even if they did impose mandatory obligations, the interim priorities would not violate them. Section 1226(c) only authorizes the detention of a noncitizen "pending the outcome of removal proceedings," *Jennings*, 138 S. Ct. at 838, and nothing in the memoranda purports to provide officials authority to release a noncitizen subject to that provision once they have exercised their antecedent discretion to pursue removal proceedings against and arrest him. More generally, the memoranda do not forbid the arrest, detention, or removal of any noncitizen. They simply require line-level officers to obtain supervisory approval to pursue enforcement against other-priority targets. Add.170, 173. The record confirms that preapproval has regularly been granted for

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005238

various individuals whose detention or removal constitutes a justified allocation of limited resources. Add.177-78.

2. Next, the district court erroneously concluded (Add.105-27) that the interim priorities lacked a rational connection between the facts found and the decision made. But that connection is apparent on the face of the memoranda. The memoranda explained that the agencies have "limited resources," Add.163, and that such resources have become further constrained by concerns arising from the pandemic and by foreign-relations considerations, Add.169. The agencies therefore directed limited resources to those actions that maximize the agencies' ability to "protect[] national security, border security, and public safety." Add.163. That straightforward explanation is all the APA requires.

The district court also concluded (Add.116-27) that the agency failed to consider the States' policy concerns and policy alternatives. As noted, however, DHS and ICE justified the priorities in terms of the relevant factors—the agencies' overarching duty to protect national security, border security, and public safety. And the court did not explain why any particular policy disagreement or policy alternative was significant enough to warrant special discussion. *Cf. Motor Vehicle Mfs. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (holding that the APA does not "require an agency to consider all policy alternatives in reaching [a] decision").

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005239

3. Finally, the district court concluded (Add.127-44) that the interim priorities were subject to notice-and-comment requirements. But the priorities are "general statements of policy" exempt from such requirements. 5 U.S.C. § 553(b)(3)(A). An agency action is a general statement of policy if it does not "impose any rights and obligations" and if it leaves "the agency and its decisionmakers free to exercise discretion" in individual cases. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted). The interim priorities do not create any rights or obligations nor do they compel or prohibit any action by any noncitizen or State. They also preserve multiple levels of discretion. DHS and ICE can revoke or amend the priorities at any time. And the priorities do not eliminate individual officers' authority to pursue noncitizens outside the priority categories. They simply urge officers to "exercise their discretion thoughtfully" and to consider "all relevant facts and circumstances" before expending scarce resources on nonpriority targets. Add.170.

II. The Remaining Factors Overwhelmingly Favor A Stay.

The government and the public will be irreparably injured if the preliminary injunction is not stayed pending appeal. These irreparable injuries outweigh the insubstantial harms that plaintiffs claim they will suffer as a result of the interim priorities. In recent years, the Supreme Court has repeatedly stayed broad injunctions against the Executive's immigration policies. *E.g.*, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. Mar. 11, 2020); *Department of Homeland Sec. v. New York*, No. 19A785

AMERICAN OVERSIGHT

(U.S. Jan. 27, 2020); *Barr v. East Bay Sanctuary Covenant*, No. 19A230 (U.S. Sept. 11, 2019); *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019). This Court should do the same here.

The preliminary injunction is "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers). The injunction usurps the Executive's constitutional and statutory authority by preventing the government from allocating scarce resources to the most serious offenders. Making matters worse, the district court has also required the government to submit monthly reports with respect to every noncitizen who would be covered by §§ 1226(c) and 1231(a)(2); to document the reasons behind every nonenforcement decision; and to retain the name of each individual officer responsible for those decisions. Add.158-59. No authority supports this extraordinary aggrandizement of judicial power at the Executive's expense.

The injunction is especially pernicious because it forbids the government from implementing a policy with proven results. As DHS and ICE anticipated when issuing the memoranda, the priorities have allowed the agencies to respond "in real time to pressing operational needs," Add.182. For example, ICE was able to "re-task[] several field operations teams" and over 300 officers to help states and localities "address increasing activity along the Southwest Border." *Id.* The priorities have also allowed the agencies to focus on "arresting and detaining the most dangerous

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005241

noncitizens." Add.180. From February through July 2021, the government processed just under 26,000 administrative arrests, nearly 20% of which involved noncitizens convicted of aggravated felonies. Add.181. By contrast, from February through July 2020, the government processed just over 39,000 administrative arrests, only 8% of which involved noncitizens convicted of aggravated felonies. *Id.* In other words, the government was able to increase its total arrests of such felons by approximately two-thirds.

More generally, upholding the injunction could destabilize the Nation's entire immigration-enforcement apparatus. Congress has not appropriated enough funds to detain every noncitizen who could come within the scope of §§ 1226(c) and 1231(a)(2). Another nationwide injunction has further resulted in the reduction of the government's available immigration-detention resources by directing ICE to enforce compliance with its Pandemic Response Requirements, which require that facilities make efforts to reduce populations to 75% of facility-capacity to enable social distancing, meaning that ICE can now operate only 26,800 detention beds. Add.179. As of August 20, 2021, 95% of those beds are occupied. Add.180. It is therefore unclear how DHS and ICE could comply with the court's injunction without adopting some other set of enforcement priorities. Yet the injunction orders the agencies to generate new guidance without any direction as to how the agencies should reconcile their enforcement efforts and limited resources with the injunction—and after holding that the previous set of priorities was both insufficiently explained and

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005242

improperly promulgated without notice-and-comment rulemaking. To the extent that the court's reasoning implies that the only acceptable priorities require arresting and detaining every noncitizen who would be covered by §§ 1226(c) and 1231(a)(2), compliance would be impossible and counterproductive.

It would be particularly problematic to allow the preliminary injunction to take effect while this appeal is pending because the DHS is nearing completion of its final priorities, which will likely render this case moot before this appeal is concluded. The consequent whipsawing between priorities regimes that will occur if the preliminary injunction is permitted to take effect will further cause confusion among DHS's workforce and undermine the agency's ability to effectively protect the Nation's safety.

The harms that the injunction inflicts on the United States and the public dwarf any incidental effect of the priorities on plaintiffs. The district court's finding of irreparable harm rests entirely on allegations that are insufficient even to satisfy Article III. *See supra* pp. 9-11. Even if those alleged harms were judicially cognizable, the notion that plaintiffs will suffer sufficient irreparable financial losses from a temporary stay to overcome the United States' countervailing interests is without merit.

Finally, even assuming plaintiffs were likely to succeed on some of their claims, that would not justify the relief granted. First, "[r]emand, not vacatur," and certainly not an injunction, is the appropriate remedy when (as here) there is "a serious possibility that the agency will be able to substantiate its decision given an opportunity

AMERICAN OVERSIGHT

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). And remand without vacatur is particularly appropriate here because, as explained above, other forms of relief "would be disruptive." *Central & S.W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). Second, the nationwide scope of the district court's injunction is inappropriate. Such universal relief contravenes core principles of Article III and of equity requiring that relief be tailored to redressing a plaintiff's specific injury and cannot be justified on the record in this case. *Cf. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

Finally, the district court also imposed onerous reporting requirements, purportedly "[t]o ensure compliance" with the injunction's terms. Add.158. Those requirements direct the government to file monthly reports providing the number of known noncitizens covered by § 1226(c) or § 1231(a)(2) who were not detained in the previous month and each covered noncitizen's address and (if applicable) the crime for which he was detained. *Id.* And the government must also make and retain contemporaneous records of the rationale for each nondetention decision and the deciding official. *Id.* Although the district court indicated today that it intends to modify those requirements, *see* Dkt. 90, it has not done so yet. The district court also stated today that the reporting requirements are not part of the injunction. But the government is unaware of any authority that would support imposing such requirements unless they were incident to the injunction. Because there is no

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005244

justification for the reporting requirements independent of the injunction, we ask the Court to stay those requirements as well.

CONCLUSION

The government respectfully requests that this Court stay the injunction pending appeal or until DHS issues final enforcement priorities, which DHS has informed undersigned counsel it intends to issue by the end of September. The government further requests that the Court provide relief by 12:00 p.m. on Monday, August 30, when the preliminary injunction will take effect.

Respectfully submitted,

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AUGUST 2021

AMERICAN OVERSIGHT

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5124 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel on August 23, 2021, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete. I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ Sean Janda
SEAN JANDA
Counsel for Appellants

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that, on August 23, 2021, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Sean Janda
SEAN JANDA
Counsel for Appellants

AMERICAN OVERSIGHT

No. 21-40618

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS AND STATE OF LOUISIANA,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants.

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

ADDENDUM TO EMERGENCY MOTION FOR A STAY PENDING APPEAL

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AMERICAN OVERSIGHT

TABLE OF CONTENTS

District Court Opinion and Order (Aug. 19, 2021) (Dkt. 79) 1

DHS Memorandum (Jan. 20, 2021) (Dkt. 1-1) 161

ICE Memorandum (Feb. 18, 2021) (Dkt. 1-2) 167

Declaration of Peter B. Berg (Aug. 20, 2021) (Dkt. 82-1) 175

Declaration of Thomas Homan (Aug. 22, 2021) (Dkt. 85-1) 187

Nick Miroff, *Why Immigration Detention Beds Became A New Issue In Trump Border Wall Fight*, WASH. POST (Feb. 19, 2019) (Doc. 85-2) 192

Declaration of Monica Burke (Aug. 23, 2021) (Doc. 87-1) 197

AMERICAN OVERSIGHT

United States District Court
Southern District of Texas
ENTERED
August 19, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

The STATE OF TEXAS; and the 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; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	§ § § §

3 (1996). That observation comes from a Senate Judiciary Committee Report addressing the problem of alien criminality in the United States. Similarly, the Supreme Court has stated "deportable criminal aliens who remain[] in the United States often commit[] more crimes before being removed." *Demore v. Kim*, 538 U.S. 510, 518, 123 S.Ct. 1708, 1715, 155 L.Ed.2d 724 (2003) (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). These observations, among others, led to the wholesale reform of our Nation's immigration laws in the 1990s.

Now, over two decades later, the States of Texas and Louisiana (the "States") seek to have the Executive Branch (the "Government")[1] adhere to two federal immigration statutes passed during that wholesale reform. The States want the Government to comply with 8 U.S.C. §§ 1226(c) and 1231(a)(2), which provide that the Government "shall" detain certain aliens when they are released from custody or during their removal period, respectively.[2] More specifically, the States move for a preliminary injunction to prohibit the Government from implementing two recent immigration memoranda which allegedly instruct Executive Branch officials to violate these laws.[3] (Dkt. No. 18).

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[1] The term "Government" used throughout this Memorandum Opinion and Order refers to the United States, the agencies, and the individuals sued in their official capacity.

[2] Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

[3] The States also seek an injunction compelling the Government to comply with the detention mandates in Sections 1226(c) and 1231(a)(2). (Dkt. No. 18).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005251

These immigration memoranda, issued on January 20 and February 18, 2021 (the "Memoranda"), purport to "prioritize" certain categories of aliens for enforcement action. (Dkt. No. 1-1); (Dkt. No. 1-2). The States point out that the priority categories enumerated in these Memoranda omit certain others—namely, aliens convicted of serious drug offenses, aliens convicted of crimes of moral turpitude, and aliens subject to a final order of removal. The States argue that federal law requires the Government to take custody of aliens falling within these overlooked categories, and the Memoranda are grinding these required detentions to a halt. Unsurprisingly, the Government disagrees and argues that the Executive Branch is simply acting within its discretion.

This case involves the intersection of several areas of administrative and immigration law. But more fundamentally, the claims made in this case implicate the separation-of-powers framework set forth in our Nation's Constitution. Put simply, the Government has instructed federal officials that "shall detain" certain aliens means "may detain" when it unambiguously mean *must* detain. Thus, the Court inquires whether the Executive Branch may direct officials to enforce a law enacted by Congress in a way that is contrary to the plain language of the law. That inquiry yields a clear answer: it may not. The Executive Branch may not instruct its officers to enforce a statute in a manner contrary to the law itself. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies . . . , faithfully executes them. The power of executing the laws [however] . . . does not include a power to revise clear

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005252

statutory terms that turn out not to work in practice." (citing U.S. Const. art. II, § 3) (cleaned up)).

Having considered the pleadings, the record, and the applicable law, the Court finds the States have satisfied the requirements for a preliminary injunction. Accordingly, the States' Motion is **GRANTED**.[4]

I. BACKGROUND

At first glance, the background facts of this case are straightforward. The Government issued two memoranda concerning civil immigration enforcement which the States claim violate two immigration laws. But upon closer examination, the actions of the Government and the claims by the States are strikingly complex. Congress did not design our Nation's immigration laws on a whim. Therefore, to place this case in its proper context and facilitate understanding of the function of Sections 1226(c) and 1231(a)(2), the Court begins by briefly detailing some of the history behind those statutes.[5]

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[4] In this Memorandum Opinion and Order, the Court does not address the States' likelihood of success on claims that the Memoranda are unlawful because they violate: (1) the Agreements between Texas and Louisiana and the Department of Homeland Security ("DHS"); and (2) the Constitution's requirement that the President "take Care that the Laws be faithfully executed." (Dkt. No. 1 at ¶¶ 122–31). In withholding a ruling on these claims, the Court is mindful that to succeed on their Motion, the States need only demonstrate a substantial likelihood of success on "at least one" claim, which they have. *See Texas v. United States*, 86 F. Supp. 3d 591, 672 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*). Moreover, given the significance of the substantial interests at stake in this case, the Court finds it to be in the interest of justice to rule after all Parties have an opportunity to make a complete presentation on the merits of these claims. *See id.* at 677. Similarly, the Court defers ruling on the States' request for an injunction to compel agency action unlawfully withheld pursuant to Section 706(1) of the Administrative Procedure Act. *See* footnote 61; *see also* (Dkt. No. 1 at 28); (Dkt. No. 18 at 26).

[5] In outlining the extensive background and history involved in this case, the factual statements made herein (except where the Court is discussing a factual dispute) should be (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005253

A. History Of Sections 1226(C) And 1231(A)(2)

The United States has long welcomed and benefited from immigration.[6] The Nation has, however, borne costs due to illegal immigration and the criminal conduct of illegal aliens. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 380–81 (2006). Congress in the 1990s was not blind to those concerns. As a legislative report from 1995 mentions, "[a]lthough immigrants to the United States have been, and continue to be, predominantly hard working and law abiding, there appears to be a growing criminal class among immigrants, especially among those here illegally." S. Rep. No. 104-48, at 7 (1995). Indeed, Congress directly linked illegal immigration with crime. The same legislative report provides:

> The fact that many criminal aliens have entered the U.S. illegally helps explain why so many aliens are involved in crime[.] [T]heir illegal situation conveys an "outlaw" status, often leading them into the shadowy realms of criminal lifestyles. The point was made succinctly in Congressional testimony by a former Commissioner of the INS, "[t]hose entering the United States illegally have no legitimate sponsors and are prohibited from holding jobs. Thus, criminal conduct may be the only way to survive."

Id. at 5.

Yet throughout much of its history, the United States had neither the means nor the ability to curb illegal immigration or alien criminality. Indeed, "[f]or much of this

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considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions, except where the Court discusses the various competing legal theories and positions, should be taken as conclusions of law regardless of any label or lack thereof.

[6] *See generally* John F. Kennedy, *A Nation of Immigrants* (1958); Andrea Barton, *Sitting on Ellis Island: The Fate of Disparate Immigration Policies in the Wake of the Guantanamo Bay Cases*, 23 Notre Dame J.L. Ethics & Pub. Pol'y 233, 237 (2009).

AMERICAN OVERSIGHT

country's history there has been no comprehensive body of immigration law and no laws at all addressing criminal aliens." *Id.* at 10. Despite the enactment of the Immigration and Nationality Act in 1952—and numerous immigration bills signed into law in the subsequent decades—these issues were "dealt with . . . mostly as an afterthought." *Id.* at 12. Prior to the 1990s, "no major immigration legislation ha[d] focused exclusively on the problem of criminal aliens." *Id.* And although there were attempts to solve the problem of illegal immigration and alien criminality, change happened in a "piecemeal fashion." *Id.* It is unsurprising, therefore, that the time leading up to the enactment of Sections 1226(c) and 1231(a)(2) has been regarded by the Supreme Court as a time of "wholesale failure by [the Executive Branch] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714 (citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 698, 121 S.Ct. 2491, 2503, 150 L.Ed.2d 653 (2001). The Executive Branch's failures at that time led to costs and consequences borne by the states, the citizens of this country, and its legal immigrants. *See Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; S. Rep. No. 104-48, at 1–2 (1995).

Congress's observations led to significant statutory reform in the federal detention of criminal aliens. Following numerous reports about the high rate of abscondment and recidivism among criminal aliens and the corresponding costs and negative effects, "Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. Section 1226(c)(1) reads:

AMERICAN OVERSIGHT

> The Attorney General *shall take into custody* any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d][7] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphases added) (footnote added). And to buttress this detention mandate, Congress in Subsection (2) provided detailed instructions on the narrow circumstances under which the Attorney General could release a detained illegal alien.

> The Attorney General *may* release an alien described in paragraph (1) *only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General 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. A decision relating to such release shall take place in accordance with a procedure

[7] The text of the statute says "sentence;" however, the Court notes it should probably be "sentenced."

AMERICAN OVERSIGHT

> that considers the severity of the offense committed by the alien.

Id. § 1226(c)(2) (emphases added).

Congress's efforts to protect the states, citizens, and legal immigrants from criminal illegal aliens through the INA during the 1990s were not confined to Section 1226(c). Through other statutes, too, "Congress explicitly expanded the group of aliens subject to mandatory detention." *Zadvydas*, 533 U.S. at 698, 121 S.Ct. at 2503 (citing Antiterrorism and Effective Death Penalty Act of 1996, § 439(c), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009–585, 3009–598 to 3009–599; 8 U.S.C. § 1226(c); and 8 U.S.C. § 1231(a)). That expansion is evident in 8 U.S.C. § 1231(a)(2), which outlines the Attorney General's discretion regarding the detention of illegal aliens who have been ordered removed:

> During the removal period, the Attorney General *shall detain* the alien. *Under no circumstance* during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphases added).

In view of the historical context and text of Sections 1226(c) and 1231(a)(2), Congress designed these two provisions to curtail the effects of illegal immigration and the concomitant concerns of alien criminality. But, as the Senate Judiciary Committee Report mentioned earlier admits, these statutory policies are futile if the "laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996).

AMERICAN OVERSIGHT

B. DETENTIONS IN PRACTICE

Previously, in *Texas v. United States*, the Court provided an in-depth overview of the immigration removal process. ____ F. Supp. 3d ____, ____, 2021 WL 2096669, at *4–9 (S.D. Tex. Feb. 23, 2021) (hereinafter "*Texas I*"). That discussion touched upon parts of the detention process for aliens subject to removal proceedings, *id.* at *5, and aliens subject to final orders of removal, *id.* at *8–9. Given the specific focus on detentions in this Motion for Preliminary Injunction, it is appropriate to more fully discuss the detention process for aliens subject to Sections 1226 and 1231.

To start, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, created a uniform procedure for deporting aliens or denying them entry into the United States. The detention and removal process under Section 240 of the Immigration and Nationality Act ("240 proceedings") commences when DHS files a Notice to Appear ("NTA") against an alien or noncitizen—who are designated as "respondents"—in immigration court. *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465 (2018); *see* 8 C.F.R. § 1003.14; Jennifer Williams, *The Potential Implications of the Supreme Court's Decision in* Pereira v. Sessions *on Prosecutions for Illegal Reentry Under 8 U.S.C. § 1326*, 67 DOJ J. Fed. L. & Prac. 141 (2019); *see also* (6:21-cv-3, Dkt. Nos. 82 at 12, 82-1 at 5, 83 at 14). Federal law then gives the Attorney General—and immigration judges by extension of DOJ's internal organizational structure—discretion on whether such an alien may continue to be detained during the proceedings or released on bond or conditional parole pursuant to Section 1226(a). 8 U.S.C. § 1226(a).

AMERICAN OVERSIGHT

For criminal aliens, however, the start of the process is a bit different. Such aliens are taken into custody by officers within the Executive Branch (*i.e.*, Immigration and Customs Enforcement ("ICE") agents) in generally three ways: an ICE arrest; in execution of detainers after a local police stop, *see* 8 C.F.R. § 287.7(a) (2011); or after completion of incarceration for a prior criminal conviction, *see* 8 C.F.R. § 287.5(c) (2016). *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 302 (2013). Of the three, immigration detainers are particularly important:

> The Executive branch uses immigration detainers to control the release of non-citizens from state prisons and local jails. When federal immigration officials learn that a state or local law enforcement agency has custody of a non-citizen targeted for immigration proceedings or investigation, they issue a detainer to give notice to state or local officials that the federal government intends to take custody of the non-citizen upon release. The form detainer notice issued by federal immigration officials directs the recipient that federal regulations require the recipient agency to detain the non-citizen for a brief period of time after the non-citizen would otherwise be released from custody.[8] Absent the ability to issue detainers, immigration enforcement officials would have to be present at the gates of the state or local detention facility to apprehend the non-citizen upon release.

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[8] Federal regulations permit the temporary detention of certain incarcerated aliens at DHS's request for a period not to exceed 48 hours "in order to permit assumption of custody" of the detainee by DHS. 8 C.F.R. § 287.7(d). Note at least one state court determined that beyond the 48-hour mark, state authorities must release the incarcerated aliens "[i]f the federal government *fails to apply* federal law and take custody of [the criminal aliens] within the time limit set by federal regulations." *Ochoa v. Bass*, 2008 OK CR 11, ¶ 19, 181 P.3d 727, 733 (emphasis added).

AMERICAN OVERSIGHT

Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L. Rev. 164, 165 (2008) (footnote added) (citations omitted).[9]

In the past, ICE and DHS have been known to "screen" state prison and local jail populations for criminal aliens who may be subject to Section 1226(c). *Id.* at 177 (citing U.S. Immigration and Customs Enforcement, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (Mar. 28, 2008), not available online (Aug. 2, 2021)). This screening takes place, at least in some circumstances, without cooperation from state and local authorities. *See, e.g.*, *State v. Reyes-Armenta*, No. M2004-00419-CCA-R3-CD, 2004 WL 2804898, at *2 (Tenn. Crim. App. 2004) ("The codefendants were then taken to the Sumner County Jail for processing. The officers had made no attempt to contact federal immigration officials; however, Agent Robert Kinghorn, an immigration officer, happened to be at the Sumner County jail and issued detainers on the defendants."). Additionally, in the past, "DHS's practice appears to be to place a detainer as soon as DHS learns of a potentially deportable prisoner—in many cases before conviction, close in time to the alien's arrest." Lasch, *supra*, at 178.

Once the alien is in mandatory custody pursuant to Section 1226(c), an NTA may be issued, formally beginning the immigration removal proceedings. Mark Noferi,

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[9] The importance of detainers aside, note that "[t]here are certainly other mechanisms available to assist in implementing the federal apprehension of criminal aliens." *Id.* at 175. For instance, written agreements between the Executive Branch and states and local governments pursuant to 8 U.S.C. § 1357(g) may permit state and local law enforcement "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)." 8 U.S.C. § 1357(g). In another example, the Executive Branch may also enter an "inter-governmental service agreement" with local and state jails to authorize such detention centers to house prisoners on behalf of DHS. Lasch, *supra*, at 175.

AMERICAN OVERSIGHT

Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 Mich. J. Race & L. 63, 83 (2012). Because certain criminal aliens are required to be detained, a Notice of Custody Determination ("Form I-286") may also be issued. *Id.* (citing 8 C.F.R. § 231.1(g)(1) (2011)). The Form I-286 explains an ICE officer's determination that an alien is subject to mandatory detention because the alien falls within certain categories of Section 1226(c). *Id.* For such aliens, "the NTA's removal charge will commonly be the [Form I-286] charge justifying mandatory detention." *Id.*

While in detention, the criminal alien is entitled to a "*Joseph* hearing." *Id.* at 63, 85–86; *see Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). The hearing is the detainee's only chance to challenge the mandatory nature of his or her detention. *Joseph*, 22 I. & N. Dec. at 800; Noferi, *supra*, at 85–86; Savaresse, *supra*, at 303. The point of the *Joseph* hearing is to determine whether the detainee challenging mandatory detention was "properly included" within a mandatory detention category; that is, the categories enumerated in Section 1226(c). *See Joseph*, 22 I. & N. Dec. at 800; Savaresse, *supra*, at 303. If the detainee prevails, he or she is entitled to a bond determination. *See Joseph*, 22 I. & N. Dec. at 808–09.

The detention process is similar for aliens with final orders of removal, *i.e.*, those who exhausted the removal proceedings and were found to be deportable. *See* 8 U.S.C. § 1231(a)(2). Criminal aliens who were initially detained under Section 1226(c) must remain in ICE custody as their removals are processed. *See* 8 U.S.C. §§ 1226(c)(2) and 1231(a)(2). As for the aliens with final orders of removal who are not currently in ICE

AMERICAN OVERSIGHT

custody, ICE sends a "Bag-and-Baggage" letter requiring the aliens to report to an ICE facility for detention and deportation. *Qian Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007); *Bermudes-Cardenas v. Gonzales*, 184 F. App'x 406, 407 (5th Cir. 2006) (per curiam). An alien who fails to report is classified by ICE and the circuit courts as a "fugitive." *See, e.g.*, *Giri v. Keisler*, 507 F.3d 833, 834–36 (5th Cir. 2007). Once an alien is in custody, ICE takes the lead in coordinating their removal from the country. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *9.

C. THE JANUARY 20 MEMORANDUM

More than two decades after Congress changed the way this country approached the issues of illegal immigration and alien criminality, the current Administration set forth its views advocating a different approach from its predecessor. *See* Revision of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021) ("[The current] Administration will *reset* the policies and practices for enforcing civil immigration laws to align enforcement with [certain] values and priorities." (emphasis added)).

Once the current Administration assumed power on January 20, 2021, it wasted no time issuing its first memorandum on civil immigration enforcement (the "January 20 Memorandum"). (Dkt. No. 1-1). The January 20 Memorandum, signed by Acting DHS Secretary David Pekoske, announced changes to the enforcement of the Nation's immigration laws. (Dkt. No. 1-1). The January 20 Memorandum begins by acknowledging the current issues the federal government is encountering in enforcing immigration laws, noting the United States "faces significant operational challenges at

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005262

the southwest border as it is confronting the most serious global public health crisis in a century." (*Id.* at 2). The January 20 Memorandum goes on to say, "in light of those unique circumstances," DHS must substantially increase "resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security." (*Id.*) In Section A, the January 20 Memorandum calls for a "Department-wide review of policies and practices concerning immigration enforcement[.]" (*Id.* at 3). In Section B, the January 20 Memorandum articulates "interim enforcement priorities [that] shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the" Department-wide review. (*Id.* at 3–4). Pending completion of the Department-wide review, the January 20 Memorandum lists three DHS enforcement priorities:

> 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

AMERICAN OVERSIGHT

> at the time of conviction, and are determined to pose a threat to public safety.

(*Id.* at 3). The January 20 Memorandum then qualifies its prioritization scheme by stating, "[w]hile resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." (*Id.* at 4).

In Section C, the January 20 Memorandum orders a temporary pause on removals of noncitizens, with some exceptions.[10] (*Id.* at 4–5). Specifically, the January 20 Memorandum directs "an immediate pause on removals of any noncitizen with a final order of removal . . . for 100 days[.]" (*Id.* at 4). The January 20 Memorandum justifies this pause by pointing to DHS's "limited resources," which it claims "must be prioritized to . . . provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently" and

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[10] The January 20 Memorandum excludes from the 100-day pause any alien with a final removal order who:

> 1) According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
> 2) Was not physically present in the United States before November 1, 2020; or
> 3) Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver and has been given a meaningful opportunity to access counsel prior to signing the waiver; or
> 4) For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

(Dkt. No. 1-1 at 4–5) (footnote omitted).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005264

to "comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact." (*Id.*). Further, the January 20 Memorandum states, the pause is necessary for DHS to "ensure that [its] removal resources are directed to [its] highest enforcement priorities." (*Id.*).

This Court partially enjoined the January 20 Memorandum on January 26 with a temporary restraining order, *Texas v. United States*, ____ F. Supp. 3d ____, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021), and again on February 23 with a preliminary injunction, *Texas I*, ____ F. Supp. 3d ____, 2021 WL 2096669. Specifically, this Court enjoined Section C of the January 20 Memorandum, which paused removals of aliens with a final order of removal for 100 days. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52. In doing so, this Court explicitly left intact Section B of the January 20 Memorandum, which enumerates DHS's "enforcement priorities" going forward. (*Id.*). Section B is a subject of this litigation. (Dkt. No. 1-1 at 3–4).

D. THE FEBRUARY 18 MEMORANDUM

On February 18, 2021, five days before the preliminary injunction was signed in *Texas I*, ICE Acting Director Tae D. Johnson issued the February 18 Memorandum to all ICE employees. (Dkt. No. 1-2). The February 18 Memorandum became "effective[] immediately" and controls to the extent it conflicts with the January 20 Memorandum. (*Id.* at 2). Designed to implement Section B of the January 20 Memorandum,[11] the February 18 Memorandum broadly delineates six "revisions":

[11] The January 20 Memorandum provides that "the Acting Director of ICE shall issue operational guidance on the implementation of these priorities." (Dkt. No. 1-1 at 4).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005265

> 1) authorization to apprehend presumed priority noncitizens in at-large enforcement actions without advance approval;
>
> 2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities;
>
> 3) authorization to apprehend without prior approval other presumed priority noncitizens who are encountered during enforcement operations;
>
> 4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended;
>
> 5) the further delegation of approval authority; and
>
> 6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

(*Id.* at 2–3).

Relevant to this case, the February 18 Memorandum lists three "criteria defining cases that are presumed to be priorities." (*Id.* at 5). The first priority category is national security.

> A noncitizen is *presumed* to be a national security enforcement and removal priority if: 1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities; 2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities; or 3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

(*Id.*) (emphasis in original). The second priority category is border security.

> A noncitizen is *presumed* to be a border security enforcement and removal priority if: 1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020; or 2) he or she

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005266

> was not physically present in the United States before November 1, 2020.

(*Id.*) (emphasis in original). And the final priority category is public safety.

> A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and: 1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA; or 2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

(*Id.* at 5–6) (emphasis in original).

In addition to the three enforcement priorities, the February 18 Memorandum explains, "[o]fficers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases"—*i.e.*, the three enforcement priorities—"beyond what existing policy requires and what a supervisor instructs." (*Id.* at 6). By contrast, preapproval is required for enforcement or removal actions that do not fall under the three enforcement priorities. (*Id.* at 7). But there are certain exceptions. The February 18 Memorandum, for example, posits that there are circumstances when "the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action." (*Id.*). But this is "generally . . . limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*).

AMERICAN OVERSIGHT

E. PROCEDURAL BACKGROUND

The States filed this case on April 6, 2021. (Dkt. No. 1). In its six-count Complaint, the States allege the January 20 and February 18 Memoranda are unlawful because they violate:

1) the Administrative Procedure Act's ("APA") proscription of actions that are "not in accordance with law" and "in excess of . . . authority" by transgressing a statutory duty of DHS to detain certain individuals pursuant to 8 U.S.C. § 1226(c) (Count I) and 8 U.S.C. 1231(a)(2) (Count II);[12]

2) the APA's proscription of actions that are "arbitrary [and] capricious" (Count III);[13]

3) the APA's requirement that agency rules be subject to notice and comment (Count IV);[14]

4) the Agreement between the States and DHS (Count V);[15] and

5) the Constitution's requirement that the President "take Care that the Laws be faithfully executed" (Count VI).

(Dkt. No. 1 at ¶¶ 94–131).

On April 27, 2021, the States filed a Motion for Preliminary Injunction moving to enjoin the implementation and enforcement of the January 20 and February 18

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[12] 5 U.S.C. § 706(2)(A), (C).

[13] 5 U.S.C. § 706(2)(A).

[14] 5 U.S.C. § 553.

[15] As this Court noted in *Texas I*, DHS, "U.S. Customs and Border Protection . . ., U.S. Immigration and Customs Enforcement . . ., and U.S. Citizenship and Immigration Services . . . entered into a Memorandum of Understanding Between Texas and DHS concerning certain aspects of the nation's immigration laws." ___ F. Supp. 3d at ____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). "The Agreement was finalized on January 8, 2021—just 12 twelve days before the transition from the Trump Administration to the Biden Administration." *Texas I*, ___ F. Supp. 3d at____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). DHS and the Louisiana Department of Justice entered into a nearly identical agreement, which was also finalized on January 8, 2021. (Dkt. No. 1-4).

AMERICAN OVERSIGHT

Case 2:21-cv-00618 Document 00515990757 Page 48 Date Filed 08/23/2021

Memoranda. (Dkt. No. 18 at 43). The Government filed a Response in opposition, (Dkt. No. 42), to which the States filed a Reply. (Dkt. No. 51). Several amicus briefs have also been filed in support of and in opposition to the Motion. (Dkt. No. 25); (Dkt. No. 48); (Dkt. No. 49). The Motion is now ripe for review.

II. JURISDICTION AND JUDICIAL REVIEW

Before addressing the merits, this Court must consider the threshold issues of whether the States have standing to bring this action and whether the APA allows this Court to review the Memoranda challenged by the States. The States contend they have standing, and their claims are reviewable. (Dkt. No. 18 at 35–40). The Government disagrees. (Dkt. No. 48 at 22–36). Based on the following, the Court finds the States have standing and their claims are reviewable.

A. STANDING

Article III of the Constitution confines judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2. "For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, ____ U.S. ____, ____, 139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019). A plaintiff has standing to sue only where it satisfactorily shows it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 856, ____, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990)); *see also Barber v. Bryant*, 860 F.3d 345, 352 (5th

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005269

Cir. 2017). In short, injury, traceability, and redressability comprise the "irreducible constitutional minimum" of standing. *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136).

Under certain circumstances, states like Texas and Louisiana are not "normal litigants." *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). Where a state alleges a defendant violated a congressionally accorded procedural right which affected the state's "quasi-sovereign" interests, that state is afforded "special solicitude" in its quest to establish standing. *Id.* at 520–21, 127 S.Ct. at 1454–55; *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015) , *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*) (hereinafter "*Texas DAPA*"). Specifically, a state armed with special solicitude can more easily satisfy the traceability and redressability elements of the traditional standing inquiry. *Massachusetts*, 549 U.S. at 520–21, 127 S.Ct. at 1454–55; *Texas DAPA*, 809 F.3d at 151–55.

Here, the States assert they have standing under the traditional inquiry *and* because they are owed special solicitude. (Dkt. No. 18 at 35–37). The Government counters that the States fail all three prongs of the traditional inquiry, and they are not entitled to special solicitude because they do not assert a proper quasi-sovereign interest. (Dkt. No. 42 at 22–25 & n.5). Based on the following, the Court finds the States have satisfied the traditional inquiry and, regardless, are owed special solicitude which would satisfy any doubts.

AMERICAN OVERSIGHT

Case 2:21-cv-00067 Document 70 Filed on 08/19/21 in TXSD Page 22 of 250

1. **Injury in Fact**

The States' first task is to establish an injury in fact. A plaintiff satisfies that burden where it shows it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136). An alleged injury is sufficiently concrete if it is "*de facto*," meaning it "actually exist[s]" and is not merely "abstract." *Id.* (alteration added) (citations omitted). An alleged injury is sufficiently particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (alteration added) (quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. at 2136 n.1). And lastly, an alleged injury is sufficiently actual or imminent, respectively, if the plaintiff suffers "continuing, present adverse effects" or demonstrates he "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending." *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (emphases in original) (citations omitted).

The States assert the Memoranda will injure two basic interests: their financial interests and their interest as *parens patriae* in protecting their citizens from criminal aliens. (Dkt. No. 35–37). As it pertains to their financial interests, the States claim the Memoranda will require them to spend more on detention facilities and several public benefits and services. (*Id.* at 35–36). Regarding the States' interest as *parens patriae*, the States allege the Memoranda will result in an increase in crime from aliens within their borders, thus harming their citizenries' physical and economic well-being. (*Id.* at 37).

AMERICAN OVERSIGHT

The Government does not seriously refute the Memoranda will result in "a drop" in immigration enforcement actions. (Dkt. No. 42 at 23). Nor could it. For example, Texas has put forth undisputed evidence 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. (Dkt. No. 19-3 at 5). That's 68 more rescinded detainers than during the same period the year prior. (*Id.* at 3, 8) (showing no detainers were dropped from January 20, 2020, to March 20, 2020). Of note, the list includes 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 the sexual assault of a child. (*Id.* at 6–7). And at least six had received a final order of removal. (*Id.* at 5). Importantly, current ICE officials "attribute" the Government's sharp decline in maintaining detainers "to the new 'enforcement priorities' established by the [M]emoranda during the Biden Administration."[16] (Dkt. No. 46 at ¶ 17).

Rather than challenge the suffocating effect of the Memoranda on federal detentions of criminal aliens, the Government counters that any drop in detentions is of

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[16] This statement comes directly from the Chief of Staff of the Texas Department of Criminal Justice. (Dkt. No. 46 at 2). It is unclear whether the "ICE officials" quoted by the Chief of Staff made this statement in a capacity excluding the statement from the rule against hearsay. *See* Fed. R. Evid. 801(d)(2). But even if hearsay, this Court may rely on the statement at the preliminary injunction phase. *See Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."). The Government has made no showing that this testimony is otherwise unreliable, and the Court finds none itself. Rather, the sworn affidavit from the Chief of Staff under penalty of perjury possesses sufficient indicia of reliability as to the statement of the ICE officials. The Court therefore accepts as fact, at the preliminary injunction phase, the testimony of the Chief of Staff regarding the statement of current ICE officials.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005272

no real consequence to the States. It argues, even if the Memoranda cause detentions to decline, the States' theories of injury rely on a "speculative chain of events involving independent actions by third parties." (Dkt. No. 42 at 23). Specifically, the Government asserts the States would incur increased financial expenses and exposure to crime only if two conditions are satisfied: (1) the aliens who would have otherwise been detained commit crimes or choose to use public benefits and services; *and* (2) those aliens do so at a higher rate than the noncitizens who *are* removed as a result of the Memoranda. (*Id.* at 23–24).

The Government's concern over the causal chain of events involving third-party action is noteworthy but out-of-turn. These concerns pertain to the "fairly traceable" prong of the traditional standing inquiry. *See Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565–66 (finding "traceability . . . satisfied" where the plaintiffs' theory "relies . . . on the predictable effect of Government action on the decisions of third parties"); *Texas DAPA*, 809 F.3d at 156–60 (finding a plaintiff–state's financial injury was "fairly traceable" to the independent conduct of third-party aliens); *see also California v. Texas*, ____ U.S. ____, ____, 141 S.Ct. 2104, 2116–17 (2021) (finding "an individual's decision to enroll [in] Medicaid" was not "fairly traceable" to the Affordable Care Act's "minimum essential coverage provision" (alteration added)). Therefore, although the Government's third-party causation concerns will need to be addressed, the Court reserves its analysis on those issues for discussion of the traceability of the States' alleged injuries. For now, the Court inquires whether the States have presented a cognizable injury to their financial interests or interests as *parens patriae*. *See also Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2

AMERICAN OVERSIGHT

(explaining "imminence" is shown where a plaintiff "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending" (emphases in original) (citations omitted)); *cf. Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565 (sidestepping the reliance of the plaintiff-states' "future" injuries upon independent decisions of third-party aliens to underreport in a census and holding the injuries were sufficiently "concrete and imminent" because the plaintiff–states demonstrated, "*if* noncitizen households are undercounted by as little as 2%[,] . . . they will lose out on federal funds that are distributed on the basis of state population" (emphasis added)). They have.

a. Financial Injuries

Between the States, Texas marshals the lion's share of state-specific evidence concerning injury. *Compare* (Dkt. Nos. 19-5–19-9) *with* (Dkt. No. 19-12). The Court therefore focuses its attention on Texas's evidence. *See Texas DAPA*, 809 F.3d at 155 (same). Texas's alleged financial injury affects three categories of its public fisc: Texas's detention system, public education services, and healthcare-related costs. (Dkt. No. 18 at 35–36). Texas asserts that in these three categories it will incur unanticipated costs due to the "rushed implementation" of the Memoranda which "deprived [it] of the ability to adjust[] [its] policies in light of the federal shift." (*Id.* at 41).

To begin, Texas has alleged injury to a legally protected interest. *See Spokeo,* 578 U.S. at ____, 136 S.Ct. at 1548. Texas complains it will incur additional costs to its public fisc because of an unlawful and sudden shift in federal immigration policy. (Dkt. No. 18 at 35). Theories of injury to state or local financial interests predicated on the actions of

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005274

the federal government are not novel. *See, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430–31, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393 (1998) (finding sufficient for standing purposes a local government's claim to suffering injury to its "borrowing power, financial strength, and fiscal planning"); *Texas DAPA*, 809 F.3d at 152–53 (finding sufficient for standing purposes several states' claims to suffering injury to their public fiscs); *see also Sch. Dist. of City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261–62 (6th Cir. 2009). And such financial harm is particularly acute in the context of federal immigration enforcement, where states have "an interest in mitigating the potentially harsh economic effects of *sudden shifts* in population." *Plyler v. Doe*, 457 U.S. 202, 228, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786 (1982) (emphasis added); *see id.* at n.23 (explaining, because the Constitution deprives states of any "direct interest in controlling entry into this country, . . . unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service"); *Texas DAPA*, 809 F.3d at 152–54; *see also Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012) (acknowledging states "bear[] many of the consequences of unlawful immigration"); *DHS v. Regents of the U. of Cal.*, ____ U.S. ____, ____, 140 S.Ct. 1891, 1913, 207 L.Ed.2d 353 (2020) (finding a sudden shift in the government's immigration policy was arbitrary and capricious in part because the government "failed to address whether there was legitimate reliance" on the former immigration policy (quotation omitted)). In sum, the financial injuries incurred by states from "sudden shifts" in their population due to federal immigration policies are not nebulous. *Plyler*, 457 U.S. at 228, 102 S.Ct. at 2400. Rather, they are among the "serious and well recognized" vintage of legally protected

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005275

interests. *Massachusetts*, 549 U.S. at 521, 127 S.Ct. at 1455. By requesting equitable relief from the impact of the Memoranda on its public fisc, then, Texas appropriately seeks judicial shelter.

The remaining inquiries as to Texas's alleged financial injury concerns whether it is sufficiently concrete, particularized, and actual or imminent. *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. The Government does not contest that Texas's alleged injury is particularized to Texas, and the Court finds that it is. Texas can therefore establish an injury in fact for its financial injury if it is both concrete and actual or imminent.

Texas asserts a financial injury in the form of added costs to its detention system. Texas states the Memoranda will lead to an unanticipated rise in criminal activity from aliens the federal government would otherwise detain. (Dkt. No. 18 at 15–16, 35–36). On average, Texas spends $62.34 per day per inmate in its detention facilities. (Dkt. No. 19-6 at 3–4). In 2018, Texas detained 8,951 criminal aliens for a total of 2,439,110 days, costing $152,054,117.[17] (*Id.*). If even one alien not detained due to the Memoranda recidivates, Texas's costs "will increase" in accordance with its current cost per inmate. (*Id.* at 4); *cf. Dep't. of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565.

The Court finds Texas's claimed injury from unanticipated detention costs is sufficiently concrete and imminent. The harm is concrete because Texas incurs real financial costs in detaining criminal aliens. And the harm is imminent because Texas

[17] As the Court discusses *infra*, the federal government reimbursed Texas for a miniscule fraction of its costs for detaining criminal aliens as part of a statutorily mandated program that seeks to help states with the burden of incarcerating criminal aliens. *See* 8 U.S.C. § 1231(a)(1)(A).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005276

currently operates a detention system holding criminal aliens and plans to continue doing so in the future.[18]

b. *Parens Patriae* Injury

In addition to its financial injury, the States assert they have been injured in their interests as *parens patriae*. (Dkt. No. 18 at 37). The Government counters that the States are precluded from bringing a *parens patriae* action against the federal government. (Dkt. No. 42 at 24 & n.5). Based on the following, the Court concludes the States properly lay claim to a *parens patriae* injury.

"*Parens patriae* means literally 'parent of the country.'" *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (quoting Black's Law Dictionary 1003 (5th ed. 1979)). The concept derives from the English constitutional system. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972). As that system developed, the Crown retained certain "duties and powers" referred to as the "royal prerogative." *Id.* (citation omitted). For example, as the "father of the country," the King served as the guardian of persons with legal disabilities. *Id.* (internal quotations omitted). When the United States achieved independence, "the prerogatives of the crown devolved upon the people of the States." *Wheeler v. Smith*, 50 U.S. (9 How.) 55, 78, 13 L.Ed. 44 (1850). That is, "[t]he State, as a sovereign," became "the *parens patriae*." *Id.* Like the King before them, the states were

[18] Because the States have put forth sufficient evidence to demonstrate a concrete and imminent injury regarding Texas's detention costs and *parens patriae*, *see infra* II.A.1., the Court need not address the States' alleged financial injuries arising from unanticipated education and healthcare-related expenses.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005277

now responsible for acting "in the interests of humanity" and "for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 808, 34 L.Ed. 478 (1890).

Once vested in the states, the scope of a *parens patriae* action under American law "greatly expanded." *Hawaii*, 405 U.S. at 257, 92 S.Ct. at 889. The first such expansion is noteworthy. Coincidentally, in a previous dispute between the States in this case, Louisiana sought through a *parens patriae* action to enjoin Texas from continuing a trade embargo that was allegedly injuring Louisiana's economy. *Louisiana v. Texas*, 176 U.S. 1, 3–4, 11–12, 20 S.Ct. 251, 251–52, 254, 44 L.Ed. 347 (1900). Texas's lead health official had cinched the spigot on all commerce flowing between the city of New Orleans and the State of Texas "under the guise of a quarantine against yellow fever." *Id.* at 11, 20 S.Ct. at 254. A standing issue arose because Louisiana had simultaneously invoked the Supreme Court's original jurisdiction, which required a "controversy arising directly between" the states as sovereigns, *and* asserted an interest as *parens patriae*, which had traditionally been a tool for a state to vindicate "the grievances of particular individuals" within its borders. *Id.* at 16, 20 S.Ct. at 256. To reconcile this seeming conflict, the Court determined Louisiana had properly stated an interest as *parens patriae* in protecting "her citizens at large" from economic harm due to Texas's quarantine regulations. *Id.* at 19, 20 S.Ct. at 257. This interest, reasoned the Court, stemmed in part from the fact that Louisiana, as a state, held no right under the Constitution to regulate "the freedom of interstate commerce." *Id.* Although the Supreme Court ultimately held Louisiana lacked standing for other reasons, *id.* at 22–23, 20 S.Ct. at 258–59, the case is considered the first

AMERICAN OVERSIGHT

to expand the notion of *parens patriae* to a state's interest in protecting its citizens' interests broadly. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266.

Perhaps unsurprisingly, the concept of a *parens patriae* action to vindicate the rights of a state's citizens-at-large proved popular. *See id.* at 603, 102 S.Ct. at 3266–67 (listing cases brought by various states during the early 20th century). And not long after *Louisiana v. Texas*, Justice Holmes referred to a state's interests in such broader matters as "quasi-sovereign" interests. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907). The term stuck. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374, 44 S.Ct. 138, 139, 68 L.Ed. 342 (1923); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447, 450, 65 S.Ct. 716, 721, 722, 89 L.Ed. 1051 (1945). And before long, the doctrine evolved to the point that the Supreme Court determined quasi-sovereign interests to be not simply a branch of traditional *parens patriae* actions, but the *sine qua non* of *parens patriae* actions. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266. ("[T]o have [*parens patriae*] standing, the State *must* express a quasi-sovereign interest[.]" (alteration and emphasis added)).

But lending this workable term to the abstract concept of a state's interest in its citizenry did not resolve all questions regarding *parens patriae* standing. Namely, the referent "quasi-sovereign interest," without more, proved useless in settling whether a state's injury is sufficiently "concrete" for purposes of Article III standing. *Id.* After all, a quasi-sovereign interest itself is nothing more than a "judicial construct" that does "not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. at 3265. On its surface, the term clearly was crafted to help distinguish from a state's "sovereign interests, proprietary interests, or private interests." *Id.* at 602, 102 S.Ct. at 3266. And an inch

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005279

deeper, the term represented "a set of interests that the State has in the well-being of its populace." *Id.* But those broad contours alone, absent further granularity, "risk[ed] being too vague to survive the standing requirements" of the Constitution. *Id.*

Recognizing this concreteness issue, the Supreme Court in *Alfred L. Snapp & Son* took it upon itself to hammer out, as best it could, the notion of a quasi-sovereign interest. 458 U.S. 592, 102 S.Ct. 3260. While at once conceding that "the articulation of such interests is a matter for case-by-case development," the Supreme Court nevertheless provided "two general categories" into which characteristics of a true quasi-sovereign interest may fall.

"First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. at 3269. Regarding the first category, the Supreme Court further elaborated, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the state standing to sue as *parens patriae* is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* And regarding the latter, the Supreme Court explained, "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents." *Id.*

Building on this rubric, the Fifth Circuit has concluded that a state's claim to a "quasi-sovereign" interest for standing purposes is sufficient when the state seeks to "protect[] its citizens from criminal activity." *Castillo v. Cameron County*, 238 F.3d 339, 351

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005280

(5th Cir. 2001) (citing *Snapp*, 458 U.S. at 602, 102 S.Ct. at 3260). In *Castillo*, Texas sought to overturn a federal district court's injunction which permitted a local County Sheriff to refuse to incarcerate alleged parole violators to reduce the county's jail population. 238 F.3d at 343–47. To prove standing in that circumstance, Texas was required to show, among other things, it had a "personal stake" in the outcome. *Id.* at 350–51. The panel held that Texas satisfied this showing in part by alleging a valid quasi-sovereign interest in protecting its citizens from criminal activity. *Id.* at 351. As a result of the injunction, the panel explained, "parole violators who should be incarcerated remain[ed] free, potentially increasing the level of criminal activity." *Id.* Although fully aware that "the concept of quasi-sovereign standing 'risks being too vague to survive the standing requirements of Article III,'" the panel found that Texas's interest in protecting its citizens from increased criminal activity "[fell] within the category of 'a quasi-sovereign interest in the health and well–being—both physical and economic—of its residents in general.'" *Id.* (quoting *Snapp*, 458 U.S. at 602, 102 S.Ct. 3260).

Bearing these principles in mind, the Court now turns to the States' basis for *parens patriae* standing in this case. The States assert a quasi-sovereign interest in protecting their citizens' physical and economic well-being "from crime caused by [the Government's] failure to detain criminal aliens." (Dkt. No. 18 at 37). As it pertains to "criminal activity" in general, *Castillo* resolves that the States here possess a quasi-sovereign interest in protecting their citizens. 238 F.3d at 351.

As it pertains to the criminal activity of "aliens" specifically, the States' interests are perhaps stronger than the circumstances presented in *Castillo*. Whereas in *Castillo* the

AMERICAN OVERSIGHT

State of Texas sought to protect its citizens from criminal activity in an area of law over which the State retained extensive authority—the procedure for detaining alleged parole violators—here the States retain *no* authority over the detention of criminal aliens upon their release from state prison and during the pendency of their removal proceedings. That is, the injury to the States' quasi-sovereign interest in protecting their citizens from criminal aliens is especially severe here because the States' hands are tied, in effect, when it comes to federal immigration policy. *See* U.S. Const. art. I, § 8, cl. 4 (conferring upon Congress the Power "[t]o establish an uniform Rule of Naturalization"); *Arizona*, 567 U.S. at 394–95, 132 S.Ct. at 2498 (holding that a state law "authorizing state officers to decide whether an alien should be detained for being removable . . . violates the principle that the removal process is entrusted to the discretion of the Federal Government" (citations omitted)).

By seeking relief for an injury to their populace from which they have no constitutional mode of recourse, the States align themselves with the rationale employed by the Supreme Court to support the first expansion of *parens patriae* standing in *Louisiana v. Texas*. Just as Louisiana once sought "vindication of the freedom of interstate commerce" that was "not committed" to it by the Constitution, here the States seek protection from an effect of a federal immigration policy that the States possess no constitutional authority to change.[19] *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Snapp*,

[19] The fact that an expansion of *parens patriae* to citizens-at-large in *Louisiana v. Texas* was determined in a case involving the Supreme Court's original jurisdiction does not restrict the scope of quasi-sovereign interests in non-original jurisdiction cases. If anything, the opposite is (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005282

458 U.S. at 608, 102 S.Ct. at 3269. Accordingly, the Court holds that the States possess a quasi-sovereign interest in protecting their citizens-at-large from the criminal activity of aliens subject to mandatory detention under federal law.

The Government contends that the States nevertheless are barred from bringing a *parens patriae* action "against the federal government." (Dkt. No. 42 at 24). For this proposition the Government relies exclusively upon *Massachusetts v. Mellon*, where the Supreme Court denied *parens patriae* standing to a state suing the federal government to protect its citizens from the "operation of" a federal statute called the Maternity Act. 262 U.S. 447, 479, 485–86, 43 S.Ct. 597, 598, 600, 67 L.Ed. 1078 (1923). A critical feature of the Supreme Court's rationale was that the state had not identified any "rights of the state falling within the scope of the judicial power," such as "quasi sovereign rights." *Id.* at 485, 43 S.Ct. at 600. These twin aspects of *Mellon*—the challenge to the "operation of federal statutes" and the state's lack of an identifiable "right"— were later acknowledged by the Supreme Court as the defining characteristics of its bar on *parens patriae* actions *vis-à-vis* the federal government. *See Massachusetts*, 549 U.S. at 520 n.17, 127 S.Ct. at 1455 n.17; *Georgia*, 324 U.S. at 447, 65 S.Ct. at 721 (holding that Georgia could bring a *parens patriae* action to protect a quasi-sovereign interest because, unlike *Mellon*, it did not seek "to protect her citizens from the *operation of* federal statutes" and it possessed "rights . . . based on federal [anti-trust] laws" (emphasis added)). And a long train of federal courts

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true. *See Snapp*, 458 U.S. at 603 n.12, 102 S.Ct. at 3267 n.12; *id.* at 611–12, 102 S.Ct. at 3270–71 (Brennan, J., concurring) (explaining on constitutional grounds that the Court might be more "restrictive" as to the types of interests a state can assert in a *parens patriae* action when the Court's original jurisdiction is invoked as compared to typical federal suits).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005283

have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a *parens patriae* action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662, 696–98 (S.D. Tex. 2018); *See Texas v. United States*, 86 F. Supp. 3d 591, 625–28 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*); *New York v. Sebelius*, No. 1:07-cv-1003, 2009 WL 1834599, at *12–13 (N.D.N.Y. June 22, 2009); *Puerto Rico Pub. Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *City of New York v. Heckler*, 578 F. Supp. 1109, 1122–25 (E.D.N.Y. 1984); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984).

The *parens patriae* injury set forth by the States safely navigates this well-trodden distinction from the *Mellon* rule. The States do not challenge the operation of any federal statute. Rather, they primarily challenge the Executive Branch's putative refusal to enforce certain immigration statutes which, they claim, should benefit their citizenries. (Dkt. No. 1 at 21–24). The States allege that the Executive Branch's policy of non-enforcement infringes upon rights they derive from the APA. (*Id.* at 21–27). Specifically, the States claim that the federal government's policy creating a categorical refusal to enforce certain immigration statutes is an unlawfully withheld agency action, contrary to law, arbitrary and capricious, procedurally defunct, and constitutionally injurious. By asserting these federal statutory rights, the States have not presented this Court with "abstract questions of political power." *Cf. Mellon*, 262 U.S. at 485, 43 S.Ct. at 600. Rather,

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005284

the States have demonstrated concrete injuries to their quasi-sovereign interests as *parens patriae*. *See Castillo*, 238 F.3d at 351; *see also Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269; *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Texas*, 328 F. Supp. 3d at 697–98 (finding the state had "demonstrated a concrete injury to its quasi-sovereign interest in the economic well-being of its citizens" in a *parens patriae* action against the federal government (quotation omitted)). The Court therefore concludes that the States have demonstrated a cognizable *parens patriae* injury.

2. Traceability

The States must next establish a "fairly traceable link" between their injuries and the Government's allegedly unlawful action. They can establish this link with "no more than *de facto* causality." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). That is to say, a federal plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S.Ct. 1154, 1164, 137 L.Ed.2d 281 (1997); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734–35, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008).

Both States' injuries depend on the future behavior of criminal aliens whom the Government would otherwise detain. Regarding Texas's detention costs injury, the States argue the Memoranda will cause a significant number of criminal aliens who otherwise would have been detained by the federal government to be detained again or longer in Texas. (Dkt. No. 18 at 16, 18, 35–37). Regarding the States' *parens patriae* injury, the States urge that the Memoranda will lead to a significant number of criminal aliens

AMERICAN OVERSIGHT

who would otherwise have been detained by the federal government causing harm—both physical and economic—to their respective citizenries. (*Id.* at 37). Thus, at their core, both States' injuries depend upon criminal aliens behaving unlawfully in the future.

The Government contends that whether the aliens who would have otherwise been taken into custody will commit crimes is speculative. (Dkt. No. 42 at 23). The Government further contends that, even if the States can make this showing, they must also prove that those aliens would commit crimes at a higher rate than the aliens who *are* removed because of the Memoranda. (*Id.*).

Regarding the Government's first concern, the Supreme Court has traditionally denied standing wherever the traceable link between the government's action and the plaintiff's injury depends in part on the future behavior of third parties. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S.Ct. 1138, 1150, 185 L.Ed.2d 264 (2013) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). This tradition is especially firm where, as here with the States' asserted injuries, it is alleged that the third parties' future behavior will be unlawful. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666–67, 75 L.Ed.2d 675 (1983).

That said, the Supreme Court embraces standing theories dependent on third parties' future behavior under certain circumstances. In *Department of Commerce*, for instance, the Supreme Court traced a governmental action to aliens' future unlawful behavior where evidence established a likelihood that aliens have "historically" behaved in a certain manner. ____ U.S. at ____, 139 S.Ct. at 2566. This type of evidence, the

AMERICAN OVERSIGHT

Supreme Court concluded, demonstrated that traceability was not "mere speculation," but rather, the product of a "predictable effect of Government action on the decisions of third parties." *Id.* (citations omitted). Similarly, in *Davis v. Federal Election Commission*, the Supreme Court traced a governmental action to the future behavior of the plaintiff's political opponent where evidence showed that "most candidates" had behaved in a certain manner and there was "no indication" the opponent would do otherwise. 554 U.S. at 734–35, 128 S.Ct. at 2769; *see also Texas DAPA*, 809 F.3d at 156 (finding a traceable link between DAPA and aliens' likelihood of obtaining driver's licenses where driving was a "practical necessity" for residents of the state). From these cases, it becomes apparent that an injury may be traced through third-party behavior to governmental action where the plaintiff demonstrates individuals similarly situated to the third party have a propensity to engage in the relevant behavior.

Considering this principle, the link between the States' alleged harm and the Memoranda is virtually unassailable. As mentioned, the undisputed evidence demonstrates that the Memoranda are *already* causing a dramatic increase in the volume of criminal aliens released into the public. The States further present evidence suggesting that criminal aliens, as a group, have a strong propensity to recidivate. (Dkt. No. 18 at 15–16). Indeed, the States submit evidence from a Texas Sheriff's Office showing that a group of 209 recently held criminal alien inmates with detainers had a recidivism rate of 73.68%. (Dkt. No. 19-5 at 3). The States also submit a 2018 study from the United States Department of Justice's Bureau of Justice Statistics showing that state offenders generally recidivate at 44% within the first year following release, 68% within the first three, 79%

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005287

within the first six, and 83% within the first nine. (Dkt. No. 19-20 at 1). And these weren't one-time recidivists. The same study shows, during the nine-year period following release, there were on average five arrests per released *prisoner*. (*Id.*).

This foregoing evidence confirms what the Supreme Court and Congress have long acknowledged: "deportable criminal aliens who remain[] in the United States often commit[] more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)); *see also Zadvydas*, 533 U.S. at 713–14, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (warning of the "risk to the community posed by the mandatory release" of criminal aliens when accounting for "statistical studies showing high recidivism rates for released aliens").

These facts and precedents should come as no surprise to the Government. Congress and the Executive have long provided financial aid to states to ameliorate the strain criminal aliens place on state detention facilities. Through the State Criminal Alien Assistance Program ("SCAAP"), the federal government partially reimburses states for costs associated with detaining criminal aliens.[20] (Dkt. No. 19-2 at 2–4). For example, in 2018 the federal government through SCAAP reimbursed Texas $14,657,739 of the total $152,054,117 Texas spent on detaining criminal aliens. (*Id.* at 4). Although amounting to less than 10% of Texas's actual costs in 2018, SCAAP payments demonstrate that the

[20] Notably, the statutory basis for SCAAP resides near one of the detention statutes at issue in this case, 8 U.S.C. § 1231(i).

AMERICAN OVERSIGHT

federal government has long acknowledged that states like Texas incur financial harm as a direct result of the unlawful behavior of criminal aliens.

In sum, the States present evidence of criminal alien and state felon recidivism through a Texas Sheriff and the DOJ's own dataset, Supreme Court precedent citing the congressional record making similar findings as to criminal aliens, and the existence of the SCAAP program. Considering this substantial evidence, the Court is not persuaded that the link between the States' injuries and criminal aliens being released is "speculative" as the Government suggests. The Court finds that criminal aliens "historically" recidivate. *See Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566.

Next, the Government asserts that the risk of criminal aliens committing further crimes is insufficient for the States to trace their injuries to the Memoranda. (Dkt. No. 42 at 23). Rather, the Government hypothesizes that "it is possible" the Memoranda's reprioritization "will result in a net reduction in crimes." (*Id.*). This argument fails in three respects.

First, evidence already in the record demonstrates that the Government is not just refusing to detain its newly deprioritized categories of criminal aliens, but even the "prioritized" variety. For instance, in Texas alone, some of the 68 individuals whose detainers were dropped were serving time for an "aggravated felony," a supposedly prioritized category. *Compare* (Dkt. No. 19-3 at 6–7) *with* 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" under the INA).

Second, the Government provides no support for its contention that its enforcement of the prioritized categories of criminal aliens will exceed any decline in

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005289

enforcement of the deprioritized categories. The Government's subjective belief cannot overcome the States' evidence demonstrating to the contrary.

Finally, even if the Government *could* demonstrate that increased enforcement in the prioritized categories might displace a drop in the total number of detained aliens resulting from the deprioritized categories, this "offset" would be irrelevant as a matter of law. The "standing analysis is not an accounting exercise." *Texas DAPA*, 809 F.3d at 156 (internal quotation omitted). Absent a "tight[] nexus" between the alleged "benefits" and the "costs" of the Memoranda, there can be no "offset." *Id.* Here, other than what it noted in the Memoranda, the Government makes no showing that the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories. And the evidence put forward by the States regarding a drop in enforcement actions—even for prioritized aliens—makes that "possibility" unlikely. Accordingly, there is no connection between the results of enforcement of prioritized categories and the results of enforcement of deprioritized categories.

The Court further notes that the number of aliens who would otherwise be detained in the entire United States is relevant to estimating the impact of the Memoranda on the States in this case. The Fifth Circuit made clear in *Texas DAPA* that injury to a state can flow from the fact that aliens are "free to move among states." 809 F.3d at 188. Indeed, the States proffer evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Given the Fifth Circuit's

AMERICAN OVERSIGHT

acknowledgement of this interstate migration principle and the data provided by the States, the prospect that criminal illegal aliens falling within the deprioritized categories of the Memoranda who are not detained elsewhere in the Nation could move to the States' territories—thereby amplifying their injuries—is not mere "conjecture," as the Government posits. *See* (Dkt. No. 42 at 61).

Considering the foregoing, the Court holds that the States have established a traceable link between their injuries and the challenged Memoranda. The Memoranda are already leading to an increased volume of criminal aliens released into Texas who otherwise should have been detained by the federal government. Criminal aliens and state offenders have a demonstrable propensity to recidivate. The Memoranda will therefore cause a traceable injury to the States' financial and *parens patriae* interests.

3. Redressability

The States must next demonstrate that their requested relief would remedy their harm. The "redressability" element of the standing to sue doctrine requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020) (cleaned up). The States' request for relief does that.

The States request two forms of injunctive relief. First, they ask this Court to *restrain* the Government from "enforcing and implementing the policies described" in Section B of the January 20 Memorandum and the February 18 Memorandum. (Dkt. No. 18-1 at 2). This Court will refer to this requested relief as the "negative injunction." Second, the States ask this Court to *order* the Government to comply with "the mandatory

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005291

duty" to "take into custody" and "detain" aliens covered by 8 U.S.C. §§ 1226(c)(1) and 1231(a)(2), respectively, and to "refrain from releasing" aliens covered by Section 1226(c)(1) except as permitted by Section 1226(c)(2). (*Id.*). The Court will refer to this requested relief as the "positive injunction." The positive injunction relates directly to the States' Count I claim that the Government is "unlawfully withholding and unreasonably delaying agency action" pursuant to 5 U.S.C. § 706(1). (Dkt. No. 1 at 23). The States further seek to implement both the negative and positive injunctions nationwide. (Dkt. No. 18-1 at 2).

Assuming, as the Court must for purposes of standing, that the States are "correct on the merits of [their] claims," either form of requested relief is substantially likely to remedy the States' alleged injuries. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Regarding the requested positive injunction, it is perhaps self-evident that an order compelling the federal government to take criminal aliens into custody and detain them pursuant to the relevant statutes would relieve the States from harm they anticipate from the criminal behavior of criminal aliens. Requiring an agency action, the withholding of which is causing injury, will logically alleviate that injury. Notably, the Government offers no clear argument to the contrary regarding the benefit of a positive injunction. (Dkt. No. 42 at 25).

But even if the Court were to grant only the requested negative injunction, then, too, the States are substantially likely to obtain reprieve. Namely, the federal government would be *required* to act in conformance with the standards set by Congress in Sections 1226(c) and 1231(a)(2) as interpreted by this Court. The Government does not quibble

AMERICAN OVERSIGHT

with the notion that, under Congress's standards, the States' injuries would be redressed. Rather, the Government argues that, if the Memoranda are enjoined, the States are unable to show that "the resulting *prioritization scheme*" will "result in a decrease in crime levels" within the States' boundaries. (Dkt. No. 42 at 25) (emphasis added). The Government's argument misses the mark for two reasons.

First, this argument suggests the Memoranda were issued in a vacuum in which no prior policy concerning the detention of criminal aliens ever existed. Of course, such a suggestion is demonstrably false: the Government's own affidavits demonstrate that the United States has "had policies guiding such exercise since as early as 1909." (Dkt. No. 42-6 at 6); (Dkt. No. 42-5 at 8).

Second, the Court's concern over redressability in an APA case such as this cuts not to the executive-level policy which would be applied in the absence of the faulty one, but rather, whether *Congress*'s express standards—both for the immigration laws challenged and the procedural standards allegedly discarded—if followed, would provide the States recourse. *See Texas DAPA*, 809 F.3d at 161. By nullifying the constraints flowing from the Memoranda's "prioritization," this Court would require that agency to return to or pursue a specific standard for exercising its discretion within the bounds set by Congress. The States have supplied evidence demonstrating that in times past, such an exercise of discretion led to significantly fewer criminal aliens who are not in custody and roaming their streets. (Dkt. No. 19-3 at 5). The Government's inability to refute this evidence is telling. It suggests that conformance with the strictures set by Congress in Sections 1226(c) or 1231(a)(2) as practiced prior to the issuance of the Memoranda would

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005293

result in a reduction of the volume of criminal aliens moving freely within the interior of the States.

Accordingly, the Court finds that, regardless of which form it takes, the injunctions sought by the States would redress their injuries flowing from the Memoranda. The States have standing under the traditional inquiry.

4. Special Solicitude

Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. The Supreme Court in *Massachusetts v. EPA* determined that states are owed special solicitude wherever they assert a congressionally bestowed procedural right and the governmental action at issue affects the state's quasi-sovereign interests. 549 U.S. at 519–20, 127 S.Ct. at 1454–55. The Fifth Circuit has acknowledged that the holding in *Massachusetts* applies to procedural claims under the APA. *Texas DAPA*, 809 F.3d at 152–55. Specifically, the Fifth Circuit in *Texas DAPA* granted the state special solicitude where it sought judicial review of an immigration policy memorandum which imposed "direct, substantial pressure" on a state's "lawmaking authority"—that is, pressure to change its laws subsidizing driver's licenses for aliens. *Id.*

The States are likewise owed special solicitude here. The States seek judicial review of immigration policy memoranda which they allege constitute final agency action, and they assert that the resulting policies cause injury to Texas's public fisc because its budget for detention facilities "has been set months or years in advance." (Dkt. No. 18 at 41). Additionally, and as discussed above, the States have shown they

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005294

possess a quasi-sovereign interest in protecting their citizenries from the unlawful activity of criminal aliens. The Government's sole argument in opposition is that special solicitude still requires an injury in fact. (Dkt. No. 42 at 24–25 n.7). But this argument falls short because, as detailed in this Memorandum Opinion and Order, *see supra* II.A.1., the States have demonstrated an injury in fact. Accordingly, the States have satisfied their burden to demonstrate they are entitled to special solicitude in the standing inquiry.

In *Massachusetts*, a state armed with special solicitude was permitted to establish causation between the EPA's decision not to regulate certain greenhouse gas emissions and the state's interest in protecting its physical territory. 549 U.S. at 523–24, 127 S.Ct. at 1456–57. As detailed above, the links between the States' injuries and the Memoranda here are not perceptibly frailer than in *Massachusetts* and likely are firmer. *See also Lujan*, 504 U.S. at 572 n.7, 112 S.Ct. at 2142 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). The States have standing under the special solicitude inquiry. Accordingly, the Court finds it has jurisdiction to consider the States' claims.[21]

[21] In sum, having concluded that the States have standing, the Court must exercise jurisdiction. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) (noting that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014) (resolving doctrinal tension that had developed with a federal court's "virtually unflagging" obligation to "hear and decide cases within its jurisdiction" (internal quotation omitted)).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005295

Case 2:21-cv-00618 Document: 00515990757 Page: 75 Date Filed: 08/23/2021

B. JUDICIAL REVIEW

The Court must next determine whether the States' claims are reviewable before turning to the merits of the Motion. *Lexmark*, 572 U.S. at 128, 134 S.Ct. at 1387–88. In so doing, the Court narrows the focus to the States' APA claims. The APA imposes four general requirements that must be satisfied before a federal court can review agency action. *See Bennett*, 520 U.S. 154, 117 S.Ct. 1154. To start, no statute may bar judicial review. *Id.* at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(1). Next, the new guidance outlined in the February 18 Memorandum must constitute a "final agency action." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 704. Third, the new guidance must not be "committed to agency discretion by law." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(2). Finally, the States must show that their injuries are within the "zone of interests" to be protected by the statutes allegedly violated by the Government. *Bennett*, 520 U.S. at 163, 117 S.Ct. at 1161; 5 U.S.C. § 702. The Court finds that the States have met each of these requirements.

1. Statutory Bars to Judicial Review

Under the APA, an action may not proceed when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). With respect to immigration, Congress enacted "many provisions . . . aimed at protecting the Executive's discretion from the courts[.]" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S.Ct. 936, 945, 142 L.Ed.2d 940 (1999). Banking on this, the Government contends that Sections 1252, 1231(h), and 1226(e) protect the Executive Branch's discretion from the States' claims before this Court. (Dkt. No. 42 at 30–35). The Court will address each in turn.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005296

First, the Government makes the same arguments it articulated in *Texas I* that 8 U.S.C. § 1252(a)(5) and (b)(9) bar judicial review of the States' APA claims. (*Id.* at 30–31); *see also* (6:21-cv-3, Dkt. No. 83 at 27).[22] The States disagree arguing that the provisions are irrelevant to this case because they apply "only with respect to review of an order of removal under subsection (a)(1)." (Dkt. No. 51 at 27–28) (quotations omitted). As in *Texas I*, the Court agrees with the States and incorporates by reference its decision on the issue in that case. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42; *see also Nielsen v. Preap*, ____ U.S. ____, ____, 139 S.Ct. 954, 962, 203 L.Ed.2d 333 (2019) (holding that Section 1252(b)(9) does not preclude judicial review of respondents' challenge to the Government's detention authority under Section 1226 because respondents "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal as opposed to the decision to deny them bond hearings; and they are not even challenging any part of the process by which their removability will be determined" (quotations omitted)); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("[W]hile [Sections 1252(a)(5) and 1252(b)(9)] limit *how immigrants* can

[22] Section 1252(a)(5) provides in relevant part: "Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." 8 U.S.C. § 1252(a)(5).

Section 1252(b)(9) states in part: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

AMERICAN OVERSIGHT

challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel *judicial review over final orders of removal to the courts of appeals*."(emphases added)).

Next, the Government, again repeating its stance in *Texas I*, argues that any of the States' claims brought under Section 1231 are precluded from judicial review by Subsection (h). (Dkt. No. 42 at 34); *see also* (6:21-cv-3, Dkt. No. 83 at 30–32). Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). In this case, the Government rehashes its prior argument in *Texas I* that the meaning of "party" in Section 1231(h) includes the States. This time around, it argues that because Black's Law Dictionary defines the word "party" as "one by or against whom a lawsuit is brought," the Court was in error when it concluded that "party" in that section narrowly means "alien in a removal proceeding." (*Id.* at 34–35); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. For their part, the States unsurprisingly agree that the Court got it right the first time around and succinctly agrees with the Court's disposition. (Dkt. No. 51 at 28–29). The Court agrees with the States.

Although the Government is correct in arguing that "party" may have a broad dictionary definition, statutory construction is more complex. On the surface, the plain meaning of "party" in Section 1231(h)—even when accounting for the dictionary definition—could refer to (1) any party *to the removal proceedings* or (2) *any* party to *any* proceeding. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24. This potential

AMERICAN OVERSIGHT

for multiple meanings of "party" in Section 1231(h) does not necessarily render the text ambiguous; if "all but one of the meanings" of the word *party* in Section 1231(h) can be "ordinarily eliminated by context," that remaining meaning is correct.[23] *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 1996–97, 124 L.Ed.2d 44 (1993) (superseded by statute on other grounds). The well-established process for interpreting a text with *potential* ambiguity focuses on "text, context, structure, and history." *See Texas v. EPA*, 983 F.3d 826, 836 (5th Cir. 2020). "Statutory language has meaning only in context." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415, 125 S.Ct. 2444, 2449, 162 L.Ed.2d 390 (2005)). While a dictionary can illuminate the "core meanings of a term," "the meanings of common words (which typically have multiple definitions) must be determined in the context in which they appear." *Texas*, 983 F.3d at 837 n.2 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 418–19 (2012)). In short, the Court in *Texas I* conducted an in-depth analysis of the term "party," the statute, and the history of the statutory scheme and, having done so, the Court determined that "party" in Section 1231(h) means "alien in a removal proceeding." *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. The Government has offered nothing to convince the Court that its analysis and conclusion in *Texas I* were in error.

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[23] The Court in *Texas I* held that Section 1231(h) was unambiguous. ___ F. Supp. 3d at ____, 2021 WL 2096669, at *26 & n.4. Hence, the Court did not find *Chevron* deference applied to the Government's preferred interpretation of Section 1231(h). *Id.* The Court adopts that reasoning by reference here. The Court additionally notes that the Government, like in *Texas I*, fails to invoke any claim to *Chevron* deference with respect to Section 1231(h) in its Response to this Motion.

AMERICAN OVERSIGHT

Case 2:21-cv-00067-Document 00515990757 Page 79 Date Filed: 08/23/2021

Thus, the Court adopts its prior reasoning and conclusion in *Texas I* with respect to Section 1231(h).

Lastly, the Government contends that Section 1226(e) bars the States' claims as they relate to Section 1226(c). (Dkt. No. 42 at 32–33). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). The Government insists that determinations under Section 1226(c) are discretionary because the federal government "may detain a noncitizen under § 1226—under either subsection (a) or subsection (c)—only 'pending a decision' on removal." (Dkt. No. 42 at 32). According to the Government, "[d]etention authority is thus contingent on the Secretary's separate, predicate, and discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear." (*Id.*) (citations omitted).

Voicing their disagreement, the States allege that Subsection (e) is irrelevant to the action since it applies only to discretionary decisions to detain *individual* aliens and not to lawsuits on the Government's detention authority. (Dkt. No. 18 at 39); (Dkt. No. 51 at 28). And because Section 1226(c) imposes a mandatory duty to detain, as the States argue, it follows that Section 1226(e) does not apply to Subsection (c). (*Id.*); *see infra* II.B.3.a. The Court agrees with the States.

AMERICAN OVERSIGHT

The Supreme Court has clearly stated that Subsection (e)'s limitation "applies only to 'discretionary' decisions about the 'application' of § 1226 to *particular cases*." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added). Section 1226(e), therefore, "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*, ____ U.S. ____, ____, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (quoting *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714)). Indeed, "Section 1226(e) . . . deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions." *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). So, for instance, Subsection (e) poses no hurdle for a respondent who challenges the statutory framework that permits his detention without bail under Section 1226. *See Demore*, 538 U.S. at 517, 123 S.Ct. at 1714. Section 1226(e) does not preclude challenges to the Government's alleged authority to detain certain aliens without a bond hearing under Sections 1225(b), 1226(a), and 1226(c). *Jennings*, ____ U.S. at ____, 138 S.Ct. at 839, 841. It also does not bar habeas corpus petitions. *See Parra*, 172 F.3d at 957. Further, Subsection (e) does not prevent plaintiffs from questioning whether the Government has the power under Section 1226(c) to detain certain aliens despite failing to detain the aliens *immediately after* they were released as required by Section 1226(c). *Preap*, ____ U.S. at ____, 139 S.Ct. at 961–62; *see also infra* II.B.4. Thus, Section 1226(e) does not prohibit parties from "disput[ing] the *extent of the statutory authority* that the Government claims." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005301

Here, the States' claims against the Government clearly "dispute the extent of the statutory authority that the Government claims." *See id.* In their Complaint, the States allege the Government does not have any discretion under Section 1226(c) to determine whether certain aliens must be detained when released from custody. *See* (Dkt. No. 1 at ¶¶ 35, 37–38, 94–101); *see also* (Dkt. No. 18 at 39). In effect, "the general extent of the Government's authority under § 1226(c) is precisely the issue here." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962. Thus, "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*, ____ U.S. at ____, 138 S.Ct. at 841.

Accordingly, the Court concludes Sections 1252(a)(5) and (b)(9), 1231(h), and 1226(e) do not preclude the States' claims. There are no statutory bars to reviewing these claims.

2. Final Agency Action

The Court next considers whether the enforcement priorities set forth in the January 20 and February 18 Memoranda constitute "final agency action" subject to judicial review. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). "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 Def.*, ____ U.S. ____, ____, 138 S.Ct. 617, 626, 199 L.Ed.2d 501 (2018) (citing 5 U.S.C. § 704) (internal quotations omitted). The States and the Government agree on the standard used to determine whether an agency action is

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005302

"final." *See* (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26). That standard requires two conditions to be satisfied. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 1129, ____, 136 S.Ct. 1807, 1813, 195 L.Ed.2d 77 (2016). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168). The Parties disagree whether the Memoranda constitute final agency action. (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26–28). The Court finds that they do for the following reasons.

a. The Consummation of the Agency's Decision-Making Process

The first condition that must be satisfied for a court to find that an agency's action is final is that the action constitutes "the consummation of the agency's decisionmaking process." *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. A consummation of this decision-making process is present when the action is "definitive [in] nature" rather than "advisory in nature." *Id.* The Court finds the Memoranda easily satisfy this condition.

As an initial matter, the text of the February 18 Memorandum indicates the Memoranda are the consummation of DHS's decision-making process. It states, "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added). Moreover, the February 18 Memorandum states, "[i]t applies to *all* U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning." (*Id.*) (emphasis added). The immediacy and

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005303

definite nature of the application of this guidance to *all* enforcement actions and custody decisions made by *all* ICE Directorates and Program Offices strongly suggest the agency's decision is final. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813.

The Government attempts to overcome these indicia of final agency action by arguing "the Secretary retains the discretion to change or abandon these policies at any time[.]" (Dkt. No. 42 at 27). This argument stems from the February 18 Memorandum, which states, "[t]his interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines," which will occur "only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices." (Dkt. No. 19-2 at 2). The Government's argument is unpersuasive. The mere fact that an agency *says* an action is not final because it maintains "discretion" to alter a policy is insufficient to *render* an action nonfinal. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." (citation omitted)); *Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

Here, the Government's insinuation that agency action is not final simply because the agency says so, would produce the absurd result of precluding judicial review of *any*

AMERICAN OVERSIGHT

policy that the agency says is not final. Indeed, if such a rule were followed, then an agency could avoid judicial review of its action in perpetuity simply by labeling its action as "interim" or "temporary" and stating that the agency maintains the ability to repeal or revise it in the future. In fact, this case demonstrates how an agency could potentially tie the judiciary's hands if the agency's action is not final simply because the agency says it is not.

In this case, the February 18 Memorandum took effect immediately upon issuance. (Dkt. No. 19-2 at 2). The Memorandum states it would "remain in effect until Secretary Mayorkas issues new enforcement guidelines." (*Id.*). It also states Secretary Mayorkas "anticipate[d] issuing these guidelines in less than 90 days," meaning the new guidance would be issued before May 19, 2021. (*Id.*). But that did not happen. *See* (Dkt. No. 63 at 3–4). In fact, in a separate challenge to the February 18 Memorandum, the Government represented to the district court that it "currently expect[s] that the Secretary will issue new immigration priorities in the beginning of July." *Arizona v. Dep't of Homeland Sec.*, No. 2:21-cv-00186-SRB, 2021 WL 2787930 (D. Ariz. June 7, 2021), Dkt. No. 85 at 2. Once again, the new guidance was not released. *See* (Dkt. No. 63 at 3–4). The Government now projects "the Secretary will issue new immigration enforcement priorities by the end of August or the beginning of September." (Dkt. No. 63 at 3–4). Notably, the Government "caution[s] that this is *only* [*its*] *current expectation*." (*Id.* at 4) (emphasis added). In other words, the Government's expectation could once again change, and the issuance of the new guidance could be delayed even longer. Thus, a purely subjective definition of nonfinality would be awfully convenient for the Government—but that is not what the

AMERICAN OVERSIGHT

law provides. Rather, because the agency-wide application of this guidance has an immediate and definite nature, it objectively demonstrates the agency's decision is indeed final. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Court therefore finds that the Memoranda satisfy the first condition.

b. Rights, Obligations, and Legal Consequences

The second condition that must be satisfied for a court to find that an agency's action is final is that the challenged action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *See Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Government argues the Memoranda do not satisfy this condition because the Memoranda do not change DHS's legal obligation to enforce the law in the manner prescribed in Sections 1226(c) and 1231(a)(2). (Dkt. No. 42 at 26–28). The Government also argues the Memoranda do not "change any person's legal status, confer any legal benefits, or have any 'legal consequences.'" (*Id.* at 27). Stated differently, the Government contends the Memoranda do not affect the rights or obligations of the States, aliens, or any other person or entity. In support, the Government points to the February 18 Memorandum, which states that the Memorandum does not "create any right or benefit, substantive or procedural, enforceable at law." (*Id.* at 27) (citing (Dkt. No. 19-2 at 8)). But once again, what the Memoranda say and do are different. The Court finds the Memoranda satisfy the second condition.

First, the Government's assertion that the Memoranda do not alter DHS's legal obligations to detain certain aliens under Sections 1226(c) and 1231(a)(2) is demonstrably false. In deciphering the meaning of Sections 1226(c) and 1231(a)(2) below, *see infra*

AMERICAN OVERSIGHT

II.B.3.a., the Court goes to great lengths to discuss what obligations those statutory provisions create for DHS. In sum, Section 1226(c) obligates DHS to detain *all* aliens who fall within the ambit of that provision *when they are "released" from state custody*. Section 1231(a)(2) requires DHS to detain *all* aliens with final orders of removal "*during the removal period*."

The Memoranda require something quite different. Specifically, the February 18 Memorandum effectively substitutes a prioritization scheme in place of the enforcement mandates set forth in these statutory provisions. This new scheme creates two categories of aliens who are required to be detained: priorities and nonpriorities. *See* (Dkt. No. 19-2 at 4–7). It also sets forth a requirement that ICE agents obtain preapproval to detain aliens who are deemed nonpriorities. (*Id.* at 7). The plain meaning of Sections 1226(c) and 1231(a)(2) allows for neither this specific prioritization scheme nor its preapproval process; they simply require DHS to detain *all* aliens described therein at a certain time or for a specific duration. Because the Memoranda *require* DHS to enforce the law in a different way than what Sections 1226(c) and 1231(a)(2) prescribe, the Memoranda constitute a change in DHS's legal obligations. Such a change weighs in favor of classifying the Memoranda as final agency action. *See Texas*, 86 F. Supp. 3d at 648–49 (finding that DAPA is a final agency action, in part, because "[a]s evidenced by the mandatory language throughout the DAPA Memorandum requiring USCIS and ICE to take certain actions, the Secretary's Directive clearly establishes the obligations of the DHS and assigns specific duties to offices within the agency").

AMERICAN OVERSIGHT

Next, the Government contends the Memoranda do not alter the rights or obligations of the States or aliens in the country. The Court disagrees. Based on the record before the Court, the Memoranda affect Texas's legal obligation to provide Emergency Medicaid to certain noncitizens. "Emergency Medicaid is a *federally required* program *jointly funded* by the federal government and the *states*." (Dkt. No. 19-7 at ¶ 7) (emphases added). Illegal aliens are eligible to participate in this program. *See* (*Id.*); 8 U.S.C. § 1611(b)(1)(A). An alien in Texas who is eligible for Emergency Medicaid and presently in state custody can benefit from the program after being released.[24] Texas is therefore legally obligated to bear part of the cost of Emergency Medicaid for aliens who qualify for the program and are not detained by ICE after being released from state custody.

But as should be clear by now, not all aliens released from state incarceration are returned to society. And that is because of Sections 1226(c) and 1231(a)(2). Again, pursuant to Section 1226(c), DHS is *required* to detain *all* aliens who have committed certain serious offenses *as soon as* they are released from state custody. And per Section 1231(a)(2), DHS is *required* to detain certain aliens during their removal period. Instead, because of the Memoranda, DHS is no longer detaining all of these aliens as soon as they are released from state custody or during their removal periods. Texas will therefore have a legal obligation to share the cost of providing Emergency Medicaid to aliens who

[24] Indeed, even the Executive Branch in a website has stated that incarcerated individuals may apply for Medicaid coverage in their respective states and thereafter be eligible for benefits after release from custody. *See* HealthCare.gov, *Health coverage for incarcerated people*, https://www.healthcare.gov/incarcerated-people/.

AMERICAN OVERSIGHT

qualify for the program and, under the Memoranda, are not detained by ICE after being released from state custody.[25]

As for the rights of aliens, another district court has already concluded the Memoranda affect the rights of certain aliens presently detained. *See Hussein S.M. v. Garland*, No. CV 21-348 (JRT/TNL), 2021 WL 1986125, at *3 (D. Minn. May 18, 2021). As this Court noted in *Texas I*, "an [alien] who has been detained for six months may be entitled to release if 'it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" ____ F. Supp. 3d at ____, 2021 WL 2096669, at *31 (quoting *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505). In *Hussein S.M.*, a detained alien with a final of order of removal filed a petition for a writ of habeas corpus to secure his release from detention. 2021 WL 1986125, at *1. The district court granted the petition, relying on the civil immigration enforcement priorities set forth in the

[25] The Court is also concerned that the Memoranda affect the States' legal obligation to provide a public-school education to certain noncitizens following their release from juvenile detention. For example, Texas is required by both federal and state law to provide noncitizen children with a public-school education. *See generally Plyler*, 457 U.S. 202, 102 S.Ct. 2382 (holding that a Texas statute that withheld state funds for educating children who were not "legally admitted" was unconstitutional); *see also LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005) ("In . . . *Plyler*, the [Supreme] Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens."); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) ("[T]he State's public education expenditures for the children of undocumented aliens are required by the equal protection clause[.]" (citing *Plyler*, 457 U.S. 202, 102 S.Ct. 2382)). This obligation would necessarily include juveniles released from the custody of the Texas Juvenile Justice Department ("TJJD") who are not detained by ICE because of the Memoranda. *See* (Dkt. No. 19-9 at ¶ 7) ("As Chapter 25, Texas Education Code, requires a child to attend school and as *Plyler* . . . prohibits denying undocumented children of illegal immigrants the right to attend public school, to the extent ICE does not take custody of non-citizen juveniles set to be released from TJJD custody, it is my understanding that those non-citizen juveniles who have not already received their General Educational Development or high school diploma attend Texas public schools after being released."). The Court is interested in further briefing on this issue at the next stage of this litigation.

AMERICAN OVERSIGHT

January 20 Memorandum and later reaffirmed in the February 18 Memorandum. *Id.* at *3. Because the alien in *Hussein S.M.* did not fall within one of the priority groups, the district court found "his removal is *unlikely to be imminent* despite ongoing removal enforcement." *Id.* (emphasis added). In short, *Hussein S.M.* demonstrates the Memoranda directly affect an alien's right to be free from prolonged detention. The Court therefore concludes the Memoranda affect the rights of and have significant legal consequences for detained aliens with final orders of removal.

In sum, the Court finds the Memoranda are the consummation of DHS's decision-making process and determine certain rights and legal obligations. Therefore, the Court concludes the Memoranda constitute final agency action under Section 704 of the APA.[26]

3. Committed to Agency Discretion by Law

In determining whether an agency action is reviewable, the Court must also determine whether the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Accordingly, the Court now inquires whether the implementation of the new guidelines found in the Memoranda is "committed" to the Government's discretion by law.

The APA embodies a "basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). But this is "just" a

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[26] A district court in Florida concluded the February 18 Memorandum is unreviewable under the APA because it did not constitute final agency action. *Florida. v. United States*, No. 8:21-CV-541-CEH-SPF, 2021 WL 1985058, at *9 (M.D. Fla. May 18, 2021). The Court respectfully disagrees with this conclusion for the reasons set forth herein.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005310

presumption. *Lincoln*, 508 U.S. at 190, 113 S.Ct. at 2030. "'[R]eview is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* at 191, 113 S.Ct. at 2031 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985)). Where there is no meaningful standard to apply, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Lincoln*, 508 U.S. at 191, 113 S.Ct. at 2031 (quoting *Heckler*, 470 U.S. at 830, 105 S.Ct. at 1655).

One category of administrative decisions that courts "traditionally have regarded as 'committed to agency discretion'" is relevant to this discussion. *Id.* (citation omitted). Namely, "an agency's decision not to institute enforcement proceedings." *Id.* (citing *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655–56). Non-enforcement decisions, however, are only "presumptively unreviewable." *Heckler*, 470 U.S. at 832–33, 105 S.Ct. at 1656. The Supreme Court has outlined a narrow but clear roadmap to overcoming that presumption and a second, less–traveled path. As for the first: "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* As for the second: it may be "justifiably . . . found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4, 105 S.Ct. at 1656 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Although the Supreme Court has not (yet) found this latter type of "abdication," it has nevertheless instructed that any such inquiry should focus on "the statute

AMERICAN OVERSIGHT

conferring authority on the agency," which "might indicate that such decisions were not 'committed to agency discretion.'" *Heckler*, 470 U.S. at 833 n.4, 105 S.Ct. at 1656 n.4; *see also Texas DAPA*, 809 F.3d at 166–67.

In this case, the Government argues the States' claims are unreviewable because the new guidelines contained in the February 18 Memorandum are committed to agency discretion by law. More precisely, the Government argues: (1) the substantive statutes in question, Sections 1226(c) and 1231(a)(2), do not set out the specific mandatory duties the States assert, that is, the duty to detain certain aliens subject to those two sections; (2) even if these statutes establish mandatory duties, the new guidelines "simply establish[] enforcement priorities" since they do "not direct ICE officials to cease detaining any particular noncitizen subject to either § 1226(c) or § 1231(a)(2)"; and (3) assuming the first two arguments fail, the Executive Branch may, in effect, dispense with a congressional mandate because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President." (Dkt. No. 42 at 28–30). Opposing the Government's suppositions, the States contend that, although the Government wields tremendous discretion in this area of immigration law, Sections 1226(c) and 1231(a)(2) limit this discretion by mandating the detention of certain aliens when they are released or during the removal period. (Dkt. No. 51 at 29–30). The Court now turns to each of these arguments.

a. Whether "Shall" Means "Must"

The Government first argues that "shall" in Sections 1226(c) and 1231(a)(2) does not impose any mandatory duties or guidelines for the Government to follow. The Court

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005312

disagrees. Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable under the INA "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

Recent Supreme Court precedent establishes "shall" means "must" in these sections. In *Johnson v. Guzman Chavez*, the Supreme Court noted "detention is mandatory" during an alien's removal period, as prescribed by Section 1231(a)(2). ____ U.S. ____, ____, 141 S.Ct. 2271, 2281 (2021) (citing 8 U.S.C. § 1231(a)(2)). And under Section 1226(c), "detention is mandatory and release is permitted in very limited circumstances" "[f]or certain criminal aliens and aliens who have connections to terrorism." *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)). In light of *Guzman Chavez*, it seems there is no dispute that Sections 1226(c) and 1231(a)(2) are mandatory.

This is not surprising. *Guzman Chavez*'s holding follows the well-established principle that Sections 1226(c) and 1231(a)(2) mandate the detention of certain aliens at specific points in time. *See Preap*, ____ U.S. at ____, 139 S.Ct. at 959 (finding under Section 1226(c) certain criminal aliens "*must* be arrested when 'they are released' from custody on criminal charges and . . . *must* be detained without a bond hearing until the question of their removal is resolved" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 835 ("§ 1226(c) makes clear that detention of aliens within its

AMERICAN OVERSIGHT

scope *must* continue 'pending a decision' on removal" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Zadvydas*, 533 U.S. at 683, 121 S.Ct. at 2495 ("After entry of a final removal order and during the 90-day removal period, however, aliens *must* be held in custody." (citing 8 U.S.C. § 1231(a)(2)) (emphasis in original)); *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716 (noting Section 1226 "*requir[ed]* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability" (emphasis added)); *Hosh v. Lucero*, 680 F.3d 375, 377, 381 (4th Cir. 2012) ("Section 1226(c) *requires* the mandatory federal detention, without the possibility of bond, of certain deportable criminal aliens '*when*' those aliens are released from other custody." (emphases added)); *Rodney v. Mukasey*, 340 F. App'x 761, 764 & n.3 (3d Cir. 2009) (per curiam) (interpreting "shall" in Section 1231(a)(2) to mean the Attorney General "*must*" detain the alien for a certain period (emphasis added)); *Khotesouvan v. Morones*, 386 F.3d 1298, 1300 (9th Cir. 2004) (observing that, in *Demore*, the Supreme Court "approved the *mandatory* detention of a criminal alien during removal proceedings under 8 U.S.C. § 1226(c) even in the absence of an individualized finding that the alien was unlikely to appear for his removal hearing if released on bond" (emphasis added)); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 & n.4 (9th Cir. 2008) (noting that detention under Section 1231(a)(2) is *mandatory*); *Nyonton v. Brackett*, No. 18-CV-481-PB, 2019 WL 1082203, at *2 (D.N.H. Mar. 7, 2019) (holding Section 1231(a)(2) is "crystal clear" in mandating the detention of aliens subject to Section 1231, especially with respect to individuals "who have been found inadmissible because of a controlled substance violation"); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 235 (S.D.N.Y. 2010) (explaining that, while Section 1226(a) provides ICE

AMERICAN OVERSIGHT

with the discretion to detain any alien pending a decision in removal proceedings, "[a]liens who have been convicted of certain enumerated offenses, however, including drug crimes . . . *are subject to mandatory detention*" pursuant to Sections 1226(c)(1)(B), 1227(a)(2)(B), and INA § 126(c) (emphasis added)).

Accordingly, the Court concludes, following *Guzman Chavez* and the foregoing overwhelming precedent, the word "shall" means "must" in Sections 1226(c) and 1231(a)(2). Consequently, the Government is required to detain certain criminal aliens and aliens with final orders of removal at certain points in time to comply with those statutes.

Despite the Supreme Court's clear interpretation of Sections 1226(c) and 1231(a)(2), the Government nevertheless argues that *Guzman Chavez* and, by extension, all other related court rulings are irrelevant here. The Government contends *Guzman Chavez* "did not address the Department of Homeland Security's discretion whether to detain individuals covered by 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a)(2)." (Dkt. No. 67 at 1). "Rather," according to the Government, *Guzman Chavez* "addressed under which authority certain individuals were detained and whether such individuals were entitled to bond hearings." (*Id.*). In short, the Government argues the Court should disregard *Guzman Chavez*'s statements on Sections 1226(c) and 1231(a)(2)—and the numerous court holdings that precede *Guzman Chavez*—because those were not central to the case's holding and thus were dicta that need not be followed. The Court disagrees.

Guzman Chavez's treatment of Sections 1226 and 1231 were central to its holding. The case's key question was whether certain aliens could be released on bond while

AMERICAN OVERSIGHT

petitioning for relief from removal. That question was necessarily answered by analyses of both sections—analyses that included looking at the mandatory nature of Sections 1226(c) and 1231(a)(2)'s detention provisions. The respondents in *Guzman Chavez*—aliens who were detained following their unlawful reentrance into the United States after previously being removed—sought release on bond while they were pursuing relief from removal. *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280. The respondents argued that Section 1226, which generally conferred discretion to the Government to detain aliens, provided them an avenue to be released on bond. *Id.* at ____, 141 S.Ct. at 2283–84. However, the Government in that action contended that Section 1231, which mandates detention of aliens with orders of removal, applied to the respondents, effectively requiring their detention to be *without* bond. *Id.*; *see also* Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897), 2020 WL 4938065. The Supreme Court was thus required to determine which INA provision applied to the respondents. This task necessitated a finding as to whether, and in what circumstances, detention was mandatory under the relevant statutes. *See Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280–82.

Guzman Chavez ultimately held Section 1231 applies to the respondents since they had effectively been ordered removed through the reinstatement of their previous orders of removal. *See id.* at ____, 141 S.Ct. at 2287–91. In reaching this conclusion, the Supreme Court compared Section 1226, which, again, applies to the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States," *id.* at ____, 141 S.Ct. at 2281, with Section 1231, which applies to an alien ordered removed, *id.*

AMERICAN OVERSIGHT

In the Supreme Court's discussion of Section 1226, it noted "DHS," pursuant to that provision, "*may* arrest and detain the alien," pending that alien's removal decision. *Id.* Such an alien "may generally apply for release on bond or conditional parole." *Id.* Nevertheless, the Supreme Court probed further, stating "there is one exception" to this general rule: for certain criminal aliens, "*detention is mandatory*" under Section 1226(c). *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)) (emphasis added). Like Section 1226(c)'s exception, the Supreme Court stated Section 1231's detention is "mandatory" precisely because of Section 1231(a)(2). *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2281 (citing 8 U.S.C. § 1231(a)(2)). Thus, *Guzman Chavez*'s interpretation of Sections 1226(c) and 1231(a)(2) as mandating detention was essential to the case's holding.

Tellingly, the Government itself admitted during briefing in *Guzman Chavez* that Section 1226(c) imposed a mandatory duty to detain certain criminal aliens.[27] The Government explained, although "Section 1226(a) makes detention discretionary," "a separate provision, Section 1226(c), *makes an exception* to that general rule, providing that the government 'shall' take into custody and not release certain criminal aliens." Brief for Petitioner, 2020 WL 4938065, at *5 (No. 19-897) (emphasis added). The Government also argued in its reply brief that the Supreme Court's "intervention" in *Guzman Chavez* would "determine[] whether Section 1226(c)—which provides for the *mandatory* detention of certain criminal aliens—applies to aliens who have reinstated orders of

[27] As another Texas court said of a similar change in litigation position, "[b]ut that was then, and this is now." *Texas v. United States*, 340 F. Supp. 3d 579, 611 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded*, 945 F.3d 355 (5th Cir. 2019), *rev'd and remanded sub nom. California v. Texas*, 141 S.Ct. 2104 (2021).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005317

removal and are in withholding-only proceedings." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 3124376, at *7 (emphasis added). Likewise, with respect to Section 1231(a)(2), the Government stated it had "long read" the statute "to *require* the detention of terrorist and *criminal* aliens." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 7249055, at *17 & footnote (emphases added). Thus, in conjunction with *Guzman Chavez*, the Court takes the Government at its word and finds "shall" means "must" in Sections 1226(c) and 1231(a)(2) with respect to the detention of certain criminal aliens.

Second, even if the clear principles delineated in *Guzman Chavez*, *Preap*, *Zadvydas*, and the like are dicta, they are persuasive, nonetheless. As the Fifth Circuit has noted, "[i]t is well established in this circuit that, although we are 'not bound by dicta, even of [this court,] [d]icta of the Supreme Court are, of course, another matter.'" *Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152, 154 n.3 (5th Cir. 2018) (quoting *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015)).[28] Thus, the Court follows the Fifth Circuit

[28] Likewise, the Eleventh Circuit concluded, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (collecting cases with similar findings) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)). Indeed, "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold," so this Court cannot "blandly shrug them off because they were not a holding." *See United States v. Montero-Camargo*, 208 F.3d 1122, n.17 (9th Cir. 2000) (en banc) (citations omitted). Other circuits agree. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (considering that dicta "must be given considerable weight and cannot be ignored in the resolution of [a] close question"); *Oyebanji v. Gonzales*, 418 F.3d 260, (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005318

and its sister circuits and defers to *Guzman Chavez*, *Preap*, *Zadvydas*, and other related Supreme Court precedent even if the statements on Sections 1226(c) and 1231(a)(2) in those cases were dicta, as the Government contends. The Court is not free to treat Supreme Court dicta as cavalierly as the Government suggests. Accordingly, the Court applies the caselaw discussed above and holds that the "shall" found in Sections 1226(c) and 1231(a)(2) means "must," imposing on the Government a duty to detain certain criminal aliens and those with final orders of removal when released and during the removal period, respectively.

Arguments about dicta aside, the Court's own statutory interpretation of Sections 1226(c) and 1231(a)(2) also leads to the conclusion that "shall" means "must" in those sections. *See* Scalia & Garner, *supra*, at 53 ("*Every* application of a text to particular circumstances entails interpretation." (emphasis added)).

264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's 'considered dicta.'" (quoting *McCoy*, 950 F.2d at 19)); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[A]s we and our sister circuits have frequently noted, . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (internal quotation marks omitted) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003))); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (noting that lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" (citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996))); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that lower courts "should respect considered Supreme Court dicta"); *McDonough v. Anoka County*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts . . . are not 'free to limit Supreme Court opinions precisely to the facts of each case.' Instead, federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings[.]'" (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993))); *Bangor Hydro–Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-particularly when expressed so unequivocally.").

AMERICAN OVERSIGHT

"The task of statutory interpretation begins and, if possible, ends with the language of the statute." *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013). "When the language is plain, [the court] 'must enforce the statute's plain meaning, unless absurd.'" *Id.* (quoting *In re Nowlin*, 576 F.3d 258, 261–62 (5th Cir. 2009)); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))). "A statute is ambiguous if it is susceptible of more than one accepted meaning." *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003). Thus, as before, regarding interpreting Section 1231(h), the Court must initially determine whether "all but one of the meanings" of the word "shall" in Sections 1226(c) and 1231(a)(2) is "ordinarily eliminated by context." *Deal*, 508 U.S. at 132–33, 113 S.Ct. at 1996–97.

For this analysis, the Court applies "the traditional means of statutory interpretation, which include the text itself, its history, and its purpose." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) (citation omitted). Put differently, the Court must initially "look first to the word's ordinary meaning," *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 131 S.Ct. 1885, 1891, 179 L.Ed.2d 825 (2011),

AMERICAN OVERSIGHT

since "[s]tatutory language has meaning only in context." *Graham Cnty.*, 545 U.S. at 415, 125 S.Ct. at 2449 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 382, 160 L.Ed.2d 271 (2004)). Only "when traditional methods of statutory construction fail to reveal a provision's meaning" may the Court "conclude that it is ambiguous." *Perry*, 102 F.3d at 147.

"[T]he word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, ____ U.S. ____, ____, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020); *see also* Scalia & Garner, *supra*, at 112 ("When drafters use *shall* and *may* correctly, the traditional rule holds—beautifully."). The Supreme Court has nonetheless cautioned, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co. v. Hecht*, 95 U.S. 168, 170, 24 L.Ed. 423 (1877).

This need for legislative intent to demonstrate "shall" should be construed as "must" against the government is present in Supreme Court jurisprudence. In *Texas I*, this Court identified *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), a Supreme Court case upon which the Government relies, (6:21-cv-3, Dkt. No. 82 at 19); (6:21-cv-3, Dkt. No. 83 at 25–26, 34); (6:21-cv-16, Dkt. No. 42 at 36–38), as an apt example of the need for legislative intent to determine that "shall" connotes a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *33. In *Castle Rock*, the respondent claimed her due process rights were violated because a police department refused to enforce restraining orders despite language printed on the orders themselves stating that an "officer shall arrest" a restrained person where probable cause of a

AMERICAN OVERSIGHT

violation was evident. 545 U.S. at 754, 759, 125 S.Ct. at 2802, 2805. The Supreme Court, however, found "the presence of seemingly mandatory legislative commands" like "shall" could not automatically impose a "true mandate" against the police. *Id.* at 760–61, 125 S.Ct. at 2805–06. What was needed—and lacking in *Castle Rock*—was "some stronger indication" from the legislature. *Id.* at 761, 125 S.Ct. at 2806. Such an "indication" was not present because the "shall" used in the restraining orders was "not perceptibly more mandatory than" other state statutes using the word "shall" where the police force was traditionally accorded discretion. *Id.*; *see also Chicago v. Morales*, 527 U.S. 41, 61–62 n.32, 119 S.Ct. 1849, 1861 n.32, 144 L.Ed.2d 67 (1999) (noting that interpreting "shall" as mandatory in the context of police action "flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances").

With the foregoing in mind, this Court in *Texas I* previously explained how a "stronger indication" from Congress may be gleaned. In *Richbourg Motor Co. v. United States* and *Escoe v. Zerbst*, the Supreme Court noted one "indication" sufficient to conclude that the word "shall" in a statute imposes an obligation upon the Government is present when the statute's manifest purpose is to protect the public or private interests of innocent third parties. *See Richbourg Motor Co. v. United States*, 281 U.S. 528, 533–34, 50 S.Ct., 385, 387–88, 74 L.Ed. 1016 (1930); *Escoe v. Zerbst*, 295 U.S. 490, 494, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34. The Court finds it appropriate to reiterate its explanations of these cases here.

AMERICAN OVERSIGHT

In *Richbourg Motor Co.*, the Supreme Court expressly found reason to avoid the rule in *Hecht* where a statute provided that an officer "shall" take possession of a vehicle used in the act of transporting liquor. 281 U.S. at 533–34, 50 S.Ct. at 387–88. After noting that the statute in question was "in form mandatory throughout," the Court explained it "detail[ed] . . . successive steps to be taken, which, if followed, [led] unavoidably to forfeiture under that section . . . , *with the important consequence of protecting the interests of innocent third persons*." *Id.* (emphasis added). These qualities of the relevant text, the Supreme Court explained, "suggests a definite purpose to make the protection effective" by imposing a mandatory duty. *Id.*

Five years after *Richbourg Motor Co.*, the Supreme Court in *Escoe* concluded that any doubt regarding the mandatory nature of a statutory "shall" is "dispelled when we pass from the words alone *to a view of ends and aims*." 295 U.S. at 492–93, 55 S.Ct. at 819–20 (emphasis added). In *Escoe*, the relevant statute appeared to require a trial court to bring a probationer to court to revoke his probation. *Id.* The Supreme Court determined, because it was "[c]lear[] [that] the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation," the presentment of the probationer was "necessary, or so the Congress must have thought, to protect the individual against malice or oppression." *Id.* at 493, 55 S.Ct. at 820. Thus, *Escoe* concluded the "shall" in the relevant statute was "mandatory in meaning as well as mandatory in form." *Id.* at 494, 55 S.Ct. at 820. Leaving no doubt, the Supreme Court stated, "[s]tatutes are not [optional] when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect." *Id.*; *see also Ralpho*

AMERICAN OVERSIGHT

v. Bell, 569 F.2d 607, 627–28 & n.149 (D.C. Cir. 1977) (applying *Escoe* to "prefer a construction" of mandatory language in a statute guiding governmental officials' discharge of duties "that bestows the benefits of the Act on those for whom it was chiefly intended").

Given the caselaw, the key in this case is whether Sections 1226(c) and 1231(a)(2) demonstrate a purpose to protect public or private interests. If so, the word "shall," as used in both sections, would connote a requirement against the Government in the manner envisioned by *Richbourg Motor Co.* and *Escoe*. Based on the following, the Court finds that the statutes do indeed demonstrate such a purpose.

The Supreme Court in *Demore* clearly explains that the purpose of Section 1226(c) was to protect third-party interests: that of the states, citizens, and legal immigrants of this country. Essentially, Section 1226(c) was enacted "against a backdrop of wholesale failure by the INS [ICE's predecessor] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. "INS' near-total inability to remove deportable criminal aliens imposed" overpopulation in federal and state prisons, caused monetary costs, took away immigration opportunities that could have been provided to others, and increased crime in the Nation's communities. *Id.* at 518–20, 123 S.Ct. at 1714–15. Crucially, "Congress also had before it 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, 123 S.Ct. at 1715. Before Section 1226, "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal

AMERICAN OVERSIGHT

proceedings when those aliens were determined not to present an excessive flight risk or threat to society." *Id.* (citing 8 U.S.C. § 1252(a) (1982 ed.)). Thus, to alleviate these issues, Congress "enacted 8 U.S.C. § 1226, *requiring* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521, 123 S.Ct. at 1716 (emphasis added). Given *Demore*'s findings, the purpose of Section 1226 is to protect the public and private interests of third parties, namely, the states, the citizens, and legal immigrants of the United States.

Considering the context and purpose of Section 1226, it is no wonder why Subsection (c) "subtract[s]," from the discretion given to the Government in Section 1226(a). *See Preap*, ____ U.S. at ____, 139 S.Ct. at 966. In fact, it does more than that. Subsection (c) also subtracts from the general "broad discretion" that the Attorney General originally had prior to the enactment of Section 1226. *See Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. "Shall" in Section 1226(c), therefore, must be construed to mean "must."

Like Section 1226(c), Section 1231(a)(2) was enacted to protect public and private interests of the states and the people of the United States. As the Supreme Court noted in *Zadvydas*, "protecting the community from dangerous aliens" is a "statutory purpose" of that section. 533 U.S. at 697, 121 S.Ct. at 2502. What's more, Section 1231 "is part of a statute that has as its basic purpose effectuating an alien's removal," a purpose related to the community's protection. *Id.* Coupled with *Demore*'s detailed explanation of the burdens criminal aliens impose on both the country and its people when the Government fails to deport them, 538 U.S. at 518–20, 123 S.Ct. at 1714–15, it is evident that Section 1231(a)(2)'s purpose was to similarly protect the states, the citizens, and legal immigrants'

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005325

interests against the harmful effects the Government's failure to remove certain aliens would bring about.

Additionally, numerous federal courts—including this Court—have recognized *other* parts of Section 1231 use "shall" as a mandatory command. *See Shuaibu v. Gonzales*, 425 F.3d 1142, 1144 (8th Cir. 2005) (interpreting the "shall" in Section 1231(b)(1)(C) to mean the Attorney General "must" attempt to remove the alien to certain countries); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (interpreting "shall" in Section 1231(a)(3) to mean all aliens ordered released "must" comply with supervision requirements); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *32–37 (analyzing Section 1231(a)(1)(A) and holding the "shall" in that provision imposes a mandate on the Government to deport aliens with final orders of removal within 90 days). These interpretations of "shall" as mandatory in other parts of Section 1231 are yet further indication the "shall" in Section 1231(a)(2) bears the same meaning, because "a word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra*, at 170; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Thus, for all these reasons, the "shall" in Section 1231(a)(2) necessarily means must.

The Government does not disagree that Congress enacted Sections 1226(c) and 1231(a)(2) to protect public or private interests. Rather, the Government demurs that a statutory purpose of protecting third parties, as held in *Richbourg Motor Co.* and *Escoe*,

AMERICAN OVERSIGHT

is not a "stronger indication," per *Castle Rock*, to make "shall" mandatory against any governmental actor. (Dkt. No. 42 at 36–38); *see Richbourg*, 281 U.S. at 533–34, 50 S.Ct., at 387–88; *Escoe*, 295 U.S. at 493–94, 55 S.Ct. at 820; *Castle Rock*, 545 U.S. at 761, 125 S.Ct. at 2806. In making this argument, the Government reasons that the "protection of a third party" rationale *cannot* serve as a stronger indication because, it claims, the very "statute [in *Castle Rock*] concerned enforcement of restraining orders entered to benefit a 'protected person.'" (*Id.* at 37–38) (emphasis omitted) (quoting *Castle Rock*, 545 U.S. at 758–59, 125 S.Ct. at 2804–05). In doing so, however, the Government ignores the Supreme Court's holdings in *Richbourg Motor Co.* and *Escoe*. *See* (*Id.* at 36–39). In short, the Government implies that *Castle Rock* overruled *Richbourg Motor Co.* and *Escoe sub silentio*. That argument fails.

As an initial matter, this Court cannot ignore *Richbourg Motor Co.* and *Escoe* where the Supreme Court or the Fifth Circuit has not expressly instructed it to do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Lopez v. City of Hous.*, Civil Action No. H-09-0420, 2009 WL 1456487, at *15 (S.D. Tex. May 22, 2009) (Lake, J.) ("[I]t is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals." (quoting *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005327

920, 925 (S.D. Tex. 1997) (Jack, J.))). The Court did not disregard those cases in *Texas I*, nor will it disregard them here.[29]

But even if the Court could ignore *Richbourg Motor Co.* and *Escoe*, *Castle Rock* is easily distinguishable from this case. The state statute ostensibly mandating the police to enforce restraining orders in *Castle Rock* was drafted upon a background of "[a] well established tradition of police discretion" that "ha[d] long coexisted with apparently mandatory arrest statutes." *Castle Rock*, 545 U.S. at 760, 125 S.Ct. at 2805–06 (citing 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980)). A similar tradition is not present with respect to Sections 1226(c) and 1231(a)(2). As explained above, it was precisely the federal government's "wholesale failure" "to deal

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[29] The Court also notes that its decision in *Texas I* did not rely entirely on the protection of "public or private interests" rationale explained in *Richbourg Motor Co.* and *Escoe* to support its finding of a "stronger indication" that the "shall" in 8 U.S.C. § 1231(a)(1)(A) connoted a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34–35. Instead, the Court performed a full statutory interpretation of the word "shall" in Section 1231(a)(1)(A) and relied on numerous precedents in the Fifth Circuit and sister circuits demonstrating the mandatory nature of that word. *Id.* at *33–38 (noting the Court had examined "the text, context, statutory history, and precedent demonstrating that 'shall' means *must* in section 1231(a)(1)(A)" (emphasis in original)). In contrast to that comprehensive analysis, the Government's current lone attack on the Court's prior synthesis of the rules from *Hecht*, *Castle Rock*, *Richbourg Motor Co.*, and *Escoe* is lacking. Nevertheless, despite the in-depth analysis the Court undertook in *Texas I*, a district court in Arizona arrived at a different conclusion, holding that "shall" does not mean "must" in 8 U.S.C. § 1231(a)(1)(A). *Arizona*, 2021 WL 2787930, at *9–10. That court's rationale was that the legislative intent required for Section 1231(a)(1)(A) to be mandatory—per *Castle Rock*—was not present. *Id.* The court based its holding on (a) the statutory scheme which apparently contemplated removals of aliens outside the 90-day period, (b) the Government's broad discretion to remove aliens at any stage of the removal process, and (c) some legislative history showing that the 90-day period contemplated in the section was intended to be "merely" a "target" date "rather than a statutory mandate." *Id.* Therefore, according to the *Arizona* court, "shall" did not mean "must" in Section 1231(a)(1)(A). *Id.* Like the Government in this case, the district court neither cited to nor discussed *Richbourg Motor Co.* and *Escoe*. This Court respectfully disagrees with the court in *Arizona* and the Government, having thoroughly probed the statutory text, the purpose of the statutes, and legislative history of Sections 1231(a)(1)(A) in *Texas I*, and Sections 1226(c) and 1231(a)(2) in this Memorandum Opinion and Order.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005328

with increasing rates of criminal activity by aliens" that prompted Congress to *limit* the Executive's discretion in such matters by enacting Section 1226. *See Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. Such specific legislative intent, backed by Supreme Court acknowledgment, was not present in the statute interpreted in *Castle Rock*. *Cf.* 545 U.S. at 760–61, 125 S.Ct. at 2805–06.

Furthermore, the Government's contention that Sections 1226(c) and 1231(a)(2) do not confer a mandatory duty against the Government goes against an analysis of the statutes' text within the whole statutory scheme. The Supreme Court has noted that "[t]he word 'may' customarily connotes discretion" and that such a "connotation is particularly apt where . . . 'may' is used in contraposition to the word 'shall.'" *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (citing *Haig v. Agee*, 453 U.S. 280, 294 n.26, 101 S.Ct. 2766, 2775 n.24, 69 L.Ed.2d 640 (1981)). That principle proved crucial in *Jama*, where the Supreme Court held that because Section 1231(b)(2) of the INA states that the Attorney General "shall remove" an alien to a designated country, it would be inappropriate to read as mandatory another provision explaining that the Attorney General "may" disregard the designation if certain circumstances arise. *Id.* This principle applies to this case as well.

Section 1231(a)(2) states that the Attorney General "shall" detain certain aliens "during the removal period," which is defined to be a period of 90 days when an alien is ordered removed. 8 U.S.C. § 1231(a)(1)–(2). Before Section 1231(a)(2), Subsection (a)(1)(C) provides that the removal period "shall" be extended beyond 90 days if certain circumstances arise, and the alien "may" remain in detention during that extended

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005329

period. *Id.* § 1231(a)(1)(C). Again, it would be absurd if Section 1231(a)(2)—with its use of "shall"—is read to provide merely discretionary authority to the Government to detain people during the removal period when Section 1231(a)(1)(C)—using "may"—clearly provides discretion to the Government to detain people *after* the initial 90-day removal period.

Likewise, Section 1226(c) clearly juxtaposes "may" and "shall" so that there is no ambiguity as to whether the "shall" used in 1226(c)(1) imposes a mandatory duty. Subsection (c)(1) states that the Attorney General "shall" detain certain aliens "when the alien is released." 8 U.S.C. § 1226(c)(1). Just right after that, Subsection (c)(2) notes that the Attorney General "may" release aliens described in Subsection (c)(1) "only if" certain circumstances are present. *Id.* § 1226(c)(2). As such, for Subsection (c)(2) to have any meaning, Subsection (c)(1) must be read as a mandate: the Attorney General *must* detain aliens when released and such aliens *may* be released *only if* certain situations call for it. If Subsection (c)(1) is not interpreted in this way, then Subsection (c)(2)—the release provision—loses its significance. It would be superfluous for Congress to state how certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place. This analysis of the two statutes within the overall scheme indeed tracks how the Supreme Court and other federal courts have construed Sections 1226(c) and 1231(a)(2), as described more fully above.

AMERICAN OVERSIGHT

b. Whether "Prioritization" Contravenes Congressional Mandates

Having concluded that "shall" means "must" in Sections 1226(c) and 1231(a)(2), the Court turns to the Government's second argument in support of its assertion that the new guidelines in the February 18 Memorandum are committed to agency discretion by law. That is, regardless of the relevant sections' mandatory nature, the new guidelines "simply establish[] enforcement priorities" because they do "not direct ICE officials to cease detaining any particular noncitizen." (Dkt. No. 42 at 28–29). Put differently, the Government argues that the guidelines do not *actually* stop detentions and, instead, merely prioritize who gets detained first. As a result, the Government concludes that the guidelines do not contravene the statutes. *See* (*Id.*). Thus, in essence, the Government argues that it has discretion to determine the *timing* of when certain aliens should be detained—if not the discretion to determine *who* gets detained. This argument fails as well.

Although the Government describes the February 18 Memorandum as only a reprioritization of immigration enforcement priorities, a review of the Memorandum itself establishes that it is more than that. *See Texas DAPA*, 809 F.3d at 171–72 ("Although the DAPA Memo facially purports to confer discretion, the district court determined that nothing about DAPA genuinely leaves the agency and its employees free to exercise discretion." (cleaned up)). The new guidelines violate the statutory commands of Sections 1226(c) and 1231(a)(2) which are: to detain certain aliens "when the alien is released," per Section 1226(c), or "during the removal period," per Section 1231(a)(2).

AMERICAN OVERSIGHT

The Government opines that the February 18 Memorandum "directs 'officers and agents . . . to exercise their discretion thoughtfully' after consideration 'of all relevant facts and circumstances'" concerning the arrest, detention, or removal of criminal illegal aliens. (Dkt. No. 42 at 29) (alteration in original) (citing Dkt. No. 42-2 at 4). That statement demonstrates that the new guidelines wade into areas that are not committed to agency discretion. *See* (*Id.*). Because "shall" means "must" in Section 1226(c), the Executive Branch is required to detain criminal aliens who have committed "*any* offense covered in section 1182(a)(2)," "*any* offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)," or *any* alien who "is deportable under section 1227(a)(2)(A)(i)," "inadmissible under section 1182(a)(3)(B)," or "deportable under section 1227(a)(4)(B)." 8 U.S.C. § 1226(c)(1)(A)–(D) (emphases added). This leaves no room for the Executive's agent to "thoughtfully" exercise discretion. *See* (Dkt. No. 42 at 29). And crucially, to protect the public, Congress mandated that *any* alien falling under any of these categories must be detained "when the alien is released" from state custody. *Id.* Likewise, Section 1231(a)(2) requires both the detention of aliens who possess orders of removal *and* aliens who have been found "inadmissible under section 1182(a)(2)," "1182(a)(3)(B)," or "deportable under section 1227(a)(2) or 1227(a)(4)(B)."[30] *Id.* § 1231(a)(2). And, like Section 1226(c),

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[30] In *Texas I*, the Government argued that Section 1231(a)(1)(A)'s use of the word "shall" could not have meant "must" because at least one other "shall" in Section 1231 is not mandatory (at least according to the Government). *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35. That other "shall" is apparently in Section 1231(a)(2) which reads, as stated earlier: "During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under [certain circumstances]." *Id.* The Government contended that reading "shall" as mandatory in the first sentence of Section 1231(a)(2) would make the second sentence (continue)

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005332

Congress in Section 1231(a)(2) mandated the timing of such detention: the aliens must be detained "during the removal period." *Id.*

Because of the clear mandates set forth in Sections 1226(c) and 1231(a)(2), determining whether and when an alien should be detained is not a decision committed to agency discretion. And by prioritizing the detention of some aliens over others, the Government has effectively conferred upon itself discretion as to the timing of detention—discretion it does not have. Put differently, the Government has assumed a discretionary power that Congress has explicitly foreclosed. Such a maneuver is impermissible. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446 ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." (alteration in

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superfluous. *Id.*; *see also* (6:21-cv-3, Dkt. No. 82 at 21); (6:21-cv-3, Dkt. No. 83 at 34). The Court found the argument unpersuasive, finding that there was a distinction between the two clauses. *Id.* As the Court held, the first clause of Section 1231(a)(2) mandates the act of detaining. *Id.* (citing *Rodney*, 340 F. App'x at 764). The second clause, on the other hand, prohibits the release of certain individuals. *Id.* Thus, the Attorney General may in some circumstances "release" those whom he has "detain[ed]." *See* 8 U.S.C. § 1231(a)(2). Section 1231 itself prescribes the conditions through which an alien—who is presumably presently detained—may pursue a "stay" and a "release." *Id.* § 1231(c)(2)(A), (C). In fact, it could easily be said that the prohibition on releasing certain aliens demonstrates that Congress assumed *all* aliens would be detained—because they "shall" be. Thus, the Court concluded in *Texas I* that the Government's "textual" argument failed. In this case, the Government briefly restates its argument from *Texas I* in an attempt to persuade the Court to change its disposition. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35; *see also* (Dkt. No. 42 at 39). The Court remains unpersuaded and adopts its prior conclusions from *Texas I* as discussed in this footnote.

AMERICAN OVERSIGHT

original) (citation omitted) (citing U.S. Const. art. II, § 3)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 956, 151 L.Ed.2d 908 (2002) (finding that an agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

"Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets." *Preap*, ____ U.S. at ____ n.6, 139 S.Ct. at 969 n.6 (emphasis in original). In this case, Section 1226(c)'s "when . . . released" language "clarifies when the duty to arrest is triggered: upon release from criminal custody." *Id.* at ____, 139 S.Ct. at 969. And as a logical extension of that reasoning, Section 1231(a)(2)'s "during the removal period" language also clarifies when a duty to arrest is triggered: when the alien is provided with a final order of removal.[31] *See* 8 U.S.C. § 1231(a)(1)–(2). In sum, Congress has clearly specified when the *duty* to detain is *triggered*: when the alien is released as provided by Section 1226(c) and during the removal period for Section 1231(a)(2). *When* that duty to detain is triggered is not left for the agency to decide. Thus, choosing to detain certain aliens "when . . . released," *see* Section 1226(c), or "during the removal period," *see* Section 1231(a)(2), over others who are mandated to be detained at those specific points in time is not left to agency discretion. Indeed, it is a violation of the clear letter of the law. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446.

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[31] For criminal aliens in state custody, the 90-day period does not start until they are released from state confinement. *See* 8 U.S.C. § 1231(a)(1)(B)(iii).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005334

c. Whether the Executive may "Dispense" with Laws

Finally, the Government argues that the Memoranda are committed to agency discretion because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President" and that such "discretion" is "greatly magnified" in the immigration law context. (Dkt. No. 42 at 29–30) (citing *Reno*, 525 U.S. at 490, 119 S.Ct. at 946). As this Court stated in *Texas I*, "whatever 'inherent authority' the Executive may have in the area of immigration, that authority—along with the executive Power—does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws." ____ F. Supp. 3d at ____, 2021 WL 2096669, at *36. The Government's suggestion that the Executive's discretion is so significant that it may, in effect, dispense with laws has significant implications for the separation-of-powers system enshrined in the Constitution. The subject is therefore worth addressing, albeit briefly, at this early stage in the litigation. However grand the Executive's discretion might be in enforcing immigration laws, the Constitution does not empower the Executive to set forth a policy that, in effect, dispenses with a congressional immigration mandate.[32]

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[32] This proposition does not include circumstances in which the President is asked to enforce a law that is unconstitutional or, more specifically, a law that usurps Executive authority. *See* Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 621–22 (1994). After all, the Constitution commands that, "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, *and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.'" U.S. Const. art. II, § 1, cl. 8 (emphasis added). The Government, however, does not assert that Sections 1226(c) or 1231(a)(2) are unconstitutional. *See* (Dkt. No. 42).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005335

Concern over the Executive's power to dispense with laws dates back to before the founding of this Nation. The Framers of the Constitution were well aware of how the English Crown had abused the dispensing power a century prior to the ratification of the Constitution. *See* Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 118 (2020) (concluding that the Framers addressed the royal "prerogatives of suspending or dispensing with the laws" in the Take Care Clause "[g]iven that the Committee [of Detail] explicitly dealt with virtually every one of the royal prerogatives, and especially the notorious prerogatives that had animated the overthrow of Charles I and James II"); Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell & Samuel L. Bray, *The Constitution of the United States* 317 (Robert C. Clark et al. eds., 2d ed. 2013) (opining that the President's duty to "'take care that the laws be faithfully executed' . . . means that the president is not permitted to dispense with or suspend statutes the way King James II did before the Glorious Revolution of 1688"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 797–98 & n.95, 804–09 (2013) (detailing how the "suspending power" was abused by English Monarchs, such as James II, and how that history influenced Americans in limiting "[t]he executive Power"); *see also* Randy Barnett & Evan Bernick, *The Letter & The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 20–21 (2018) (contending the Founding Fathers constructed the new American government as a fiduciary of We the People, "bound by fiduciary duties to *honor the law*, . . . *remain loyal to the public interest*, . . . and *account for violations of these duties*." (emphasis added) (citations and quotations omitted)). As a

AMERICAN OVERSIGHT

prime example, King James II dispensed with the Test Acts,[33] which effectively barred Catholics from holding government or military office, "to create an enlarged standing army under the control of Catholic officers . . . and . . . put Catholic peers in key positions in the Privy Council and the government" because he did "[n]ot trust[] Protestant militias and gentry to protect him from rebellion[.]" McConnell, *supra*, at 116; *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 691 (2014) ("King James enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters."); Delahunty & Yoo, *supra*, at 805–06 ("James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics."). This decision angered many Englishmen[34] and played a significant role in igniting the Glorious Revolution, which resulted in William III and Mary II replacing James II on the throne. Delahunty & Yoo, *supra*, at 807. Although no longer on

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[33] Specifically, the First Test Act, enacted in 1673, "was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation and receive the Anglican sacrament. Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily." Delahunty & Yoo, *supra*, at 805–06. The Second Test Act, enacted in 1678, "made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy." *Id.* at 806.

[34] This ire towards James II's use of the dispensing power is best captured in the English Bill of Rights, which says:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;
>
> By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament[.]

The Bill of Rights, 1 W. & M., c. 1 (1689).

AMERICAN OVERSIGHT

the throne, James II had already left his mark on the future powers of the Crown. Indeed, the English Bill of Rights of 1689 barred William III and Mary II and all future monarchs from suspending or dispensing with laws.[35]

By 1776, Americans had developed a similar sentiment about the dispensing power as had the English in 1689. *See* Price, *supra*, at 692. Notably, one of the grievances against King George III articulated in the Declaration of Independence[36] was that he "often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing him to halt their execution." Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy Rabkin as Amici Curiae Supporting Respondents at 5–6, *United States v. Texas*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (mem) (per curiam) (citing Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 224–27, 256–68 (1934)). This "allowed the king not only to dispense with the implementation of statutes, but also to force changes to their content—an essentially legislative power." *Id.* at 5–6; *see also* Declaration of Independence ¶¶ 3–4.

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[35] Specifically, the English Bill of Rights of 1689 provides: "[T]he pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal" and that "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal." The Bill of Rights, 1 W. & M., c. 2 (1689).

[36] These grievances are as follows:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good; He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Declaration of Independence ¶¶ 3–4.

AMERICAN OVERSIGHT

Prior to the United States Constitution's ratification, states were aware of this sentiment and crafted state constitutions of their own that barred the Executive from exercising the suspending or dispensing power. *See* Price, *supra*, at 692 ("Drawing from this English model, several states during the American revolutionary period adopted constitutions including prohibitions on executive suspension of laws."); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights In 1787 and 1791: What Individual Rights Are Really Deeply Rooted In American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534–35 (2012) (explaining that, at the time of the founding, "state constitutions . . . had constitutional clauses restricting the power to suspend or dispense with laws to the legislature"); *cf.* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425–26 (1999) (noting that, "[i]n the 1760s and 1770s, during the crisis that eventually tore apart the British empire, the American colonists had this long English heritage of popular rights to draw upon," including the English Bill of Rights, which "declared illegal certain actions of the crown, including its dispensing with laws"). By 1787, six states—Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia—had state constitutions containing provisions barring the Executive from exercising the suspending or dispensing power. *See* Del. Const. of 1776 Decl. of Rights, § 7 ("That no power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature."); Md. Const. of 1776 Decl. of Rights, § VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); Mass. Const. of 1780 pt. 1, art. XX ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the

AMERICAN OVERSIGHT

legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."); N.H. Const. of 1784 pt. 1, art. XXIX ("The power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for."); N.C. Const. of 1776 Decl. of Rights, § V ("That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised."); Va. Const. of 1776 Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."); *see also* Calabresi, Agudo & Dore, *supra,* at 1534. This number soon grew to eight after Pennsylvania added a provision prohibiting the Executive from suspending or dispensing with laws to its constitution in 1790, and Vermont, which already had such a provision in its constitution, became a state in 1791.[37] *See* Pa. Const. of 1790 art. IX, § 12 ("That no power of suspending laws shall be exercised, unless by the legislature, or its authority."); Vt. Const. of 1786 Decl. of Rights, § XVII ("The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by

[37] Not all states ratified constitutions at the time of the founding. Indeed, "two states, Connecticut and Rhode Island, retained their Colonial Charters issued by King Charles II and did not try to write new state constitutions or declarations of rights" at this time. Calabresi, Agudo, & Dore, *supra*, at 1543; *see also Narragansett Indian Tribe of R.I. v. State,* 667 A.2d 280, 280 (R.I. 1995) ("Rhode Island's first constitution was adopted in 1842 . . . ."); *Moore v. Ganim*, 660 A.2d 742, 772 (Conn. 1995) (Peters, C.J., concurring) ("Of the thirteen original states, Connecticut was the second to last to adopt a written state constitution, failing to do so until 1818.").

AMERICAN OVERSIGHT

authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for."); *see also* Calabresi, Agudo & Dore, *supra,* at 1535.

Although the Constitution does not contain a provision of its own explicitly prohibiting the Executive from dispensing with laws,[38] it in no way sanctions such action by the Executive for at least two reasons. First, the Constitution separates power among three branches, vesting executive power *exclusively* in the President and legislative power *exclusively* in Congress. *See* U.S. Const. art. I, § 1; U.S. Const. art. II, § 1; U.S. Const. art. III, § 1; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 130 S.Ct. 3138, 3146, 177 L.Ed.2d 706 (2010) ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" (quoting *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983))); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949) ("When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical

[38] In fact, "[a]t the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority." *See* Price, *supra*, at 693. The First Congress did, however, have an opportunity to bar the President from possessing such power in the Bill of Rights but failed to do so, "despite proposals from several state ratifying conventions that the Constitution be amended to include such a provision." *Id.* at 694. But "any negative inference from Congress's failure to act on these proposals seems weak." *Id.* Instead, "[i]t seems more likely that James Madison and other members of the First Congress failed to include an antisuspension provision in the Bill of Rights precisely because they thought the Constitution already made it clear enough that the President lacked such powers." *Id.*

AMERICAN OVERSIGHT

manner."). Dispensing of laws is, in effect, a *legislative* power. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13, 9 L.Ed. 1181 (1838); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (stating that the President does not have the dispensing power, in part, because only Congress has "dominion" over the laws—*i.e.*, the legislative power); *see also* Del. Const. of 1776 Decl. of Rights, § 7; Md. Const. of 1776 Decl. of Rights, § VII; Mass. Const. of 1780 pt. 1, art. XX; N.H. Const. of 1784 pt. 1, art. XXIX; N.C. Const. of 1776 Decl. of Rights, § V; Va. Const. of 1776 Bill of Rights, § 7; Pa. Const. of 1790 art. IX, § 12; Vt. Const. of 1786 Decl. of Rights, § XVII. As such, the Executive does not possess this power. *See Kendall*, 37 U.S. (12 Pet.) at 612–13 (stating that giving the President the dispensing power "would be clothing the President with a power entirely to *control the legislation of congress*, and paralyze the administration of justice" (emphasis added)); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids[.]"); *cf. Clinton*, 524 U.S. at 438, 118 S.Ct. at 2103 ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Second, the dispensing power conflicts with the Executive's *duty* to *faithfully* execute the laws. *See* U.S. Const. art. II, § 3. In vesting the executive power in the

AMERICAN OVERSIGHT

President,[39] the Constitution requires the President to channel that power to perform certain duties and prescribes how he or she is to carry out those duties.[40] *See id.* One of those duties, contained in the Take Care Clause, is that "he *shall take Care*[41] that the Laws be *faithfully*[42] executed[43] . . . ."[44] *Id.* (emphasis added) (footnotes added); *see Morrison v. Olson*, 487 U.S. 654, 689–90, 108 S.Ct. 2597, 2618, 101 L.Ed.2d 569 (1988) ("The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere

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[39] "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

[40] "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3.

[41] "*Care*: Regard; charge; heed in order to protection and preservation." Samuel Johnson, *A Dictionary of the English Language* (1755).
https://johnsonsdictionaryonline.com/1755/care_ns.

"*Care*: Charge or oversight, implying concern for safety and prosperity." Noah Webster, *American Dictionary of the English Language* (1828).
http://webstersdictionary1828.com/Dictionary/care.

[42] "*Faithfully*: Without failure of performance; honestly; exactly." Johnson, *supra.*
https://johnsonsdictionaryonline.com/1755/faithfully_adv.

"*Faithfully*: With strict adherence to allegiance and duty." Webster, *supra.*
http://webstersdictionary1828.com/Dictionary/faithfully.

[43] "*Execute*: To put in act; to do what is planned or determined." Johnson, *supra.*
https://johnsonsdictionaryonline.com/1755/execute_va.

"*Execute*: To carry into effect; as, to execute law or justice." Webster, *supra.*
http://webstersdictionary1828.com/Dictionary/execute.

[44] As stated above, the Court, at this time, declines to weigh in on the merits of the States' separate claim that the Memoranda violate the Take Care Clause. *See* footnote 4. However, the Court is interested in further briefing on this claim at the next stage of this litigation. In addition to any issues the Parties would like to bring to the Court's attention, the Parties should focus part of their briefing on whether the States can bring a Take Care Clause claim independent of or in conjunction with their APA claims.

AMERICAN OVERSIGHT

with the President's exercise of the 'executive power' and his *constitutionally appointed duty* to 'take care that the laws be faithfully executed' under Article II." (emphasis added) (footnote omitted)); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863, 102 S.Ct. 3440, 3444, 73 L.Ed.2d 1193 (1982) ("The Constitution imposes on the President the *duty* to 'take Care that the Laws be faithfully executed." (emphasis added) (quoting U.S. Const. art. II, § 3)); *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926) ("Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his *duty expressly declared* in the third section of the article to 'take care that the laws be faithfully executed.'" (emphasis added)); *see also Seila L. LLC v. Consumer Fin. Prot. Bureau*, ____ U.S. ____, ____, 140 S.Ct. 2183, 2228, 207 L.Ed.2d 494 (2020) (Kagan, J., concurring in part) ("To begin with, the provision—'he shall take Care that the Laws be faithfully executed'—speaks of *duty*, not power." (emphasis added) (quoting U.S. Const. art. II, § 3)); Letter from George Washington to Alexander Hamilton[45] (Sept. 7, 1792) (on file with the National Archives) ("It is my *duty* to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it; nor can the Government longer remain a passive spectator of the contempt with which they are treated." (emphasis added)); Letter from John Adams to Roger Sherman[46] (July 18, 1789) *reprinted in* 6 *The Works of John Adams, Second President of The United States* 427, 429–30 (Charles

[45] https://founders.archives.gov/documents/Washington/05-11-02-0040.

[46] https:// https://founders.archives.gov/documents/Adams/99-02-02-0682.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005344

Francis Adams ed., 1851) (stating that it is the President's "*duty* to take Care that the Laws be faithfully executed" (emphasis added)); Saikrishna B. Prakash, *Faithless Execution*, 133 Harv. L. Rev. F. 94, 97 (2020) ("The *duty* to see the laws faithfully executed implies that the President has the power—the executive power—to see the laws faithfully executed." (emphasis added)); Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014) ("To be sure, the President has the *duty* to take care that the laws be faithfully executed." (emphasis added)).

Given this duty to take care that the laws are faithfully executed, the Constitution's system of separation-of-powers, and the treatment of the dispensing power in American history and tradition, the Court is hard pressed, at this early stage of the litigation, to see how the Government can suggest that the Constitution confers upon the Executive the "discretion" to ignore clear congressional commands contained in Sections 1226(c) and 1231(a)(2). *See Kendall*, 37 U.S. (12 Pet.) at 612–13 ("It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a *dispensing power*, which has no countenance for its support in any part of the constitution . . . . To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and

AMERICAN OVERSIGHT

entirely inadmissible." (emphasis added)); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (stating that, because the President has the "high duty . . . to 'take care that the laws be faithfully executed,'" he must enforce a law in accordance with congressional commands where Congress has "prescribed . . . the manner in which [the] law shall be carried into execution"); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, *nor dispense with its execution*, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government." (emphasis added)); *see also Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435, 110 S.Ct. 2465, 2477, 110 L.Ed.2d 387 (1990) (White, J., concurring) ("The Executive Branch *does not have the dispensing power* on its own[.]" (emphasis added) (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 505, 35 S.Ct. 309, 325, 59 L.Ed. 673 (1915) (Day, J., dissenting) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); McConnell, *supra*, at 119 ("The Dispensing Power must not be confused with the exercise of prosecutorial discretion. The executive decision not to prosecute a particular person or class of persons for actions in violation of the law does not give them the legal right to violate the law."); Paulsen, Calabresi, McConnell & Bray, *supra*, at 317; Joseph Story, *Commentaries on the Constitution of the United States* 316 (Quid Pro Brooks 2013) (1833) ("[T]he duty imposed upon [the President] to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will 'preserve,

AMERICAN OVERSIGHT

protect, and defend the constitution.' The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people."); Kavanaugh, *supra*, at 1911 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws *regulating the executive branch*." (emphasis added)); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 620 (1994) (noting that the "Committee of Detail [may have] added the requirement that the President 'take care' that the laws be 'faithfully' executed" out of a "desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it"); Delahunty & Yoo, *supra*, at 797–98 & n.95, 804–09; Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873–74 (1994) ("The duty to execute the laws faithfully means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection." (footnotes omitted)); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 18 n.80 (1993) (quoting William Rawle, *A View of the*

AMERICAN OVERSIGHT

Constitution of the United States of America 148–49 (2d ed. 1829), for the proposition that the Take Care Clause "declares what is [the President's] *duty*" and that "[h]e is *bound* to enforce" the laws (first alteration in original) (emphases added)); William P. Marshall & Saikrishna B. Prakash, *Common Interpretation: Article II, Section 3*, National Constitution Center[47] ("At a minimum, the [Take Care] Clause means that the President may neither breach federal law *nor order his or her subordinates to do so*, for defiance cannot be considered faithful execution. *The Constitution also incorporates the English bars on dispensing or suspending the law*, with some supposing that the Clause itself prohibits both." (emphases added)).

Instead, the Executive—and thus, the Attorney General or the Secretary of DHS—must exercise any discretion accorded to it by statute in the manner which Congress has prescribed. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Vigil*, 508 U.S. at 193, 113 S.Ct. at 2032 ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."); *Heckler*, 470 U.S. at 832–34, 105 S.Ct. at 1656–57; *see also Regents*, ____ U.S. at ____, 140 S.Ct. at 1926 (Thomas, J., concurring in part) ("It is axiomatic that an administrative agency's power . . . is limited to the authority granted by Congress." (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988))).

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[47] https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/348?aff_id=1000.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005348

Accordingly, the Executive Branch, including its agencies, may not dispense with a clear congressional mandate under the guise of exercising "discretion."

d. The Memoranda are not Committed to Agency Discretion

In sum, the Court finds that Sections 1226(c) and 1231(a)(2) impose mandatory detention at specific points in time for certain aliens. The Executive Branch may neither alter these statutory obligations through reprioritization nor dispense with them. Accordingly, the Court concludes that the detention of certain aliens subject to Sections 1226(c) and 1231(a)(2) is not committed to agency discretion.

4. Zone of Interests

The States must next show that their injuries are within the "zones of interest" the two laws were intended to protect. Congress has placed limits on *how* the Executive may be sued for violating the law and *who* can do it. Congress, through the APA, has provided a cause of action for those seeking redress against the federal government for violating other federal laws. *See* 5 U.S.C. §§ 702, 706. But Congress has limited the availability of an APA cause of action to those who allege an injury that is "arguably" within the "zone of interests" to be protected or regulated by the relevant statutes. *Collins v. Mnuchin*, 938 F.3d 553, 573–74 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, ____ U.S. ____, 141 S.Ct. 1761 (2021); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (hereinafter "*Match-E*") (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)).

AMERICAN OVERSIGHT

The zone of interests test is not "especially demanding" in the APA context. *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389). Indeed, the Supreme Court has "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389 (quoting *Match-E*, 567 U.S. at 225, 132 S.Ct. at 2210). The zone of interests 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 authorized that plaintiff to sue." *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389).

Importantly, the relevant statute in whose zone of interests the plaintiff's injury must reside "is to be determined not by reference to the overall purpose of the Act in question," but rather, "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–76, 117 S.Ct. at 1167. In other words, a court must review those "substantive provisions" of law that the plaintiff relies on for "the gravamen" of its complaint. *Id.*

In this case, the States essentially bring three APA claims asserting that the Government violated federal law: (1) the Memoranda are contrary to Sections 1226(c) and 1231(a)(2) of the INA, (Dkt. No. 1 at ¶¶ 94–107); (2) the policy set forth in the Memoranda is arbitrary and capricious, (*id.* at ¶¶ 108–17); and (3) the Government was required but failed to follow notice and comment procedures in issuing the Memoranda, (*id.* at ¶¶ 118–121).

AMERICAN OVERSIGHT

As in *Texas I,* the Government solely—and narrowly—maintains that "the States do not come within the relevant zone-of-interests" because "no entity can enforce § 1231" because Subsection (h) bars any party from enforcing Section 1231 against the Government.[48] (Dkt. No. 42 at 35–36); *see* (6:21-cv-3, Dkt. No. 83 at 30–32); *Texas I,* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *22–23. For their part, the States briefly address the Government's suppositions, arguing they "fit within the zone of interests both because [the Government is] wrong about Section 1231(h) and for the reasons this Court has already explained" in *Texas I.* (Dkt. No. 51 at 29) (citing *Texas I,* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–29). The Court agrees with the States.

For starters, the Government cannot refute the States' position that their injuries are within the zones of interests of Sections 1226(c) and 1231(a)(2), particularly in light of this Court's discussions of *Demore* and *Zadvydas* concerning the development and purpose of Sections 1226 and 1231. *See supra* I.A, II.B.1 & II.B.3. This discussion makes clear that Sections 1226(c) and 1231(a)(2)—and indeed the INA itself, *see Texas DAPA*, 809 F.3d at 163 & n.80—were enacted to protect and benefit the states, the citizens of this country, and the legal immigrants of the United States. *See supra* I.A, II.B.1 & II.B.3. As such, the injuries the States suffer due to the Memoranda, *see supra* II.A.1–4, fall within the relevant statutes' zones of interests. *See Texas DAPA*, 809 F.3d at 163 (finding that

[48] In so doing, the Government essentially foregoes any zone-of-interest challenge on the States' other APA claims, that is, those based on Section 1226(c) and those which are arguably not based on any of the statutes in question (*i.e.*, the arbitrary and capricious and notice and comment claims).

AMERICAN OVERSIGHT

Texas satisfies the zone-of-interest test as a result of the same injuries that give Texas Article III standing).

The Government, indeed, does not dispute that the States' injuries fall within Sections 1226(c) and 1231(a)(2)'s zones of interests. Rather, the Government focuses its attention on Section 1231(h), in essence arguing that because Subsection (h) bars parties from enforcing Section 1231, any injury stemming from violations of the section does not fall within the statute's zone of interests. *See* (Dkt. No. 42 at 35–36). But, as explained earlier, Section 1231(h) does not bar the States' claims. *See supra* II.B.1; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42. Thus, the Government's lone contention fails. The Court finds that the States' injuries fall within the zones of interest of Sections 1226(c) and 1231(a)(2).

III. DISCUSSION OF PRELIMINARY INJUNCTION

Having determined the Court has jurisdiction over the action and nothing precludes judicial review under the APA, the Court now turns to the merits of the States' Motion for Preliminary Injunction.

A. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, ____ U.S. ____, ____, 138 S.Ct. 1942, 1943, 201 L.Ed.2d 398 (2018) (quotation omitted). Indeed, the decision to grant a preliminary injunction is "to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Thus, "[i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or

AMERICAN OVERSIGHT

withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008) (quotation omitted). And in determining whether injunctive relief is proper, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*

A preliminary injunction "issue[s] only where (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). As such, "[t]he party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated" in order for a preliminary injunction to be granted. *Id.*

Note, however, that "none of the four prerequisites has a fixed quantitative value." *Texas v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975). "Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id.* (citing *Siff v. State Democratic Exec. Comm.*, 500 F.2d 1307 (5th Cir. 1974)). For instance, "a preliminary injunction does *not* follow as a matter of course from a plaintiff's showing" of the first element, "a likelihood of success on the merits." *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1943–44 (emphasis added). Thus, federal courts must consider whether the movant has established the three other elements as well for a preliminary injunction to issue. *Id.* at ____, 138 S.Ct. at 1944.

AMERICAN OVERSIGHT

B. APPLICATION

1. Substantial Likelihood of Success on the Merits

a. Counts I & II: Contrary to Law

As described above, the Court determined that "shall" in Sections 1226(c) and 1231(a)(2) means "must." *See supra* II.B.3.a. This conclusion means that the Attorney General must detain certain aliens subject to those sections. The Court also found that both statutes mandate detention of certain aliens at specific points in time: for Section 1226(c), the Attorney General is required to detain certain aliens "when the alien is released from custody," while for Section 1231(a)(2), the Attorney General is obligated to detain certain aliens "during the removal period." The policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur. This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2). Thus, the States have demonstrated a substantial likelihood of success on Counts I & II.

b. Count III: Arbitrary and Capricious

The States argue that the Government's Memoranda establishing new guidelines and priorities for the detention of certain aliens are arbitrary and capricious because they "failed to consider important aspects of a problem." (Dkt. No. 18 at 28). Specifically, the States allege that the Memoranda: (1) "failed to consider the risks of recidivism among criminal aliens who are not detained;" (2) "ignore the effects non-detention will have on future removal efforts," especially on the costs that delays in deportation often produce

AMERICAN OVERSIGHT

and the rate of abscondment of released aliens; (3) "do not discuss the costs that [the new guidance] will impose on [the] States;" (4) "did not consider more limited policies that would have retained congressionally mandated detention of criminal aliens and those with final orders of removal;" and (5) "do[] not explain Defendants' choice[]"of prioritizing the detention of aliens who have aggravated felonies over others who have committed drug offenses and crimes of moral turpitude or those with final orders of removal. (*Id.* at 27–29). The Government disagrees with the States' contentions. Countering the States point-by-point, the Government argues that it "considered the relevant factors and reached a reasonable decision." (Dkt. No. 42 at 42–47). Reviewing these assertions, the Court finds the States have demonstrated a substantial likelihood of success in establishing that the policy set forth in the Memoranda is arbitrary and capricious as alleged in Count III.

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). With that in mind, federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 826, 139 L.Ed.2d 797 (1998) (internal quotation omitted). This necessarily means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be *logical and rational*." *Id.* (emphasis added). More specifically, "the 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*.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

AMERICAN OVERSIGHT

Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)) (emphasis added).

When final agency action is challenged as arbitrary and capricious, "[t]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989) (internal quotations omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. If a court finds that an administrative agency failed to engage in reasoned decision-making, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

"Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) (quoting *State Farm*, 463 U.S. at 50, 103 S.Ct. at 2870). As such, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its

AMERICAN OVERSIGHT

action was based." [49] *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). The administrative record need only "indicate[] the determinative reason for the final action taken," *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973), and courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974).

Finally, the Court is mindful that the arbitrary and capricious standard is "highly deferential." *Garner*, 767 F.2d at 116. Courts must "accord the agency's decision a presumption of regularity" and "are prohibited from substituting [the courts'] judgment for that of the agency." *Id.* (citation omitted). But "while the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *Id.* Based on

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[49] In a status conference with the Parties on July 2, 2021, the Court asked whether the Government intended to file the administrative record for review. The Government declined stating that it was unnecessary at this stage of the litigation. (July 2, 2021, Status Conference, 10:00–10:15 A.M.). For their part, the States did not oppose the Government's position, and, instead, told the Court that it could dispose of the pending Motion for Preliminary Injunction without the full administrative record in hand. *Id.* In effect, the Parties agreed that the full administrative record is not necessary for the Court to rule on the arbitrary and capricious claim at this time.

"A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2556 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). As such, the Court will limit its inquiry to the findings, conclusions, and explanations provided in the February 18 Memorandum for its review. In addition, because the Court is ruling on a motion for preliminary injunction, the Court merely needs to determine "if there is a substantial likelihood that" the States "will prevail on the merits" of their arbitrary and capricious claim. *Prichard*, 812 F.2d at 993. It follows, therefore, that the disposition of the arbitrary and capricious claim, at this stage, is not final. Indeed, for at least one other district court, the lack of an administrative record was not a barrier for that court to rule on an arbitrary and capricious claim at this stage. *See Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *23 & n.8, 28–29 (N.D. Tex. June 27, 2016).

AMERICAN OVERSIGHT

the following, the Memoranda fail to indicate that the Government engaged in reasoned decision-making, thereby rendering them arbitrary and capricious.

At their core, the Memoranda reprioritize certain classes of aliens for immigration enforcement action. In the February 18 Memorandum specifically, the Government states that it is establishing enforcement and removal guidelines with respect to immigration enforcement and removal priorities pursuant to the January 20 Memorandum.[50] *See* (Dkt. No. 19-2 at 5). As discussed above, if a criminal illegal alien falls under a category deemed to be a priority, no preapproval is required for an enforcement or removal action. On the other hand, if the criminal illegal alien does not fall under any of the categories, an enforcement or removal action "will require preapproval." (*Id.* at 7). The Memorandum states that "ICE operates in an environment of limited resources," and thus, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." (*Id.* at 3). In addition to "resource constraints," "several other factors," according to the Memorandum, "render ICE's mission particularly complex." These factors include "ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and relationships with, sovereign

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[50] To the extent the January 20 Memorandum's 100-day pause on removals and that Memorandum's corresponding administrative record are implicated in this action, the Court adopts its reasoning in *Texas I* and finds that the Government failed to engage in reasoned decision-making. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *38–42. Thus, the Court adopts and incorporates by reference its prior decision that the January 20 Memorandum's 100-day pause is arbitrary and capricious.

AMERICAN OVERSIGHT

nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal." (*Id.*). Given these considerations, the Memorandum states that the Government "must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission." (*Id.* at 4).

As described here, the February 18 Memorandum indeed enumerates quite a few factors that make the Government's "mission particularly complex" in this field. But the Memorandum itself does not directly state whether these factors were considered while the Government was actually formulating the guidance in question. Assuming they were considered and were the bases for the new guidance, *see Pitts*, 411 U.S. at 143, 93 S.Ct. at 1244, the February 18 Memorandum (along with its predecessor, the January 20 Memorandum) still does not demonstrate reasoned decision-making. The February 18 Memorandum does not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued. In short, both Memoranda fail to establish any rational connection or logical link between any of these factors and the new guidance. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866.

First, the February 18 Memorandum does not offer even a brief explanation of how "ongoing litigation in various fora" affected the Government's decision-making in promulgating the new guidance. It is simply a vague and conclusory statement. Did the Government mean to say that *Texas I* or other pending cases were considered when crafting the new guidance? If so, how did the disposition of *Texas I* or other cases affect the reprioritization? Those questions have yet to be answered.

AMERICAN OVERSIGHT

Second, the Government's stated responsibility and desire to ensure that eligible aliens may be afforded relief from removal is commendable but likewise lacks any rational connection with the new guidance. The new guidance reprioritizes the detention and deportation of criminal illegal aliens. But the February 18 Memorandum does not explain how or why prioritizing, for instance, the detention or deportation of "border security risks" (aliens who entered the country on or after November 1, 2020) over aliens who have drug offenses or crimes of moral turpitude would ensure that eligible noncitizens will obtain relief in their own removal proceedings. There does not seem to be any connection between reprioritizing the detention and removal of certain aliens to whether other aliens may be afforded legally authorized relief from deportation. The February 18 Memorandum does not shed light on this disconnect.

Third, although the Court acknowledges as a general matter that interactions and relationships with other sovereign nations "may place constraints" on the Government's ability to "execute final orders of removal," *see* (Dkt. No. 19-2 at 4), there is no rational link between any of these factual constraints to the reprioritization scheme the Government has chosen to pursue. For example, do these international relationships make it more inefficient to deport aliens with drug offenses over so-called "national security risks" or "border security risks"? If so, what are the facts that justify such conclusions? Those questions are also unanswered. Like the considerations described above, the Memorandum does not state any facts or findings with respect to why international relations apparently factored in the Government's decision-making.

AMERICAN OVERSIGHT

Lastly, the Government's written concern for the health and safety of ICE workers in the midst of the COVID-19 pandemic is not rationally relevant to the new guidance. Will COVID-19 infections among the ICE workforce be substantially reduced if the Government prioritizes the deportation of one category of criminal illegal aliens over another? How does reprioritization alleviate those health concerns, if any? On these points the February 18 Memorandum is, unfortunately, silent.

The Court further notes that, out of all these considerations, the cursory use of the COVID-19 pandemic to justify the new guidance comes across as implausible. Throughout the last year, institutions, including federal and state governments, have used the pandemic to rationalize policies found to be unlawful or unconstitutional. *See, e.g.*, *Chrysafis v. Marks*, ____ U.S. ____, 2021 WL 3560766 (U.S. Aug. 12, 2021) (enjoining the part of New York's COVID Emergency Eviction and Foreclosure Prevention Act that precluded landlords from contesting a tenant's self-certification of financial hardship on the grounds that "no man can be a judge in his own case" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955))); *Tandon v. Newsom*, ____ U.S. ____, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (enjoining California officials from enforcing occupancy limits on at-home religious exercise in response to COVID-19 when other policies treated comparable secular activities that did not pose a lesser risk of transmission more favorably); *Roman Cath. Diocese v. Cuomo*, ____ U.S. ____, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam) (enjoining the Governor of New York from enforcing occupancy limits on religious services in response to COVID-19 that would have violated the Free Exercise Clause of the First Amendment); *Capitol Hill Baptist Church v. Bowser*,

AMERICAN OVERSIGHT

496 F. Supp. 3d 284, 289 (D.D.C. 2020) (finding that the District's COVID-19-related prohibition of religious gatherings of more than 100 people, even those with appropriate precautions, substantially burdens the plaintiff's exercise of religion in violation of the Religious Freedom Restoration Act). And now the Government has added immigration to the mix.

The Government used the pandemic to reason that the January 20 Memorandum's 100-day pause on removals—the precursor to the February 18 Memorandum—was borne out of reasoned decision-making. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40. But, as the Court noted in *Texas I*, the U.S. Department of Health and Human Services Centers for Disease Control and Prevention ("CDC"), on October 13, 2020, authorized the CDC Director "to suspend the right to introduce persons into the United States" because of the COVID-19 pandemic. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40 & n.46 (citing CDC, *Order Suspending Introduction of Certain Persons Where a Communicable Disease Exists*, (Mar. 20, 2020), available at https://bit.ly/3736Lue (updated Oct. 2020)). The relevant CDC Order "applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to [certain] exceptions." *Id.* Considering the CDC Order, the Government's new guidance is puzzling. The new guidance effectively introduces and keeps more people—specifically, criminal illegal aliens—in the Nation's communities. But, per the CDC Order, the COVID-19 pandemic would likely justify a different course of action. Throughout this time, the Government

AMERICAN OVERSIGHT

has not introduced any further papers or discussed anything in the February 18 Memorandum that show it is following different health guidelines related to COVID-19 that speak to the safety of introducing aliens into the country and its communities. The February 18 Memorandum likewise does not grapple with or otherwise explain how the new guidelines are consistent with these CDC policies. Thus, like in *Texas I*, the Government's consideration of the COVID-19 pandemic not only is implausibly connected to the new guidance, it also "runs counter to the evidence before the agency." *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. In other words, the Government cannot use the pandemic as a blanket reason—devoid of explanation—to justify its choices, especially when these choices run afoul of another agency's published health directives.[51]

"[A]gency action must be based on *non-arbitrary*, *relevant* factors." *Judulang v. Holder*, 565 U.S. 42, 55, 132 S.Ct. 476, 485, 181 L.Ed.2d 449 (2011) (internal quotation omitted) (emphasis added). In this case, the factors apparently considered in the February 18 Memorandum and its predecessor, the January 20 Memorandum, are, after a thorough review, arbitrary and irrelevant to the new guidance. The link between the new guidance and the factors enumerated are so contradictory to the evidence and "implausible" that the States' challenge cannot be said to be differing policy preferences

[51] The Court acknowledges it could be argued that, considering the transmissibility of COVID-19, the Executive Branch has chosen to detain fewer aliens to minimize the spread of the virus in detention facilities where it could not ensure proper safety precautions. But it could also be argued (and the CDC Report the Court describes above strongly suggests) that allowing certain aliens—those who would be detained but for the Memoranda—to be released within communities during the pandemic would exacerbate COVID-19's community spread. Regardless, the Memoranda fail to logically link the Executive Branch's bare COVID-19 justifications to the new guidance such that the Court can conclude the Memoranda were borne of reasoned decision making.

AMERICAN OVERSIGHT

or views. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009) (explaining that when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account, [i]t would be arbitrary or capricious to ignore such matters," and "[i]n such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" (internal citation omitted)); *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'" (quoting *Chenery*, 332 U.S. at 196, 67 S.Ct. at 1577)); *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n*, 2 F.4th 421, 452 (5th Cir. 2021) (explaining that, when considering an agency's cost-benefit analysis in the scope of the arbitrary and capricious standard, the Court's "job 'is not to undertake [its] own economic study, but to determine whether the [agency] 'has established in the record a reasonable basis for its decision'" (quoting *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 251 (5th Cir. 1989))); *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) ("The agency must 'articulate a satisfactory explanation for its action including a

AMERICAN OVERSIGHT

rational connection between the facts found and the choice made.'" (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866)); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (noting the Court must "ensure that the agency examined the relevant data and articulated a satisfactory explanation for its action, and assess whether the agency's decision was based on a consideration of the relevant factors" (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (cleaned up)). Thus, the Court finds that the Government failed to engage in the reasoned decision-making required by law.

What's more, while the Government argues it actually did consider certain relevant factors in crafting the new guidelines (thus engaging in reasoned decision-making), the Court finds that the Government's briefs actually establish that it *did not* consider those factors. To begin with, "*[p]ost 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, 103 S.Ct. [at 2870]). Therefore, this Court finds it inappropriate to consider each of the Government's arguments in their briefing that were not included in the Memoranda. Even assuming they were relevant, however, the Government's in-brief explanations are meritless.

First, the Government states that it considered the prospect of recidivism when crafting the new guidance found in the February 18 Memorandum. (Dkt. No. 42 at 44). Specifically, the Government alleges that "DHS weighed the threat to public safety from criminal noncitizens reoffending in prioritizing certain noncitizens for removal." (*Id.*). In support, the Government cites to passages from the February 18 Memorandum that,

AMERICAN OVERSIGHT

according to the Government, (a) "focused on the degree of threat to public safety" the "different criminal noncitizens presented," which, apparently, is akin to considering the risk of recidivism; and (b) allowed immigration officers, in making "individualized determinations" for enforcement and removal, to "consider public interest factors, which include the risk of recidivism." *See* (*Id.* at 44). These points miss the mark entirely.

With respect to the first, the Government's decision to "focus[] on the degree of threat to public safety" establishes that the Government either did not consider the risk of recidivism or created a policy contrary to the evidence before it. In their claim, the States argue that, in choosing which policy to pursue, the Government did not consider the risks of recidivism of *all* criminal aliens. *See* (Dkt. No. 18 at 44). Indeed, the Supreme Court has stated that "*deportable* criminal aliens who remained in the United States"—notably *not* a certain subset or category of such aliens—"often committed more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (emphasis added); *see also Zadvydas*, 533 U.S. at 713–714, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (discussing rates of recidivism for released criminal aliens and their threat to public safety, noting the "high recidivism rates for released aliens"). Despite the Supreme Court's recognition of the risks deportable criminal aliens pose, the February 18 Memorandum requires prioritization of criminal aliens who *both* pose a threat to public safety *and* have had a prior aggravated felony conviction or criminal gang affiliation. *See* (Dkt. No. 19-2 at 5–6). The States correctly point out that by prioritizing certain aliens, the Memorandum "omit[s] aliens" who are solely "threats to public safety," in other words, potential recidivists. (Dkt. No. 51 at 14). Nothing in the February 18 Memorandum explains that

AMERICAN OVERSIGHT

criminal illegal aliens who are only "threats to public safety" are at a much lower risk of recidivism compared to criminal aliens who have had prior felonies or criminal gang convictions. Put differently, the new guidelines do not establish that the Government considered recidivism since the reprioritization leaves so many other "deprioritized" criminal illegal aliens free to recidivate—to harm the public. And crucially, the Government has not rebutted or clarified the well-established concept that *all* criminal illegal aliens or "deportable aliens pose high risks of recidivism." *See Demore*, 538 U.S. at 518, 123 S.Ct. at 1715. Instead, the February 18 Memorandum, without any support or evidence, implements new guidelines stemming from an idea that it is merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations—who have a much higher risk of recidivism. Such a *conclusion* is without any foundation in the record and shows that the Government either failed to consider recidivism as a factor in its decision-making or it explained its decision in a manner which contradicts the evidence before it. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867.

Moreover, it is irrelevant whether immigration officers have the capability, pursuant to the February 18 Memorandum, to "consider public interest factors" that "could" include the risk of recidivism. *See* (Dkt. No. 42 at 44). Arbitrary and capricious review calls for the Court to examine the rationality of agency decision-making and not the actual decision. *Garner*, 767 F.2d 104 at 116. Even if the new guidelines give some leeway to immigration officers to consider "public interest factors," this does not establish that the Government considered the risk of recidivism when crafting the new guidelines. As the Government frankly admits, the Memoranda "do not use the term

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005367

'recidivism'" anywhere. (Dkt. No. 42 at 44). The February 18 Memorandum is, thus, devoid of any references to recidivism or other statements tending to show that the risk of recidivism that criminal illegal aliens pose was considered when drafting the new policy.

Second, the Government asserts that it has limited resources and must prioritize certain enforcement and removal actions under Section 1226(c). (*Id.* at 45). But, as the States point out, this contention "dodges the key issue" of whether the Government actually considered the effects of the new guidelines to costs of delaying deportations and the overall rate of abscondment of criminal illegal aliens. (Dkt. No. 51 at 15); (Dkt. No. 18 at 27–28). The costs of the non-detainment of criminal aliens are substantial. For instance, in the past, "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." *Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14. Even "[c]ourt ordered release" itself "cannot help but encourage dilatory and obstructive tactics by aliens." *Zadvydas*, 533 U.S. at 713, 121 S.Ct. 2491 (Kennedy, J., dissenting). "An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility." *Id.* And following this line, a Senate Report from 1995 noted that "[d]elays" in deportation "can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U.S. citizenship." S. Rep. No. 104–48, at 2 (1995). The costs from non-detainment rival the costs of abscondment. The same Senate Report found that "[o]ver 20 percent of nondetained criminal aliens fail to appear for

AMERICAN OVERSIGHT

deportation proceedings." *Id.* This Court, as well, found the rate of abscondment to be substantial even for aliens who have been "thoroughly vetted" in order for them to be placed in an "alternative to detention program." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *19. Even in light of these effects and costs, the February 18 Memorandum is silent on whether these were considered while crafting the new guidelines. The Court, therefore, finds that the Government failed to consider this relevant factor.

Third, the Government argues that, with regard to the additional costs the States will incur, "the States are wrong to argue that DHS was required to expressly evaluate the costs to each State," and, regardless, the Government "did consider how the Priority Framework would impact public safety . . . which should reduce the costs from crime to the States." (Dkt. No. 42 at 45–46). Rephrased, the Government argues that state costs and expenses are not relevant factors, but, nevertheless, the February 18 Memorandum indirectly considered them since it factored in the new guidelines' impact to public safety. The Government is incorrect on both issues.

State costs and expenses are, indeed, relevant factors. That was the case in *Texas I*, *see* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *41, and the Government takes issue with the Court's prior holding, *see* (Dkt. No. 42 at 46 & n.16). Thus, to be clear, a more descriptive analysis of the caselaw is in order.

As stated earlier, an "agency rule would be arbitrary and capricious" if the relevant agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. The Supreme Court has noted that immigration "ha[s] a discernable impact on traditional state concerns," owing to the fact that

AMERICAN OVERSIGHT

"unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Plyler*, 457 U.S. at 228, n.23, 102 S.Ct. at 2400, n.23 (citing *DeCanas v. Bica*, 424 U.S. 351, 354–56, 96 S.Ct. 933, 935–36, 47 L.Ed.2d 43 (1976)). Indeed, immigration policy is important to the states since they "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500. Obviously, as *Plyler* noted, some of those problematic consequences stem from a newly promulgated immigration policy's effect on the state's economy and its services; in other words, state costs and expenses. *See Texas DAPA*, 809 F.3d at 153 (holding that Texas had standing to challenge the federal government's DAPA policy in part because the policy "would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone" and "would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury"). In *Regents*, for instance, the Supreme Court held that the federal government's recission of its DACA policy was arbitrary and capricious in part because the government failed to consider the loss of state and local tax revenue stemming from the policy's rescission. ____ U.S. at ____, 140 S.Ct. at 1914. Along with a few other concerns, the Supreme Court characterized the loss of local and state tax revenue as "noteworthy," but "not necessarily dispositive." *Id.* Nevertheless, the Supreme Court found that the federal government needed to *consider* that factor—along with many others—and weigh them all together to ultimately decide whether to retain DACA or not. *Id.* As in this case, "[m]aking that difficult decision was the agency's job, but the agency failed to do it." *Id.*

AMERICAN OVERSIGHT

Further, the Supreme Court has indicated that, in the context of immigration policy, an agency's approach to decision-making "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55, 132 S.Ct. at 485. One broad purpose of immigration law and policy is to minimize the costs and expenses related to the presence of illegal aliens in the country. *See Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14 (noting that "prior to the enactment of 8 U.S.C. § 1226(c)," a vast majority of deportable criminal aliens were free during their deportation proceedings and many filed frivolous appeals to delay deportation); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. 1995) (noting 8 U.S.C. § 1252(i) (1986) was enacted "to ease financial burdens on federal, state and local prisons resulting from lengthy detention of aliens awaiting deportation"); *Giddings v. Chandler*, 979 F.2d 1104, 1109 (5th Cir. 1992) (noting that the main purpose of Section 1252(i) was to "reduc[e] prison overcrowding and cost to the government"); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990) (explaining that Section 1252(i) was enacted because there was a concern in Congress with prison overcrowding in "local and State jails"). While the Government is correct that immigration policy "affect[s] trade, investment, tourism, and diplomatic relations," among other things, *see* (Dkt. No. 42 at 46, n.16) and *Arizona*, 567 U.S. 387 at 395, 132 S.Ct. at 2498, that list of considerations is not exhaustive. Therefore, the Court finds the Government's argument that it need not consider the States' costs and expenses stemming from the new guidelines to be without merit.

Likewise, the Court finds that the Memoranda did not consider the States' costs and expenses even though, according to the Government, DHS considered the new

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005371

guidelines' impact to public safety. In fact, the Memoranda did not consider or failed to substantially consider the new guidelines' effects on public safety. Indeed, both Memoranda are devoid of explanation as to how or why prioritizing the detention or deportation of some criminal illegal aliens, while effectively delaying the detention or deportation of and releasing so many other criminal illegal aliens, positively impact public safety. Moreover, the Memoranda provide no indication that any relevant data or facts were considered in ultimately concluding that the public will be safer by releasing more criminal illegal aliens into communities from detention while fewer are detained or deported. *See State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866 (explaining that an agency "must examine the relevant data" in order to explain its policy choices).

Additionally, even if the Government did consider public safety, the Memoranda—and the February 18 Memorandum most crucially—do not state or explain how that consideration connects with concerns regarding state costs and expenses. The Government in its brief argues that, by focusing its "limited resources" on enforcement actions against "the most significant threats to public safety," the Memoranda "should reduce the costs from crime to the States." (Dkt. No. 42 at 46). Leaving aside that the new guidelines practically provide for the non-detention of many criminal illegal aliens who are not within the ambit of any of the prioritized categories, the Government's assertion still fails. "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87, 63 S.Ct. at 459. And the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime.

AMERICAN OVERSIGHT

Next, the Government argues that, contrary to the States' allegations, DHS "need not 'consider all policy alternatives in reaching [its] decision.'" (Dkt. No. 42 at 46) (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2870). Instead, the Government states that "it need only 'consider the alternative[s] that are within the ambit of the existing [policy].'" (*Id.*) (quoting *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913). In this case, per the Government, "the States fail to identify a single policy alternative" that would be "within the ambit of existing policy," or would otherwise be "obvious," "significant and viable." (*Id.*) (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013)). The Court disagrees with the Government's contentions.

The States do propose that, instead of the prioritization scheme found in the February 18 Memorandum, the Government should have considered policies "that would have retained congressionally mandated detention of criminal aliens and aliens with final orders of removal." (Dkt. No. 18 at 28). The foregoing is simply asking that the Government follow the law.[52] Of course, such policies are "within the ambit of existing policy." After all, the February 18 Memorandum states that its reprioritization scheme "covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning," (Dkt. No. 19-2 at 2), and congressional statutes mandating the detention of aliens go to the explicit focus of the

[52] Not only that, the States' proposed limited policies are "obvious," "significant," and "viable" to this Court. *See Jones*, 716 F.3d at 215. It is incredibly obvious that a "reprioritization policy" that still effectuates and follows the law on detention and removals is more limited than the new guidelines. And surely, following laws should be significantly viable for the Executive Branch given it is *required* by the Constitution to enforce such laws. U.S. Const. art. II, §§ 1, 3.

AMERICAN OVERSIGHT

Memorandum. *See State Farm*, 463 U.S. at 51, 103 S.Ct. at 2871. But despite all this, the February 18 Memorandum never considered the limited policies the States proposed. It failed to discuss how a policy enabling the Government to detain all criminal illegal aliens subject to congressional mandates compares with the opted-for guidelines. It did not even state whether the new guidelines even considered *any* other policy. In short, the Government did not grapple with or provide any alternatives when it was required to do so. *See Regents*, ____ U.S. at ____, 140 S.Ct. at 1913 ("*State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis *must* consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856) (emphasis added)). "That omission alone" makes the new guidelines arbitrary and capricious. *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913.

Lastly, the States argue that the February 18 Memorandum failed to rationally explain why criminal illegal aliens who have committed aggravated felonies or who are affiliated with criminal gangs are prioritized over other criminal illegal aliens and aliens with final orders of removal. (Dkt. No. 18 at 29). The Government responds that the Memorandum "provides a clear, rational justification for prioritizing" such aliens. (Dkt. No. 42 at 43–44). As the Government writes, "the former category presumptively presents a more significant threat to public safety." (*Id.*). In mandating the detention of criminal aliens convicted of serious drug offenses, crimes of moral turpitude, and some other specified offenses, *see* 8 U.S.C. § 1226(c), as well as aliens with final orders of removal during the removal period, *see* 8 U.S.C. § 1231(a)(2), Congress did not differentiate among certain "types" or "categories" of deportable and detainable persons.

AMERICAN OVERSIGHT

These laws plainly mandate the detention of *all* the deportable criminal aliens subject to the relevant statutes. The new guidelines directly go against these congressional mandates, opting instead to prioritize certain criminal illegal aliens' detention and deportation over others because of an assertion that such aliens "presumptively present[] a more significant threat to public safety" than "one million noncitizens with final orders of removal," (Dkt. No. 42 at 44), and—necessarily—other criminal aliens with convictions for drug offenses or crimes of moral turpitude. But the February 18 Memorandum does not ground this otherwise unsupported assertion. It does not even explain or state how it considered, compared, and ultimately concluded that criminal illegal aliens of a certain category must be prioritized over others. Despite Sections 1226(c) and 1231(a)(2), nowhere in the February 18 Memorandum do the new guidelines even contemplate the prioritization of these "other" criminal illegal aliens. As the States correctly surmise, "[t]he very reason the February 18 Memorandum provides for prioritizing aggravated felonies also supports prioritizing drug offenses, crimes of moral turpitude, and final orders of removal." (Dkt. No. 18 at 29). Without more explanation grounded on relevant data and facts, it is unknown why the priorities were implemented in that way. The new guidance, therefore, indeed appears to be the product of arbitrary and capricious decision-making.

In sum, the Government's failure to rationally explain and connect the basis for the new guidance, along with the Government's failure to consider certain relevant factors and alternative policies, establish that there is a substantial likelihood that the reprioritization is an arbitrary and capricious policy. As the above discussion shows, the

AMERICAN OVERSIGHT

Government certainly did not engage in reasoned decision-making as required by the APA. The Court therefore finds that the States have established a substantial likelihood of success on this claim.

c. Count IV: Notice and Comment Rulemaking

The States' next claim is similar to one Texas raised in *Texas I*. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *42–47. In *Texas I*, this Court enjoined Section C of the January 20 Memorandum, in part, because Section C did not undergo notice and comment as required by the APA. *See id.* In this case, the States ask this Court to enjoin Section B of the January 20 Memorandum and the February 18 Memorandum for the same reason. The States argue that "[t]he January 20 and February 18 Memoranda are subject to notice and comment rulemaking because they are substantive or legislative rules." (Dkt. No. 18 at 30). The Government disagrees, raising nearly identical arguments to those it raised in *Texas I*. *See* (Dkt. No. 42 at 47). Namely, the Government contends that the Memoranda are exempt from the APA's notice and comment requirement as "general statement[s] of policy" or, alternatively, as "procedural rules." (*Id.*). For the following reasons, the Court disagrees with the Government's characterizations of the Memoranda and finds that the States have a substantial likelihood of success on the merits of their procedural APA claim.

AMERICAN OVERSIGHT

Rulemaking under 5 U.S.C. § 553

As in *Texas I*, no Party disputes that the Memoranda are rules of some kind and, therefore, that the rulemaking provisions of the APA apply.[53] *See* (Dkt. No. 18); (Dkt. No. 42); *see also* ___ F. Supp. 3d at ____, 2021 WL 2096669, at *42. Nor does any Party contend that the Memoranda underwent any notice and comment. (*Id.*). The question, then, is whether the Memoranda are the type of rules that *should* have undergone notice and comment but did not.

The Court begins with an overview of the APA's notice and comment requirement and the exceptions thereto. The APA requires rules to undergo notice and comment unless they are exempt. *See* 5 U.S.C. § 553.[54] Section 553 sets forth two such categories of exemptions to the notice and comment requirement, one of which is relevant to this case. *Id.* § 553(b). That category exempts "interpretative rules, *general statements of policy*, or *rules of* agency organization, *procedure*, or practice" from notice and comment. *Id.* § 553(b)(A) (emphases added). Thus, if an agency proposes a rule that is either a general

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[53] "'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4).

[54] Specifically, the APA requires that "[g]eneral notice of proposed rule making *shall* be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." *Id.* § 553(b) (emphasis added). And that notice *shall* contain "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The APA also requires an agency to "give interested persons an opportunity to participate in the rule making," *id.* § 553(c), and that the "publication or service of a substantive rule shall be made not less than 30 days." *Id.* § 553(d).

AMERICAN OVERSIGHT

statement of policy or a procedural rule, the agency is not required to conduct notice and comment on the proposed rule. *See id.*

The Fifth Circuit has made clear that exemptions to the notice and comment requirement "must be narrowly construed." *Texas DAPA,* 809 F.3d at 171. A narrow reading of the exemptions safeguards the vital interests notice and comment is intended to protect. *See Dep't of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984) ("Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." (quotations omitted)). Indeed, notice and comment ensures that those affected by a proposed rule have a voice in the rule-making process and assist the agency in crafting rules that better account for the costs and benefits of agency action. *See id.* at 1153. *But see id.* ("Inevitably, in determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension.").

In harmony with the Fifth Circuit's warning to narrowly construe exemptions to APA's procedural strictures, the Supreme Court has recognized that states like Louisiana and Texas offer important perspectives on illegal immigration issues. *See Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."); *see also Texas DAPA*, 809 F.3d at 163. States can assist an agency in crafting rules addressing important immigration issues. Mindful of the importance of notice and comment in this context, the Court now considers whether the reprioritization scheme contained within the Memoranda is

AMERICAN OVERSIGHT

exempt from the notice and comment requirement as either a general statement of policy or as a procedural rule.

General Statement of Policy

The Court first considers whether the Memoranda are general statements of policy. If so, notice and comment is not required. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see also* 5 U.S.C. § 553(b)(A). "In analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point is the agency's characterization of the rule." *Shalala,* at 596. As in *Texas I*, the Court would likely be convinced that the Memoranda are general statements of policy if it could rely on the Government's characterization of the Memoranda alone. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *43. Both the Government in its brief and the Memoranda themselves declare that the Memoranda are mere statements of policy. (Dkt. No. 42 at 47–49); (Dkt. No. 19-1); (Dkt. No. 19-2). Indeed, the January 20 Memorandum explicitly declares that it "should be considered Department-wide *guidance*[.]" (Dkt. No. 19-1 at 2) (emphasis added). The January 20 Memorandum also states that the "guidelines and priorities" contained therein "are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party[.]" (*Id.* at 5).

The February 18 Memorandum contains similar language. It begins by declaring that it "establishes interim *guidance*[.]" (Dkt. No. 19-2 at 2) (emphasis added). The February 18 Memorandum goes on to say that "[t]hese guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive

AMERICAN OVERSIGHT

or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 8).

But an agency's characterization of its rule is just that—its *own* characterization. Indeed, "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. 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." *Azar v. Allina Health Servs.*, ____ U.S. ____, ____, 139 S.Ct. 1804, 1812, 204 L.Ed.2d 139 (2019) (emphasis in original). The Fifth Circuit, too, cautions courts to be "mindful but suspicious of the agency's own characterization." *Texas DAPA*, 809 F.3d at 171 (quotation omitted). The Fifth Circuit therefore demands more of a district court than simply taking an agency at its word when determining whether the challenged rule is a general statement of policy or a substantive rule requiring notice and comment. *See Shalala*, 56 F.3d at 596 ("The label that the particular agency puts upon its given exercise of administrative power is not, for [this court's] purposes, conclusive; rather, it is what the agency does in fact.").

Specifically, the Fifth Circuit instructs district courts to also "evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (quotation omitted).[55] The Fifth

[55] The Fifth Circuit and the D.C. Circuit have emphasized that "unless a pronouncement acts prospectively, it is a binding norm. Thus . . . a statement of policy may not have a present effect[.]" *Shalala*, 56 F.3d at 595; *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987).
(continue)

AMERICAN OVERSIGHT

Circuit has acknowledged that "[t]here is some overlap in the analysis of those prongs because if a statement denies the decisionmaker discretion in the area of its coverage . . . then the statement is binding and creates rights or obligations." *Id.* (cleaned up). Moreover, these "criteria" are merely intended to guide a court in "fathom[ing] the interpretative/legislative distinction." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). In other words, "[t]hese 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*, 328 F. Supp. at 730 (citing *Am. Bus Ass'n v. United States*, 627 F.2d 525, 530 (D.C. Cir. 1980)).[56] The Court now weighs these criteria to determine whether the Memoranda are general statements of policy or substantive rules requiring notice and comment.

The Court first considers whether the Memoranda impose any rights or obligations. *See Texas DAPA*, 809 F.3d at 171. In doing so, the Court is mindful that "a substantive rule—or a legislative-type rule, is one that affects individual rights and

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Here, the February 18 Memorandum states that "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added).

The Fifth Circuit cautions, however, that the "binding effect, *not the timing*, . . . is the essence of criterion one." *Shalala*, 56 F.3d at 595 (emphasis added). Thus, the "[m]ere pronouncements of what the agency intends, whether for the present or for the future, which do not have a binding effect, are properly classified as interpretative rules." *Cmty. Nutrition Inst.*, 818 F.2d at 946 n.4. This caveat is of no consequence here because the Court finds that the Memoranda have a binding effect due to their effect on the rights and obligations described.

[56] In describing the criteria for determining whether a rule is a general statement of policy or a substantive rule requiring notice and comment, the Fifth Circuit has relied on the D.C. Circuit. *See Shalala*, 56 F.3d at 595 nn.15–16 (citing *Cmty. Nutrition Inst.*, 818 F.2d at 943, and *Am. Bus Ass'n*, 627 F.2d at 529).

AMERICAN OVERSIGHT

obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979) (citation and quotation omitted) (cleaned up). "This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'" *Id.* (citation omitted).

At the outset, it is worth noting that the Court has extensively described how the Memoranda affect rights and obligations in its analysis on whether the Memoranda constitute final agency action. *See supra* II.B.2. As a review, the Memoranda affect rights and obligations in at least three ways. First, the February 18 Memorandum commands that DHS abdicate its obligations under Sections 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. *Compare* §§ 1226(c) and 1231(a)(2) *with* (Dkt. No. 19-2 at 4–7).

Second, the Memoranda also create financial obligations for Texas that would not have existed but for the Memoranda. Based on the record, Texas will be required *by law* to bear some of the cost of providing Emergency Medicaid to eligible aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2). *See supra* II.B.2.b. The legal obligation to provide these aliens with these services would not exist if deprioritized aliens were taken into federal custody at the time of their release from state custody as mandated by Section 1226(c), or if they were detained during the removal period, as required by Section 1231(a)(2).

Finally, as described above, the Memoranda affect the rights of some aliens already in detention. *See supra* II.B.2.b. As another court has already found, the Memoranda make a nonpriority alien's removal "unlikely to be imminent." *See Hussein S.M.*, 2021

AMERICAN OVERSIGHT

WL 1986125, at *3. This status, in turn, entitles certain aliens to release from detention. *See id.*; *see also Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. That is an effect on rights.

For these reasons, the Court finds that the Memoranda affect the rights and obligations of those within the Memoranda's regulatory sphere—DHS, the states, and certain aliens. This consideration weighs against finding that the Memoranda are general statements of policy.

Next, the Court considers whether the Memoranda give the agency and its decisionmakers sufficient discretion to be considered a general statement of policy. They do not.

"General statements of policy" are those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197, 113 S.Ct. at 2034 (quotations omitted). The Fifth Circuit has described the inquiry for determining whether a rule gives an agency and its decisionmakers sufficient discretion to be classified as a general statement of policy:

> The key inquiry . . . is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Shalala, 56 F.3d at 596–97 (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, 466 U.S. 927, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984)). Applying

AMERICAN OVERSIGHT

this inquiry to the Memoranda, the Court is of the opinion that the amount of discretion they afford is insufficient for them to be classified as general statements of policy.

The core feature of the Memoranda is their prioritization of immigration enforcement actions for some classes of aliens to the exclusion of others. The Memoranda state explicitly that "[e]nforcement and removal actions [against aliens who fall within] the [priority groups] described . . . are *presumed* to be a justified allocation of ICE's limited resources." *See, e.g.*, (Dkt. No. 19-2 at 4–6) (alterations added) (emphasis added). And although the February 18 Memorandum purports to say that actions against nonprioritized aliens "may also be justified" and that "the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen," an agent's discretion in this regard appears so constrained as to be illusory. (*Id.* at 4). Specifically, the February 18 Memorandum stipulates that "[*a*]*ny* civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases *will require* preapproval from the [Field Office Director (FOD)] or [Special Agent in Charge (SAC)]." (*Id.* at 7) (emphasis added). The preapproval constraint *greatly* constricts the normal discretion ICE agents enjoy while exercising their statutory and regulatory duties on behalf of the agency. *See* (Dkt. No. 19-4 at ¶ 29) ("This policy requires field agents to obtain special permission before engaging in routine enforcement."); *cf.* 8 U.S.C. § 1357; 8 C.F.R. § 287.5. Put differently, agents now need the approval of a FOD or SAC to conduct otherwise routine enforcement operations. (Dkt. No. 19-2 at 7); (Dkt. No. 19-4 at ¶ 29).

AMERICAN OVERSIGHT

Moreover, the Memorandum details a mandatory process for receiving such preapproval. Indeed, "[i]n deciding to undertake an enforcement action or removal, the agent or officer *must* consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors." (Dkt. No. 19-2 at 7) (emphasis added). "In requesting . . . preapproval, the officer or agent *must* raise a written justification *through the chain of command*, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place." (*Id.*) (emphases added). In other words, 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. *See* (*Id.*); (Dkt. No. 19-4 at ¶ 29).

If this cumbersome preapproval requirement and process were not enough in general to limit the agents' usual discretion, the February 18 Memorandum goes even further by expressly describing two specific scenarios in which an agent's decision-making power is greatly reduced. First, the February 18 Memorandum states that "[t]he approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other [nonprioritized] noncitizens encountered

AMERICAN OVERSIGHT

during an operation."[57] (Dkt. No. 19-2 at 7). Simply put, the February 18 Memorandum flatly denies agents the ability to exercise discretion over non-preapproved, nonprioritized aliens "during an operation." Second, the February 18 Memorandum limits agency discretion in detaining and conducting other enforcement actions against nonpriority aliens where exigent circumstances exist. *See* (Dkt. No. 19-2 at 7). To be sure, the Memorandum allows for detention of, and other enforcement actions against, nonpriority aliens without preapproval when obtaining such preapproval would be "impracticable." (*Id.*). And while the Memorandum acknowledges that "it is impossible to preconceive all such circumstances" in which obtaining preapproval may be impracticable, it nevertheless states that circumstances where obtaining preapproval is impracticable "generally will be *limited* to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*) (emphasis added). Yet, even in these circumstances, the February 18 Memorandum requires approval, albeit after the enforcement action is conducted. (*Id.*). Specifically, the agent is *required*, within 24 hours of the enforcement action having been conducted, to "explain the exigency, where and when the enforcement activity took place, and whether the

[57] Specifically, the February 18 Memorandum states: "The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above." (Dkt. No. 19-2 at 7). In such circumstances, "[a]n approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above." (*Id.*).

AMERICAN OVERSIGHT

noncitizen is currently detained." (*Id.* at 7 n.7).[58] Once again, in a situation in which the agent's discretion is likely at its zenith—where exigent circumstances exist—the February 18 Memorandum severely restricts the agent's ability to exercise it.

In light of these policies, it is perhaps no surprise that the States provide evidence suggesting that ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance. *See* (Dkt. No. 19-4 at ¶ 36). Specifically, a former Acting Director of ICE with more than 32 years of service in the agency testified that, "[a]s 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." (*Id.* at ¶ 29). Also unsurprisingly, there is evidence in the record tending to show that these "categorical rules" in the February 18 Memorandum are already hampering enforcement actions and will continue to deter agents and officers from exercising their discretion in determining whether to conduct enforcement actions in the future. *See* (Dkt. No. 19-3 at 3–8); (Dkt. No. 46 at ¶ 17); *cf. Texas DAPA*, 809 F.3d at 173 (assessing how DAPA has been applied in practice in determining whether it conferred sufficient discretion to be considered a general policy statement).

In addition to limiting the discretion of individual ICE agents and officers, the Memoranda also restrict the discretion of entire ICE field offices. *See* (Dkt. No. 19-2 at 6); (Dkt. No. 42-2 at 6). Specifically, the February 18 Memorandum states that "ICE will

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[58] And "when the location of a proposed or completed enforcement action is a courthouse, . . . or a sensitive location, . . . that should be explicitly highlighted in the request." (*Id.* at 7 n.7) (citations omitted).

AMERICAN OVERSIGHT

require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases." (*Id.*). In other words, the Memoranda not only require individual agents and officers to receive preapproval before conducting enforcement actions against aliens falling outside the three priority groups; they also appear to bind *the field offices themselves* to the preapproval process delineated in the February 18 Memorandum.

For these reasons, the Court finds that the amount of discretion that the February 18 Memorandum confers to the agency and its decisionmakers in conducting routine enforcement actions weighs against classifying the Memorandum as a general statement of policy. Weighing this factor along with the rights and obligations affected, the Court concludes that the Memoranda do not constitute a general statement of policy.

Procedural Rule

Even if the February 18 Memorandum is not a general statement of policy, it may nevertheless be exempt from notice and comment if it is a rule "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also Texas DAPA*, 809 F.3d at 176. The Government does not assert that the February 18 Memorandum is a rule of DHS organization or practice; rather, the Government contends that it is one of agency procedure. (Dkt. No. 42 at 47–50). The Fifth Circuit employs two tests to determine whether a rule is one of agency procedure. *See Texas DAPA*, 809 F.3d at 176–77; *see also Texas*, 328 F. Supp. 3d at 728. Here, both tests yield the same conclusion: the Memoranda do not constitute a procedural rule that is exempt from the APA's notice and comment requirement.

AMERICAN OVERSIGHT

The first test used by the Fifth Circuit to determine whether a rule is procedural is the "substantial impact test." *See Texas DAPA*, 809 F.3d at 176. This test "is the primary means by which [the court] look[s] beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *Id.* (citing *Kast Metals*, 744 F.2d at 1153). "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Texas DAPA*, 809 F.3d at 176 (quoting *Kast Metals Corp.*, 744 F.2d at 1153).

In making this determination, the question is not "whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir.), *modified on reh'g*, 36 F.3d 89 (5th Cir. 1994), for text, *see* No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994). This distinction makes good sense, as "the notice and comment provisions 'were designed to assure fairness and mature consideration of rules of general application,'" *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969)), and to "afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.'" *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)).

In determining whether the rule will have a "substantial impact" on those regulated, the Court may consider whether the rule creates legal or financial obligations for the plaintiff and whether the rule restricts the discretion of agency officials. *See Texas DAPA*, 809 F.3d at 176 (concluding DAPA "undoubtedly [satisfies the substantial impact]

AMERICAN OVERSIGHT

test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes"); *Phillips Petroleum Co.*, 22 F.3d at 620 (concluding the rule at issue was not procedural because, in part, "[t]he rule narrowly restrict[ed] the discretion of MMS officials in determining the value of NGLP's" and "[i]t foreclose[d] other valuation methods by prescribing binding valuation criteria"); *see also Texas*, 328 F. Supp. 3d at 728 (concluding DACA is not a procedural rule, having found it "undoubtedly satisfies [the substantial impact] test because it has forced the states to spend money on various social services costs, which are clearly modif[ications] of substantive rights" (quotation omitted)). If the rule has a substantial impact on "the regulated industry, or an important class of the members or the products of that industry," then "notice and opportunity for comment should first be provided" because "[t]he exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated." *Phillips Petroleum Co.*, 22 F.3d at 620.

Considering these criteria, the Memoranda satisfy the substantial impact test. First, as discussed above, the Memoranda affect at least one of Texas's legal obligations. *See supra* II.B.2.b. Specifically, they affect Texas's legal and financial obligations to partially fund Emergency Medicaid to aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2) but, pursuant to the Memoranda, are not detained by ICE when they are released from state custody or during the removal period. The Memoranda also have a substantial impact because, as just described, they limit the discretion exercised by ICE

AMERICAN OVERSIGHT

field offices, agents, and officers. In sum, the February 18 Memorandum mandates a process for ICE field offices and agents to follow for obtaining preapproval to detain aliens the Memoranda deem to be nonpriorities. This mandatory policy restricts DHS from exercising discretion and conducting routine enforcement actions against aliens the Memoranda classify as nonpriorities. This curtailment of agency discretion in conducting routine civil immigration enforcement actions is yet another substantial impact the Memoranda have on those they regulate.

Finally, the Memoranda have a substantial impact on certain aliens already in detention. As discussed above, *see supra* II.B.2.b, and as another district court's ruling demonstrates, the Memoranda make certain nonpriority aliens' removal "unlikely to be imminent," thus entitling some of those aliens to be released from detention. *Hussein S.M.*, 2021 WL 1986125, at *3; *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. Considering the many ways the Memoranda affect rights and obligations, it is clear that the Memoranda have a substantial impact and, therefore, the substantial impact test weighs against classifying the Memoranda as procedural rules.

The second test for determining whether a rule is procedural asks the Court to weigh two considerations. First, the Court must consider the "effect on those interests ultimately at stake in the agency proceeding." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013)) (quotation omitted). "Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns.*, 931 F. Supp. 2d at 107). This consideration clearly

AMERICAN OVERSIGHT

weighs against characterizing the Memoranda as procedural rules, given that the Court has already found that the Memoranda affect the rights and obligations of Texas, DHS, and certain aliens. *See supra* II.B.2.b.

Second, the Court must assess whether the Memoranda affect the substantive standards by which DHS determines whether to detain certain aliens. *See Texas DAPA*, 809 F.3d at 176–77 ("[R]ules are generally considered procedural so long as they do not 'change the substantive standards by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide." (quotation omitted)). Here, the Memoranda alter the substantive standards by which DHS determines whether and when to detain certain aliens by departing from the plain statutory requirements in Sections 1226(c) and 1231(a)(2) and effectively replacing them with new standards for making such determinations. As discussed above, Section 1226(c) requires DHS to detain aliens falling within the ambit of that provision when they are released from state custody. *See supra* II.B.3.a. Section 1231(a)(2) requires DHS to detain an alien with a final order of removal during the removal period. *See supra* II.B.3.a. The Memoranda, however, require DHS to do something different, setting forth a prioritization scheme that declares some aliens falling within the ambit of Section 1226(c) and 1231(a)(2) as enforcement "priorities" and others also falling within those same statutory categories as "nonpriorities." *See* (Dkt. No. 19-2 at 4–7). And to detain nonpriorities, the February 18 Memorandum *requires* ICE agents to obtain preapproval. *See* (*Id.* at 7). No such prioritization scheme or preapproval process exists in Sections 1226(c) and 1231(a)(2). Rather, these provisions plainly require DHS to detain *all* aliens who meet the

AMERICAN OVERSIGHT

enumerated statutory criteria and that DHS detain them at or during the time stated in the provisions. *See* 8 U.S.C. §§ 1226(c), 1231(a)(2). Thus, the Memoranda change the "substantive standards by which [DHS] evaluates" whether or not to detain an alien who falls within the ambit of Section 1226(c) and 1231(a)(2). *See Texas DAPA*, 809 F.3d at 177 ("DAPA establishes the substantive standards by which the agency evaluates applications which seek a benefit that the agency purportedly has the power to provide—a critical fact requiring notice and comment." (cleaned up)). Therefore, this test also weighs against classifying the Memoranda as procedural rules.

Texas Has Met Its Burden on Its Procedural APA Claim

In sum, the Court finds that the Memoranda do not constitute a rule that is exempt from the notice and comment requirements of Section 553. The 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. Likewise, the Memoranda are not procedural rules because they have a significant impact on DHS, the states, and certain aliens. Therefore, the Court finds Texas has shown a substantial likelihood of success on the merits of its procedural APA claim.

2. Irreparable Harm

In addition to demonstrating a substantial likelihood of success on the merits, the States must demonstrate "a substantial threat of irreparable injury if the injunction is not issued." *Texas DAPA*, 809 F.3d at 150. Put another way, the States must show they are "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20, 129 S.Ct. at 374 (emphasis added). For an injury to be sufficiently "irreparable," the

AMERICAN OVERSIGHT

States need only show 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 States argue their injuries are irreparable because they will incur financial costs that are unrecoverable. (Dkt. No. 18 at 40–41); (Dkt. No. 51 at 31). The States also argue they will suffer irreparable harm because non-detention will result in increased crime. (*Id.*). In response, the Government contends there is no irreparable harm because "there is not a significant impact on the States." (Dkt. No. 42 at 50). The Court concludes the States have demonstrated they are likely to suffer irreparable harm for the following reasons.

As discussed in this Court's standing analysis, the States have presented evidence demonstrating the Memoranda cause financial harm in the form of increased costs for detention facilities. *See supra* II.A.1.a. The States have also demonstrated the Memoranda harm their interests as *parens patriae* because of an increase in criminal activity resulting from the Memoranda's implementation. *See supra* II.A.1.b. The Court found these two injuries were concrete, imminent, and traceable to the Memoranda. The Court also concludes the threat of injuries to the States is "likely" as that term is used by the Supreme Court. *See Winter*, 555 U.S. at 20, 129 S.Ct. at 374.

There is also no indication the States can recover for their injuries. Indeed, there is no immediately discernable theory under which a state can "pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669,

AMERICAN OVERSIGHT

at *47. To that point, no Party has suggested the States can recover any of their likely financial injuries here. And the Fifth Circuit rebuffed an attempt by Texas in the late 1990s to force the federal government to pay medical, educational, and criminal justice expenditures caused by immigration. *See Texas*, 106 F.3d at 663–64 ("The State of Texas and its political subdivisions . . . appeal a Fed.R.Civ.P. 12(b)(6) dismissal of their complaint seeking declaratory and injunctive relief which would require that the United States pay the educational, medical, and criminal justice expenses allegedly incurred as a result of the presence of undocumented or illegal aliens in Texas. Concluding that the complaint raises questions of policy rather than colorable claims of constitutional or statutory violations, we affirm."). Thus, any financial injury is irreparable. *See Burgess*, 871 F.3d at 304.

As for injuries to the States' interests as *parens patriae*, the Supreme Court has determined that "law enforcement and public safety interests" can constitute irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (granting a stay of a judgment after finding Maryland experienced ongoing irreparable harm because it was enjoined from effectuating a statute that assisted government officials in investigating crimes and arresting violent offenders). Here, law-enforcement and public-safety interests underlie the States' *parens patriae* injuries. Accordingly, the States have demonstrated they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Benisek*, ____ U.S. at ____, 138 S.Ct. at 1944.

AMERICAN OVERSIGHT

3. The Balance of Equities and the Public's Interest

Having concluded the States have satisfied the first two elements for obtaining a preliminary injunction, the Court must now determine whether "the threatened injury outweighs any harm that may result from the injunction to the non-movant" and whether "the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051, 1056 (5th Cir. 1997); *accord Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294 (5th Cir. 2020). Federal courts have considered the balance-of-equities and public-interest elements together as they overlap considerably. *Texas DAPA*, 809 F.3d at 187; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 n.36 (N.D. Tex. 2016). And because the Government is the nonmoving party, these two elements "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 1762, 173 L.Ed.2d 550 (2009); *accord Texas DAPA*, 809 F.3d at 187.

In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376. As for determining whether an injunction will undermine the public interest, a court should consider the public interests that may be injured and those that may be served by granting or denying a preliminary injunction. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997–98 (8th Cir. 2011) (citing *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)).

AMERICAN OVERSIGHT

The States argue the Government has no interest in the implementation and enforcement of the unlawful policy contained in the Memoranda. (Dkt. No. 18 at 41–42). The States contend the public interest is furthered when the Executive Branch follows congressional mandates. *See* (*Id.* at 42); (Dkt. No. 51 at 31–32). In response, the Government characterizes any injunction as a restraint on "core Article II authority" which "outweighs any harm to the States and undermines the public interest." (Dkt. No. 42 at 55). In the Government's view, an injunction would inhibit its ability to prioritize limited resources, cause confusion within the Executive Branch, and impede any effort to draft final guidance. (*Id.* at 55–56). The Government also contends the public interest is served when it has the ability "to prioritize national security, border security, and public safety." (*Id.* at 57). Considering these arguments, the Court finds the States have the upper hand.

Notably, without a preliminary injunction, the States will be "threatened with substantial harm" to their state budgets and interests as *parens patriae*. *See Burwell*, 227 F. Supp. 3d at 694. As discussed earlier, the Court is unpersuaded by the Government's claim that the States' injuries are "speculative." *See* (Dkt. No. 42 at 22–23). Instead, the Court has found the States' injuries from costs relating to detention facilities and increased criminal activity are traceable to the implementation of the Memoranda. *See supra* II.A.2.

Although the States face substantial harm from the implementation of the Memoranda, the Government nevertheless attempts to show that the harm it faces is worse. The Government, however, postulates harms "that are less substantial" and

AMERICAN OVERSIGHT

"vague." *See Texas DAPA*, 809 F.3d at 186. Specifically, the Government makes much of an injunction's supposed harm to the Executive Branch's authority. *See* (Dkt. No. 42 at 55–56). Although it is true that the Executive Branch retains vast discretion in immigration enforcement, *see Arizona*, 567 U.S. at 396, 132 S.Ct. at 2499; *Reno*, 525 U.S. at 490, 119 S.Ct. at 946, that discretion ebbs when Congress sets forth a statutory mandate. Indeed, "[i]t is undisputed that Congress may *mandate* that the Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring) (emphasis added). Sections 1226(c) and 1231(a)(2) do just that: they *require* the Executive Branch to detain certain aliens at or for a specified time.[59] Any harm to the Government is therefore exaggerated and should be addressed to Congress.

The Government next complains that an injunction would create inefficiency because it would inhibit the Executive Branch's ability to prioritize limited resources.[60] (Dkt. No. 42 at 55–56). The Court is unpersuaded. First, in at least one case, the Fifth Circuit has concluded that any inefficiency resulting from an injunction inhibiting the Executive's ability to prioritize certain immigration-enforcement actions is "outweighed

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[59] The Government implicitly invokes prosecutorial discretion with respect to any harm an injunction may cause its Article II authority. *See* (Dkt. No. 42 at 55). This argument does not warrant much discussion. Indeed, the Court has already extensively discussed the extent of the Executive's discretion in enforcing a law when a clear congressional mandate is in place. *See supra* II.B.3.

[60] Relatedly, the Government argues that an injunction would harm it by dismantling the two-step process ICE currently undergoes to determine whether to detain an alien in state custody. *See* (Dkt. No. 42 at 56). Sections 1226(c) and 1231(a)(2) already mandate which aliens must be detained and the time at or for which the Government must detain the alien.

AMERICAN OVERSIGHT

by the major financial losses [that] states face." *See Texas DAPA*, 809 F.3d at 187. Here, the Court, in its standing analysis, has already found the Memoranda will result in significant financial losses for the States. *See supra* II.A.1.a. Second, the Government overestimates the effect of an injunction on the Executive's limited resources. Rather than dictate the use of resources, the injunction precludes the Executive Branch from instructing officials to act in a manner contrary to a clear congressional mandate. In other words, the Government remains free to expend its resources in a *lawful* manner.

To this point, "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), 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. *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."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases) ("[T]he public interest in enforcement of the immigration laws is significant."); *cf. Nken*, 556 U.S. at 436, 129 S.Ct. at 1762 ("There is always a public interest in prompt execution of removal orders[.]"). The public interest is particularly strong here because, as fully described earlier, Sections 1226(c) and 1231(a)(2) are statutes that Congress enacted for the benefit of the United States, its citizens, and its legal immigrants. *See supra* I.A.; *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; *Zadvydas*, 533 U.S. at 697, 121 S.Ct. at 2502.

Finally, the Government argues an injunction would result in confusion inside the Executive Branch because immigration officials will be left with little to no guidance on

AMERICAN OVERSIGHT

how to exercise their enforcement discretion. (Dkt. No. 42 at 56). Relatedly, the Government also theorizes that injunctive relief would impede its effort to draft final guidance. (*Id.* at 56–57). These arguments are puzzling because, with or without an injunction in place, the Government is free to craft new guidance or instruct Executive Branch officials to act in a certain manner *so long as such guidance and instructions comport with the law* (*i.e.*, congressional mandates).

Given the discussion above, the Court concludes the potential harms to the States arising out of the Memoranda outweigh any potential harms to the Government. The Court also concludes the public interest is served, rather than undermined, by an injunction. Thus, the States have satisfied all four elements for a preliminary injunction.

C. SCOPE OF RELIEF

The States have satisfied the standard for a preliminary injunction. This conclusion raises two additional inquiries: the geographic scope of the injunction as well as the nature of the injunctive remedy. The Court addresses each in turn.

1. Geographic Scope

The States request a nationwide injunction. (Dkt. No. 18 at 42–43). The Court has expressed its substantial skepticism of nationwide injunctions. *Texas*, ____ F. Supp. 3d at ____, 2021 WL 247877, at *6–7; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51. Indeed, nationwide injunctions of executive actions are an area of fierce disagreement in the courts and in legal academia. *See id.* But, as with any case, this Court is bound by applicable Fifth Circuit precedent in determining whether a nationwide scope for an injunction is appropriate. That precedent explains that a federal district

AMERICAN OVERSIGHT

court, under "appropriate circumstances," has authority "to issue a nationwide injunction." *Texas DAPA*, 809 F.3d at 188. One such appropriate circumstance is when a nationwide injunction is necessary is to ensure uniformity in immigration policies as prescribed by federal law. *Id.* at 187–88; *see also E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("[C]ases implicating immigration policy have a particularly strong claim for uniform, nationwide relief." (citation omitted)). Another such circumstance is when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries [of the unlawful policy] would be free to move among states." *Texas DAPA*, 809 F.3d at 188.

The Court finds both circumstances exist here. First, the Memoranda affect national immigration policy, which is designed to be uniform. *See id.* at 187–88. Second, given what has been detailed in the Court's standing analysis, 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. *See supra* II.A.2 & II.A.3; *see also Texas DAPA*, 809 F.3d at 188. The States submitted evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Accordingly, a nationwide injunction is appropriate. *See Texas DAPA*, 809 F.3d at 187–88; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51.

The Government offers a handful of arguments in opposition to issuing a nationwide injunction. None carry the day.

AMERICAN OVERSIGHT

First, the Government argues nationwide relief is inappropriate because lawsuits concerning the Memoranda in other jurisdictions have been unsuccessful. (Dkt. No. 42 at 60). This misses the point. In determining the appropriate scope of an injunction, the Court's task is to fashion a remedy that prevents the plaintiffs *in this case* from suffering irreparable harm. *See ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) ("When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979)); *see also Dep't of Homeland Sec. v. New York*, ____ U.S. ____, ____, 140 S.Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring in the grant of a stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a *particular plaintiff in a particular lawsuit*. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place." (emphasis added)); *ODonnell v. Goodhart*, 900 F.3d 220, 224 (5th Cir. 2018) ("The district court must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order." (emphasis added) (quoting *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004))). In concluding the States are entitled to injunctive relief, this Court has determined, based on Fifth Circuit precedent and the record before it, that a nationwide injunction is appropriate to prevent the States from suffering irreparable harm.

Next, the Government argues nationwide relief is generally ill-advised because, in effect, any attempt by the Government to create a new federal policy is thwarted by "a

AMERICAN OVERSIGHT

single successful challenge" to the policy, even if other challenges to the policy are unsuccessful. (Dkt. No. 42 at 60) (quoting *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 601 (Gorsuch, J., concurring in the grant of a stay)). Frankly, the Court shares these concerns. Nonetheless, the Court, in fashioning a proper remedy, is bound by precedent, *see Texas DAPA*, 809 F.3d at 187–88, and "must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order," *Goodhart*, 900 F.3d at 224 (emphasis added) (quoting *Veneman*, 380 F.3d at 818); *see also Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of a stay). The Court therefore finds the Government's argument unpersuasive.

Third, the Government attempts to distinguish this case from *Texas DAPA* and *Texas I* by asserting that this case involves *individual* detention decisions rather than a blanket policy pausing enforcement actions against aliens. (Dkt. No. 42 at 60). To be sure, individual enforcement decisions are "inherently discretionary and non-uniform," *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *51, but the States are not challenging individual enforcement decisions. Rather, the States, like the plaintiffs in *Texas DAPA* and *Texas I*, are challenging a blanket policy. *See Texas DAPA*, 809 F.3d at 146–49; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *30. Specifically, the States are challenging the Memoranda, which implement and enforce a blanket policy regarding the detention of certain aliens—a policy that contravenes congressional mandates. Accordingly, the Government's argument that this case is distinguishable from *Texas I* and *Texas DAPA* falls short.

AMERICAN OVERSIGHT

Finally, the Government argues that, because the States' injuries are supposedly premised on detainers in Texas and Louisiana, an injunction limited in geographic scope to the boundaries of those two states will sufficiently protect them from any irreparable harm they may suffer due to the Memoranda. (Dkt. No. 42 at 60–61). The Court disagrees for two reasons. First, the Government incorrectly asserts that the States' injuries are premised on detainers when the States' injuries are, in fact, premised on the increased costs to their detention systems and their interests as *parens patriae*. *See* (Dkt. No. 1 at 15–16); (Dkt. No. 18 at 15–16, 18, 35–37). Second, in arguing that the geographic scope of the injunction should be limited to the boundaries of Texas and Louisiana, the Government ignores that, if aliens are not detained in other states, those aliens can migrate to Texas and Louisiana thus causing them harm. *See Texas DAPA*, 809 F.3d at 188 (recognizing that "there is a substantial likelihood that a geographically-limited injunction would be ineffective because" the beneficiaries of the unlawful policies "would be free to move among states"). Indeed, the evidence produced in this case regarding the migration patterns of aliens to Texas and from other states buttresses this point. *See supra* II.A.2 & II.A.3; (Dkt. No. 19-21 at 5–7); (Dkt. No. 19-22 at 5–7, 14); (Dkt. No. 19-23 at 2). The Government's argument is therefore meritless.

Thus, for the foregoing reasons, the States are entitled to a nationwide injunction.

2. <u>Remedy</u>

As stated above, "the scope of injunctive relief is dictated by the extent of the violation established." *ODonnell*, 892 F.3d at 163 (quoting *Califano*, 442 U.S. at 702, 99 S.Ct. at 2558); *see also Goodhart*, 900 F.3d at 224 ("The district court must narrowly tailor

AMERICAN OVERSIGHT

an injunction to remedy the specific action which gives rise to the order." (quoting *Veneman*, 380 F.3d at 818)). Since the States have satisfied the four elements required for a preliminary injunction, the Court finds that it is appropriate to enjoin the Executive Branch from implementing and enforcing the Memoranda. Specifically, the Court enjoins (1) Section B of the January 20 Memorandum, and (2) the sections from the February 18 Memorandum entitled "Civil Immigration Enforcement and Removal Priorities" and "Enforcement and Removal Actions: Approval, Coordination, and Data Collection." (Dkt. No. 1-2 at 4–8). These sections implement and enforce a policy that directly contravenes congressional mandates. As stressed above, agency policies that contravene congressional mandates are unlawful—plain and simple. *See Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Barnhart*, 534 U.S. at 462, 122 S.Ct. at 956. Moreover, the States have met their burden to show a substantial likelihood that the Memoranda's policy prioritizing the detention of certain aliens over others is arbitrary and capricious and fails to comply with the APA's notice and comment requirement. The Court therefore enjoins the implementation and enforcement of these sections.[61]

IV. CONCLUSION

Although this case involves many issues of administrative and immigration law, its core concerns whether the Executive Branch may implement a policy that directly

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[61] The States also request that the Court issue a positive injunction to compel agency action unlawfully withheld. (Dkt. No. 18 at 25–26); (Dkt. No. 51 at 33). The Government is opposed. (Dkt. No. 42 at 57–61). Under the APA, a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Court reserves ruling on this issue until later in the litigation.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005405

conflicts with laws that Congress enacted. The answer is no. In the end, through all their detailed explanations of the Executive's seemingly unending discretion, the Government substantially undervalues the People's grant of "legislative Powers" to Congress.

Because the States have demonstrated that there is a substantial likelihood that portions of the Memoranda direct Executive Branch officials to act in a way that is contrary to Sections 1226(c) and 1231(a)(2), those sections of the Memoranda cannot stand and are hereby enjoined. Additionally, the Court enjoins the sections of the Memoranda described above because the States have demonstrated a substantial likelihood that the policy concerning detention of certain aliens set forth in the Memoranda is arbitrary and capricious under the APA and the Memoranda fail to comply with the APA's notice and comment requirement.

For the foregoing reasons, the Court **GRANTS** the States' Motion for Preliminary Injunction. (Dkt. No. 18). Therefore, it is hereby **ORDERED** that:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from enforcing and implementing the policies described in:

    a. Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4);

    b. The section entitled "Civil Immigration Enforcement and Removal Priorities" in the February 18 Memorandum. (Dkt. No. 1-2 at 4–6); and

AMERICAN OVERSIGHT

c. The section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the February 18 Memorandum.[62] (Dkt. No. 1-2 at 6–8).

2. This Preliminary Injunction is granted on a nationwide basis and prohibits enforcement and implementation in every place the Government has jurisdiction to enforce and implement the January 20 and February 18 Memoranda.

3. This Preliminary Injunction shall remain in effect pending a final resolution of the merits of this case or until a further Order from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

To ensure compliance with this Preliminary Injunction, the Court further **ORDERS** the following:

1. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of these aliens in light of the fact that the Memoranda have been enjoined.

2. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1231(a)(2) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of aliens in light of the fact that the Memoranda have been enjoined.

3. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens known to the Government, who are covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release.

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[62] This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's subsections entitled "Notice of At-Large Enforcement Actions" and "Weekly Reporting of All Enforcement and Removal Actions."

AMERICAN OVERSIGHT

For each of these aliens, provide under seal the alien's last known residence or address and the offense for which the alien had been incarcerated.

Additionally, for each alien not detained, the Government shall make and retain a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

4. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens in their removal period as defined in 8 U.S.C. § 1231(a)(1). Of those, provide the number who were not detained pursuant to 8 U.S.C. § 1231(a)(2).

For each of these aliens not detained, provide under seal the alien's last known residence or address.

Additionally, for each alien not detained, the Government shall make a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the January 20 Memorandum's sections entitled "A. Comprehensive Review of Enforcement Policies and Priorities" and "D. No Private Right Statement."[63] This Memorandum Opinion and Order also does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's sections entitled "Purpose," "Background," "Questions," and "No Private Right Statement."

No security bond is required under Federal Rule of Civil Procedure 65(c).

It is SO ORDERED.

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[63] This Court previously enjoined Section C of the January 20 Memorandum. *See Texas I*, ___ F. Supp. 3d at ____, 2021 WL 2096669, at *52.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005408

Signed on August 19, 2021.

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005409

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. _____

EXHIBIT A

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005410

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracey Renaud
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services

CC: Karen Olick
Chief of Staff

FROM: David Pekoske
Acting Secretary

SUBJECT: **Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities**

This memorandum directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement. It also sets interim policies during the course of that review, including a 100-day pause on certain removals to enable focusing the Department's resources where they are most needed. The United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century. In light of those unique circumstances, the Department must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security.

This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

AMERICAN OVERSIGHT

A. Comprehensive Review of Enforcement Policies and Priorities

The Chief of Staff shall coordinate a Department-wide review of policies and practices concerning immigration enforcement. Pursuant to the review, each component shall develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel, detention space, and removal assets; policies governing the exercise of prosecutorial discretion; policies governing detention; and policies regarding interaction with state and local law enforcement. These recommendations shall ensure that the Department carries out our duties to enforce the law and serve the Department's mission in line with our values. The Chief of Staff shall provide recommendations for the issuance of revised policies at any point during this review and no later than 100 days from the date of this memo.

The memoranda in the attached appendix are hereby rescinded and superseded.

B. Interim Civil Enforcement Guidelines

Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances. DHS's civil immigration enforcement priorities are protecting national security, border security, and public safety. The review directed in section A will enable the development, issuance, and implementation of detailed revised enforcement priorities. In the interim and pending completion of that review, the Department's priorities shall be:

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.

These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole. In

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005412

addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.

While resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein. In order to ensure appropriate allocation of resources and exercise of prosecutorial discretion, the Acting Director of ICE shall issue operational guidance on the implementation of these priorities. This guidance shall contain a protocol for the Acting Secretary to conduct a periodic review of enforcement actions to ensure consistency with the priorities set forth in this memorandum. This guidance shall also include a process for the Director of ICE to review and approve of any civil immigration enforcement actions against individuals outside of federal, state or local prisons or jails.

These interim enforcement priorities shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the review directed in section A.

C. Immediate 100-Day Pause on Removals

In light of the unique circumstances described above, DHS's limited resources must be prioritized to: (1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact. In addition, we must ensure that our removal resources are directed to the Department's highest enforcement priorities. Accordingly, and pending the completion of the review set forth in section A, I am directing an immediate pause on removals of any noncitizen[1] with a final order of removal (except as noted below) for 100 days to go into effect as soon as practical and no later than January 22, 2021.

The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who:

1. According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
2. Was not physically present in the United States before November 1, 2020; or
3. Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver

[1] "Noncitizen" as used in this memorandum does not include noncitizen nationals of the United States.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005413

and has been given a meaningful opportunity to access counsel prior to signing the waiver;[2] or

4. For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

No later than February 1, 2021, the Acting Director of ICE shall issue written instructions with additional operational guidance on the further implementation of this removal pause. The guidance shall include a process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause. The process shall provide for assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

D. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[2] A voluntary waiver encompasses noncitizens who stipulate to removal as part of a criminal disposition.

AMERICAN OVERSIGHT

APPENDIX

Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest,* Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Implementing the President's Border Security and Interior Immigration Enforcement Policies*, Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement*, Memorandum of August 15, 2017.

US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* Policy Memorandum of June 28, 2018. (US Citizenship and Immigration Services should revert to the preexisting guidance in Policy Memorandum 602-0050, US Citizenship and Immigration Services, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, Policy Memorandum of Nov. 7, 2011.)

US Citizenship and Immigration Services, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA,* Policy Memorandum of June 28, 2018.

U.S. Customs and Border Protection, *Executive Orders 13767 and 13768 and the Secretary's Implementation Directions of February 17, 2017*, Memorandum of February 21, 2017.

AMERICAN OVERSIGHT

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. _____

EXHIBIT B

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005416

Policy Number: 11090.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

February 18, 2021

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director

SUBJECT: Interim Guidance: Civil Immigration Enforcement and Removal Priorities

Purpose

This memorandum establishes interim guidance in support of the interim civil immigration enforcement and removal priorities that Acting Secretary Pekoske issued on January 20, 2021. Acting Secretary Pekoske issued the interim priorities in his memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memo).

This interim guidance is effective immediately. It applies to all U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning.

This interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines. The Secretary has informed me that he will issue new guidelines only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices. He anticipates issuing these guidelines in less than 90 days.

I have requested approval of certain revisions to the Interim Memo until the Secretary issues new enforcement guidelines. My requested revisions have been approved, and they are incorporated into this guidance. To the extent this guidance conflicts with the Interim Memo, this guidance controls. As you will read below, the revisions include, but are not limited to: (1) authorization to apprehend presumed priority noncitizens[1] in at-large enforcement actions without advance approval; (2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; (3) authorization to apprehend

[1] For purposes of this memorandum, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

AMERICAN OVERSIGHT

without prior approval other presumed priority noncitizens who are encountered during enforcement operations; (4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended; (5) the further delegation of approval authority; and (6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

Section C of the Interim Memo has been enjoined. This memorandum does not implement, nor take into account, Section C. This memorandum implements Section B (Interim Civil Enforcement Guidelines).

Background

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021), which articulated the Administration's baseline values and priorities for the enforcement of the civil immigration laws.

On the same day, Acting Secretary Pekoske issued the Interim Memo. The Interim Memo did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review. Fourth, it rescinded several existing policy memoranda, including two ICE-related memoranda, as inconsistent with EO 13993.[2] The Interim Memo further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining the Department from enforcing and implementing the 100-day removal pause in Section C.

Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others.

In addition to resource constraints, several other factors render ICE's mission particularly complex. These factors include ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and, relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

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[2] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017); Memorandum from Tracy Short, Principal Legal Advisor, ICE, to All OPLA Attorneys, *Guidance to OPLA Attorneys Regarding Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

AMERICAN OVERSIGHT

Accordingly, in executing its critical national security, border security, and public safety mission, the Department must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission.

Civil Immigration Enforcement and Removal Priorities

In support of the interim priorities, the guidance established in this memorandum shall be applied to all civil immigration enforcement and removal decisions made after the issuance of this memorandum. The civil immigration enforcement and removal decisions include, but are not limited to, the following:[3]

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions;
- Deciding whether to grant deferred action or parole; and
- Deciding when and under what circumstances to execute final orders of removal.

For ease of reference, the interim priorities identified in the Interim Memo, and as revised by this guidance, are set forth below along with further explanation.

As a preliminary matter, it is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen. Rather, officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Enforcement and removal actions that meet the criteria described below are presumed to be a justified allocation of ICE's limited resources. Actions not reflected in the criteria described below may also be justified, but they are subject to advance review as outlined further below.

In determining whether to pursue an action that falls outside the criteria described below, all relevant facts and circumstances regarding the noncitizen should be considered. For instance, officers and agents should consider: whether there are criminal convictions; the seriousness and recency of such convictions, and the sentences imposed; the law enforcement resources that have been spent; whether a threat can be addressed through other means, such as through recourse to criminal law enforcement authorities at the federal, state, or local level, or to public health and other civil authorities at the state or local level; and, other relevant factors (including, for example, the mitigating factors identified on page 5).

[3] As discussed above, the Department is enjoined from enforcing the Immediate 100-Day Pause on Removals in the Interim Memo. This following interim guidance should not be read to permit implementation of Section C of the Interim Memo.

AMERICAN OVERSIGHT

Criteria Defining Cases That Are Presumed to be Priorities

Priority Category 1: National Security. A noncitizen is *presumed* to be a national security enforcement and removal priority if:

1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities;
2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities;[4] or
3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

In evaluating whether a noncitizen's "apprehension, arrest, or custody is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat (as distinguished from a public safety threat) and is discussed below.

Priority Category 2: Border Security. A noncitizen is *presumed* to be a border security enforcement and removal priority if:

1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020[5]; or
2) he or she was not physically present in the United States before November 1, 2020.

To be clear, the border security priority includes any noncitizen who unlawfully entered the United States on or after November 1, 2020.

Priority Category 3: Public Safety. A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA[6]; or

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[4] For purposes of the national security enforcement priority, the terms "terrorism or terrorism-related activities" and "espionage or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws.

[5] The statutory mandates in Section 235 of the INA (regarding asylum seekers) continue to apply to noncitizens.

[6] This criterion tracks Congress's prioritization of aggravated felonies for immigration enforcement actions. Whether an individual has been convicted of an aggravated felony is a complex question that may involve securing and analyzing a host of conviction documents, many of which may not be immediately available to officers and agents. Even when all conviction documents are available, whether a conviction is for an aggravated felony may be a novel question under applicable law. Accordingly, in deciding whether a noncitizen has been convicted of an

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005420

2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

In evaluating whether a noncitizen currently "pose[s] a threat to public safety," officers and agents are to consider the extensiveness, seriousness, and recency of the criminal activity. Officers and agents are to also consider mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.

Officers are to base their conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consult with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

Particular attention is to be exercised in cases involving noncitizens who are elderly or are known to be suffering from serious physical or mental illness. Similarly, particular attention is to be exercised with respect to noncitizens who have pending petitions for review on direct appeal from an order of removal; have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or have pending applications for immigration relief and are prima facie eligible for such relief. In such cases, execution of removal orders should have a compelling reason and are to have approval from the FOD.

A civil enforcement or removal action that does not meet the above criteria for presumed priority cases will require preapproval as described below.

Enforcement and Removal Actions: Approval, Coordination, and Data Collection

To ensure compliance with this guidance and consistency across geographic areas of responsibility, and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim guidance, ICE will require that field offices collect data on the nature and type of enforcement and removal actions they perform. In addition, ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases. The data and coordination will inform the development of the Secretary's new enforcement guidance.

No Preapproval Required for Presumed Priority Cases

Officers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases, beyond what existing policy requires and what a supervisor instructs.

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aggravated felony for purposes of this memorandum, officers and agents must have a good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005421

Preapproval for Other Priority Cases

Any civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval from the FOD or SAC. In deciding to undertake an enforcement action or removal, the agent or officer must consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors. In requesting this preapproval, the officer or agent must raise a written justification through the chain of command, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place.

The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above. An approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above.

In some cases, exigent circumstances and the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action. While it is impossible to preconceive all such circumstances, they generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property. If preapproval is impracticable, an officer or agent should conduct the enforcement action and then request approval as described above within 24 hours following the action.[7]

As always, it is important that ICE endeavor to remove noncitizens with final removal orders who have remained in post-order detention for more than 90 days. ICE will continue to review such noncitizens' cases on a regular basis, consistent with existing law and policy. ICE will endeavor to remove such noncitizens consistent with legal requirements and national, border security, and public safety priorities.

Periodically, ICE receives requests to exercise some form of individualized discretion in the interests of law and justice. ICE will create and maintain a system by which personnel can evaluate these individualized requests.

Notice of At-Large Enforcement Actions

The execution of an at-large enforcement action should be preceded by notification to the relevant state and local law enforcement agency or agencies. This notification will advance

[7] Where approval is sought following the enforcement action due to exigent circumstances, the request shall explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained. Additionally, when the location of a proposed or completed enforcement action is a courthouse, as defined in ICE Directive 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018, or as superseded), or a sensitive location, as defined in ICE Directive No. 10029.2, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011, or as superseded), that should be explicitly highlighted in the request.

AMERICAN OVERSIGHT

public safety and help ensure that planned immigration enforcement actions do not improperly interfere with state and local law enforcement investigations and actions.

Weekly Reporting of All Enforcement and Removal Actions

The Director will review all enforcement actions to ensure compliance with this guidance and consistency across geographic areas of responsibility and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim priorities.

Each Friday, the Executive Associate Directors for Enforcement and Removal Operations and Homeland Security Investigations will compile and provide to the Office of the Director, the Office of the Deputy Director, and the Office of Policy and Planning (OPP), a written report: (1) identifying each enforcement action taken in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the action; and (3) identifying the date, time, and location of the action.

In addition, each Friday the Executive Associate Director for Enforcement and Removal Operations will provide to the Office of the Director, the Office of the Deputy Director, and OPP, a written report: (1) identifying each removal in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the removal; and (3) identifying the date, time, and location of the removal.

These reporting requirements will be assessed periodically during this interim period to ensure that they are both productive and manageable.

The weekly reports will be made available to the Office of the Secretary.

Questions

Questions regarding this interim guidance or the Interim Memo should be directed to OPP through the chain of command and Directorate or Program Office leadership. Answers to frequently asked policy questions will be published on OPP's inSight page on an ongoing basis. Please note, however, that case-specific questions should generally be addressed by Directorate or Program Office leadership.

No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005423

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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DECLARATION OF PETER B. BERG

I, Peter B. Berg, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since October 4, 2020. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.

2. Prior to this position, I served as the Assistant Director for Field Operations beginning on June 21, 2020 and had been acting in that role since January 31, 2020. In these capacities, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 24 Field Offices and 188 sub-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005424

offices. I further managed ERO Headquarters components, including Domestic Operations, Special Operations, and Law Enforcement Systems and Analysis.

3. I have been a career law enforcement officer since 1996, serving in various capacities with both ICE and the former Immigration and Naturalization Service (INS). Other leadership positions I have held within ICE include: Field Office Director and Deputy Field Office Director for the St. Paul Field Office, Acting Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and Acting Deputy Assistant Director for the ERO Headquarters Field Operations Division.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 3.2 million cases, which

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005425

includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

III. Guidance for Immigration Enforcement and Removal Actions

6. On February 18, 2021, ICE's Acting Director, Tae D. Johnson, issued interim guidance titled, *Civil Immigration Enforcement and Removal Priorities* (Johnson Memorandum) (Feb. 18, 2021), which implements with revisions the priorities set forth in DHS's January 20, 2021 Memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (January 20 Memorandum). The Johnson Memorandum lays out a process to allocate ICE's limited law enforcement resources to achieve its mission by focusing on cases that fall within three "presumed priority" categories: national security, border security, and public safety.

7. Further, the Johnson Memorandum emphasizes that the priorities do not prohibit the arrest, detention, or removal of any noncitizen; to the contrary, the memorandum presumes and sets out a process with respect to actions involving cases that fall outside the three priority categories. As a result, under the Johnson Memorandum, ICE has continued to arrest and remove individuals who meet the three presumed priorities, as well as those who constitute "other priority cases." Under the memorandum, no immigration enforcement action or removal is categorically prohibited. Rather, actions that do not meet the presumed priority criteria require preapproval by the appropriate ERO Field Office Director or Homeland Security Investigations Special Agent in Charge except where exigent circumstances and public safety make preapproval impracticable. Pursuant to this guidance, ICE took approved enforcement actions against individuals with serious and violent pending criminal charges, non-aggravated felon sexual predators, individuals with a nexus to national security threats to

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005426

the United States, individuals who are identified as members of Transnational Organized Crime groups, individuals with warrants from foreign governments identified by an INTERPOL issued "Red Notice," and individuals with a range of violent criminal convictions.

IV. Irreparable Harm to ICE from Issuance of the Preliminary Injunction

8. I have read and am familiar with the preliminary injunction issued by the U.S. District Court for the Southern District of Texas in this case.

Inability to Prioritize Use of Finite Resources

9. On August 19, 2021, the U.S. District Court for the Southern District of Texas enjoined DHS from enforcing and implementing the policies described in: Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4); the section entitled "Civil Immigration Enforcement and Removal Priorities" in the Johnson Memorandum. (Dkt. No. 1-2 at 4–6); and the section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the Johnson Memorandum, with certain exceptions. (Dkt. No. 1-2 at 6–8). Implementing the terms of the injunction and the reporting requirements, discussed in more detail below, would be unreasonably and unduly burdensome, if not entirely impossible.

10. First, the number of noncitizens who likely would fall within the scope of the court's order and nationwide preliminary injunction significantly exceeds ICE's capacity to detain. In July of this calendar year alone, CBP apprehended a total of over 212,000 individuals seeking to cross the southwest border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited August 19, 2021). Even with over 95,000 expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005427

authorities, over 116,000 were processed under Title 8. Another 64,000 Title 8 cases were apprehended in March; 66,000 in April; 67,000 in May; and 83,000 in June. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code.

11. Enforcement actions against the entire population covered by the court's order and preliminary injunction would require ICE bedspace, personnel, and other resources that simply do not exist. ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide, including approximately 31,500 single adult beds and approximately 2,500 family unit beds, to support its mission to enforce immigration law. ICE's access to its full inventory of bedspace is severely limited due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, detention facility contract modifications, and the ongoing COVID-19 pandemic. Specifically, ICE's Pandemic Response Requirements (PRR) for its detention facilities, which are informed by the Centers for Disease Control and Prevention's COVID-19 guidelines, require that facilities undertake efforts to reduce populations to approximately 75% capacity.[1] Last year, the U.S. District Court for the Central District of California issued a nationwide preliminary injunction recognizing the 75% capacity limit, and ordering ICE to maintain additional strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020). In light of these mandates, ICE's currently available bedspace inventory is only approximately 26,800 beds.

[1] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements (PRR), Version 6.0 (March 16, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited August 19, 2021).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005428

12. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public-safety threats, and/or recent border entrants. According to data last viewed on August 20, 2021, the currently-detained population of 25,596 noncitizens constitutes more than 95% of the approximately 26,800 currently available beds. The court's order and the preliminary injunction would make it impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety and national security mission in a fair, consistent, and effective manner. Specifically, the injunction and the order would likely result in the release of noncitizens ICE has deemed priorities for removal.

13. Second, the order and the preliminary injunction could adversely impact the ability of ICE to take immediate enforcement action against noncitizens who pose a security threat or other real harm to U.S. communities. Indeed, implementation of ICE's interim priority structure has enabled the agency to focus resources on arresting and detaining the most dangerous noncitizens.

14. If ICE were required to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, it would significantly curtail ERO's ability to protect communities from public safety threats. And given the limited detention capacity described above, detaining such individuals may well prevent ICE from detaining other individuals not subject to detention under section 1226(c) or section 1231(a)(2), even where those individuals present a danger to the community or a flight risk.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005429

15. Third, compliance with the nationwide preliminary injunction would adversely impact ICE's ability to plan targeted enforcement operations focused on security or public safety threats. ICE's best understanding is that there are approximately 11 million noncitizens in the United States who do not have authorization to reside here. It is critical that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated enforcement operation that builds on ongoing efforts to arrest and remove noncitizen sex offenders from our communities. Historically, ICE has used targeted operations like Operation SOAR as a mechanism to focus agency resources on the most egregious offenders in the interest of public safety, even where those offenders may not be subject to the statutory provisions at issue in this case.

16. The Johnson Memorandum focuses agency resources on enforcement actions against the most serious offenders. From February 18, 2021, through July 31, 2021, ERO processed 25,916 administrative arrests. Almost 20% of those arrests were noncitizens convicted of aggravated felony offenses. For the same period in the year 2020, ERO processed 39,107 administrative arrests. However, less than 8% of those arrests were noncitizens convicted of aggravated felony offenses.

17. Fourth, compliance with the nationwide preliminary injunction would effectively eliminate the ability of the Secretary to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5).. The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909 to maximize use of scarce agency resources, to protect the United States from national security threats and to protect our citizens and communities from harm. *See Department of*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005430

Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.,* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

18. The implementation of the enforcement priorities set forth in the DHS January 20 Memorandum and the Johnson Memorandum has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, to date, approximately 300 officers have been detailed to the Southwest Border to support CBP operations. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b); and transfers of those taken into custody. This support has significantly increased over the past few months.

19. This flexibility has enabled ERO to prioritize border security, consistent with the Johnson Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. Implementing the terms of the court's order and the preliminary injunction would likely force ERO to realign field teams and other assets to allocate limited time and resources on non-criminal and other lower priority targets. Such a reallocation would likely disrupt ERO's ability to have a meaningful impact on important border security efforts.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005431

Lack of Clear Guidance for Nationwide Workforce

20. Absent clear priorities, ERO immigration officers may be left with only very general guidance—or without guidance at all—on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to initiate enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable apportionment of ICE's limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

Unduly Burdensome and Impossible Reporting Requirements

21. The court's order requires ICE to produce monthly reports stating the number of noncitizens known to be "covered by or subject to 8 U.S.C. § 1226(c)(1)(A)-(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release," and to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1226(c) reporting requirement"). The order further requires ICE to produce monthly reports stating the number of noncitizens "in their removal period as defined in 8 U.S.C. § 1231(a)(1)," along with the number of those "who were not detained pursuant to 8 U.S.C. § 1231(a)(2)," to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1231(a) reporting requirement").

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005432

22. ICE's ability to comply to the court's satisfaction with the 1226(c) reporting requirement, for instance, depends almost entirely on ICE's ability to determine whether a noncitizen is covered by or subject to § 1226(c) prior to a decision whether to take the noncitizen into custody, but that would be exceedingly burdensome or, in some instances, impossible to accomplish. When ICE receives information from a state or local law enforcement agency about a noncitizen in detention, the agency only needs probable cause of removability in order to lodge a detainer request. The probable cause standard constitutes neither a conclusive determination that a noncitizen is in fact removable nor a determination that the noncitizen may be covered by one of the statutes at issue in this case. It is only after ICE encounters the individual, assumes custody, and conducts an initial intake screening, that those formal determinations are currently made. In fact, in light of the complexities of the immigration laws, although a removability determination may be possible, a determination regarding the applicable detention authority may require obtaining and reviewing criminal records and ever-evolving developments in caselaw.

23. ICE's ability to determine whether a noncitizen in state or local custody would be covered by or subject to § 1226(c) is further limited by the fact that some states have enacted laws barring information sharing with ICE and/or prohibiting ICE access to facilities.

24. Additionally, even where ICE would be able to make determinations upfront that a noncitizen in state or local custody is covered by or subject to § 1226(c), ICE's ability to learn when a noncitizen may be released from custody is significantly limited in many jurisdictions. Many jurisdictions across the country neither honor ICE detainers nor notify ICE when inmates are released from custody. As of July 19, 2021, ICE had identified 463 jails or prisons that do not notify ICE prior to the release of a noncitizen, and 155 jails or

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005433

prisons that provide notification to ICE prior to a noncitizen's release from custody but do not provide adequate hold time for ICE to take an individual into custody. For many cases in these jurisdictions, ICE is not aware when noncitizens are released from criminal custody and has no knowledge of their last known residence. Some jurisdictions have also significantly limited ICE's access to state and local databases, which would include some of the information being sought by the court.

25. The 1231(a) reporting requirement similarly poses significant burdens for ICE and may, depending upon the court's interpretation of the requirement, apply to a very large class of individuals. There are currently an estimated 1.2 million noncitizens in the United States who have been issued final orders of removal. If the 1231(a) reporting requirement is intended to include both noncitizens who were detained at the time the order of removal became administratively final and those who were not detained, providing updated information on this population every month would significantly strain ICE's capacity to manage and track statistical data for any other purpose, including its mandatory congressional reporting requirements, statutory FOIA obligations, and myriad reporting requirements in this and other litigation.

26. The requirement that ICE make contemporaneous records of the decision not to detain will impose a serious administrative burden on the line officers making those decisions. Because of the constraints on available bedspace, the number of noncitizens subject to detention under either § 1231(a)(2) or § 1226(c) who will not be detained will likely be significant. Under the terms of the order, the line officers will be required to document that decision, thus diverting them from other important duties, including other enforcement efforts.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005434

Case 6:21-cv-00016 Document 63-2 Filed on 08/20/21 in TXSD Page 12 of 12

27. Simply put, it would be impossible for ICE to accurately and completely comply with these requirements. And it would pose extraordinary burdens on ICE to attempt to do so. ICE simply does not collect and retain data in the way that the court has requested. Moreover, with respect to noncitizens against whom no enforcement action has been taken, ICE's databases and systems do not (and cannot) capture information pertaining to the detention authority that would have applied to those noncitizens. In other words, ICE can only track the detention authority of individuals who are presently in ICE custody. Even then, ICE systems are not designed to capture the level of granularity needed to accurately report the number of noncitizens subject to § 1226(c) mandatory custody or the subset of noncitizens subject to § 1231(a) custody authority for whom custody is mandatory.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 20th day of August, 2021.

PETER B BERG

Digitally signed by PETER B BERG
Date: 2021.08.20 23:13:13 -04'00'

Peter B. Berg
Acting Deputy Executive Associate Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005435

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-00016

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO FOR A STAY PENDING APPEAL

EXHIBIT A

DECLARATION OF THOMAS HOMAN

AMERICAN OVERSIGHT

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

STATE OF TEXAS, STATE OF LOUISIANA, *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants*.	Civ. Action No. 6:21-cv-00016

DECLARATION OF THOMAS HOMAN

1. My name is Thomas Homan I am over the age of eighteen and competent to testify to the matters addressed in this declaration. I make this declaration on the basis of my own personal and professional knowledge and experience, as well as information available to me in my positions in public service

2. I am the former Acting Director of the U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS), a position I held from January 2017 to June 30, 2018.

3. I have over thirty-two years of experience working for ICE and its predecessor entity, the Immigration and Naturalization Service (INS). I am a 34-year veteran of law enforcement, having begun my career as a police officer in New York in 1983. In 1984, I became a U.S. Border Patrol Agent with the former Immigration and Naturalization Service (INS) in Campo, California. In 1988, I became an INS Special Agent in Phoenix, Arizona, and was later promoted to Supervisory Special Agent and Deputy Assistant Director for Investigations. In 1999, I became the Assistant District Director for Investigations (ADDI) in San Antonio, Texas, and three years later transferred to the ADDI position in Dallas, Texas.

4. The INS was abolished by the Homeland Security Act of 2002, and ICE was created to perform many of its former enforcement functions, along with the investigative functions of the former U.S. Customs Service. Upon the creation of ICE in March 2003, I was named the Assistant Special Agent in Charge in Dallas, Texas. In August 2004, I was named the Deputy Special Agent in Charge (DSAC) in that same office. As DSAC, I directed the day-to-day operations of seven local offices, with more than 200 special agents and support personnel, conducting investigations related to terrorism, export

AMERICAN OVERSIGHT

enforcement, illicit financing, money laundering, human trafficking, intellectual property rights violations, and cybercrimes.

5. In March of 2009, I became Enforcement and Removal Operations (ERO) Assistant Director for Enforcement at ICE Headquarters. In that position, I was responsible for ICE's enforcement initiatives and components through which ERO identifies and arrests removable aliens, including the Criminal Alien Program, the National Fugitive Operations Program, Field Training, the 287(g) Program, the Law Enforcement Support Center (LESC), the Fugitive Operations Support Center (now the National Criminal Analysis and Targeting Center (NCATC)), the Detainee Enforcement and Processing Offenders by Remote Technology Center, and the Interoperability Response Centers. In October of the following year, I was promoted to Deputy Executive Associate Director for ERO, and in May 2013, I was promoted to Executive Associate Director for ERO, a position I held until January 2017.

6. From November 2017 to January 2018, I held the position of Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement, DHS. From January 2017 until June 30, 2018, I served as Acting Director of ICE. In both positions, I directly oversaw ICE's core operational programs, as well as the agency's managerial and administrative support functions. I also directed and oversaw ICE's day-to-day work of enforcing the nation's immigration and customs laws; investigating a wide range of domestic and international activities arising from the illegal movement of people and goods into, within, and outside of the United States and supporting the OPLA litigators who prosecute exclusion, deportation, and removal proceedings, including against national security threats, criminal aliens, and other aliens posing a threat to public safety. ICE employs more than 20,000 federal civil servants and contract staff in more than 400 offices within the United States and 50 foreign countries.

7. I previously provided a declaration in this case. In my declaration, I outlined my concerns about the impact and effects of the memorandum issued by Acting Director David Pekoske dated January 20, 2021, and the February 18, 2021 memorandum issued by Acting Director of ICE, Tae Johnson. I provided my declaration on April 25, 2021, and understand it was filed in this cause as Document 19-4.

8. I have been provided a copy of the stay motion and the accompanying affidavit of Peter Berg filed by the Department of Justice in this matter. I have profound disagreements with the assertions contained in Mr. Berg's affidavit.

9. In the stay motion, the Department of Justice says, "ICE lacks the resources, including appropriated funds and bedspace, to detain all noncitizens potentially implicated by the injunction, as well as to protect the public by detaining and removing those individuals DHS has already identified as presenting safety threats and as deemed necessary for border security." I disagree with that assertion.

10. ICE's budget is sufficient to maintain higher levels of enforcement to cover the necessary expenses. As an initial matter, ICE has benefited from a significant budget increase in the

AMERICAN OVERSIGHT

last decade compared to prior budget years. For example, in 2012 the enacted ICE budget was 5.8 billion, and in FY 2021 the enacted budget is $7.97 billion. That is nearly a $2.2 billion, or 37.4%, increase. And while the specific line item for detention funding has decreased, the ICE budget is at historic highs and those funds can be reallocated to fund additional detention capacity. This has occurred at various times in the past. Thus, in my opinion, ICE has sufficient resources to maintain higher levels of enforcement.

11. The Department of Justice's contrary belief seems to be based on a misunderstanding of ICE's budget. Mr. Berg declares that "ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide," but ICE can use additional funding within their budget for detention needs. Congress has authorized DHS to transfer funds from other portions of its budget to "custody operations." Using this authority, ICE and DHS can fund significantly more than the 34,000 detention beds that Mr. Berg mentions, in the event that became necessary.

12. ICE's ability to transfer funds in this way is not new. During my tenure, ICE commonly utilized that authority to fund additional detention capacity. In fact, it occurred in approximately eight of my last ten years of service at headquarters.

13. During both the Obama and Trump Administrations, officials concluded that ICE needed additional funding, beyond that specifically appropriated for detention, to detain aliens in the United States. In those circumstances, officials would transfer the necessary amount of money from other portions of the ICE or DHS budget where it was less urgently needed.

14. For example, ICE and DHS re-purposed millions of dollars of funds to support increased detention capacity during the migrant surge of 2014 and 2015.

15. Insofar as Mr. Berg suggests that ICE cannot detain more than 34,000 aliens at one time, the suggestion is incorrect.

16. ERO's Average Daily Population (ADP) measures the number of individuals in ICE custody on an average day during the fiscal year. In FY 2019, ERO's ADP was 50,165 and at times during that year, ERO's detention population exceeded 56,000. *See* https://www.ice.gov/features/ERO-2019. During that year the average length of stay for ICE's detained population was 34.3 days.

17. It is worth nothing that during the same period, FY 2019, ICE removed over 267,258 aliens and 56% of those were reportedly convicted of a crime. Even with the limitations imposed by the COVID-19 pandemic, there is no good reason ICE could not detain similar numbers of aliens again and increase detention capacity as needed.

18. In addition, ICE has multiple options for detention facilities. First, it operates some facilities itself. Second, it contracts with other governmental entities, including the U.S. Marshal Service and various local governments, to operate detention facilities that house aliens through intergovernmental service agreements. Third, ICE contracts with private providers, such as GEO Care and CoreCivic to increase detention capacity and bedspace

AMERICAN OVERSIGHT

to detain migrants. I have learned that both GEO Care and CoreCivic have the additional capacity to easily provide over 15,000 additional detention beds.

19. During the Biden Administration, ICE has canceled or reduced multiple contracts with other governmental entities and private providers. This includes providers who have been reliable long-term partners. As a result, those entities have detention capacity that ICE could use but is not currently using. Some of these providers were low-cost providers of detention capacity for ICE, so the loss of their facilities is particularly harmful to ICE's mission. ICE has flexibility to utilize multiple options to increase its potential detention capacity. In my opinion ICE has chosen not to maximize those options.

20. I have also reviewed Mr. Berg's claim that implementing the Court's "reporting requirements" "would be unreasonably and unduly burdensome, if not entirely impossible." I disagree with Mr. Berg's assertions and believe that he overstates the burden such a requirement imposes. ICE has existing advanced databases that can track the vast majority of information addressed by the Court.

21. In some cases, ICE may lack sufficient information to reach a definitive conclusion about whether an alien is covered by Section 1226(c) or Section 1231(a)(2), but that does not prevent ICE from reporting information about aliens it knows or reasonably believes to be covered by Section 1226(c) or Section 1231(a)(2). In my view, ICE can reasonably comply with the Court's reporting requirements.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of August, 2021.

/s/ Thomas Homan

Thomas Homan

AMERICAN OVERSIGHT

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-00016

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO FOR A STAY PENDING APPEAL

EXHIBIT B

NICK MIROFF, *WHY IMMIGRATION DETENTION BEDS BECAME A NEW ISSUE IN TRUMP BORDER WALL FIGHT*, WASHINGTON POST (FEB. 12, 2019)

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 221 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 3 of 5

The Washington Post *Democracy Dies in Darkness*

Why immigration detention beds became a new issue in Trump border wall fight

By Nick Miroff

February 12, 2019 8:00:00 a.m.

   128

Democrats opposing President Trump's push for a border wall used this week's budget negotiations to launch an attempt to rein in his administration's deportation efforts, proposing to reduce the number of detention beds available for immigration arrests inside the United States.

Though the congressional deal struck late Monday omits a strict new cap Democrats had sought for immigrants detained within the United States — as opposed to at the border — it returns funding levels for detention beds maintained by the U.S. Immigration and Customs Enforcement agency to 2018 levels. Lawmakers backing the proposal, amid calls by some Democrats to "abolish" U.S. Immigration and Customs Enforcement, said they hoped a bed limit would force the agency to refocus its attention on violent criminals while backing off immigrants who lack legal status but have not committed serious offenses.

Before the deal scrapped the proposal, Trump administration officials had denounced the idea, saying a reduction in detention beds would hamstring ICE and force the release of thousands of criminals. Matthew Albence, ICE's deputy director, said he had never seen a proposal for such a cap during his 24-year career.

"It would be extremely damaging to public safety," Albence said.

But the Democrats' maneuver was not entirely unprecedented: It takes a little-known funding mechanism long-wielded by border hawks and tries to turn it against them.

Proponents of a more-rigorous approach to immigration enforcement have for more than a decade treated detention bed funding as a way to ensure a minimum number of immigration arrests. By tying funding levels to a specific number of beds — 40,500 per day last year — appropriators were able to establish an informal quota for enforcement activity. Unofficially known as the "bed mandate," Republican lawmakers typically pushed for as many beds as possible and encouraged ICE officials to fill them with potential deportees.

In their clash with the president over border wall funding, Democrats were working to use the bed

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 222 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 3 of 5

By Laris Karklis and Tim Meko/Post, undefined and undefined
12:26 p.m.

Despite a partial government shutdown that lasted nearly 35 days, President Trump's efforts to secure border wall funding fizzled last month. However, that has not stopped efforts that were already underway to shore up sections of the southern border in two Texas counties.

The Democrats' proposal aimed to cap the number of detention beds available for interior enforcement at 16,500 per day. Democrats also wanted to reduce the overall number of available beds to 35,400, far below the 52,000 that the Trump administration has requested.

"ICE has been overspending and overjailing," said Kerri Talbot, an advocate with Immigration Hub, a group that is backing the Democrats' proposal. "Democrats want controls on ICE because ICE is out of control."

President Barack Obama came under criticism during his first term from many Democrats and immigrant advocates when annual deportations reached levels that far exceed current totals. By his second term, ICE had developed a more tailored enforcement approach that targeted serious and violent offenders but gave greater latitude to immigrants who were otherwise law-abiding.

After Trump took office, ICE officials praised him for "taking the shackles off" and giving agents greater discretion to make arrests. Criminal violators remain the agency's priority, ICE officials say, but they also have sparked a backlash with arrests of immigrants with deep community ties, American children and well-established lives in the United States.

ICE arrests increased 11 percent last year, and the agency carried out 14 percent more deportations. But enforcement efforts have fallen far short of Trump's post-election promise to immediately remove 2 million to 3 million immigrants living in the United States illegally.

At a time when record numbers of Central American families have been showing up at the border, the number of people held in ICE custody has soared to nearly 50,000 per day, far above the number of beds Congress has funded.

Albence told reporters Monday his agency has paid for the additional beds by making the best use of its resources, but noted that ICE has an obligation to enforce immigration laws. A cap on interior enforcement would ask ICE "to ignore the very laws that Congress has already passed," he said.

"We cannot have a system whereby immigration enforcement is only effectuated against individuals once they commit a subsequent crime to their immigration violation," he said. "If they know there is no enforcement arm within the interior of the United States that is out there looking for them, you will continually have that pull factor and you will never secure the border."

AMERICAN OVERSIGHT

Case: 21-40618 Document: 00515990757 Page: 223 Date Filed: 08/23/2021
Case 6:21-cv-00016 Document 65-2 Filed on 08/23/21 in TXSD Page 4 of 5

GOP aides said after Monday's deal was reached that ICE would have enough money and flexibility to maintain its current detention levels and add more when needed.

Albence held a White House conference call hours after senior Trump adviser Stephen Miller had a separate call with the president's surrogates and supporters, telling them the Democrats "want illegals released" and "won't fund ICE officers," according to a person who listened to the briefing.

ICE relies on a network of government-run and privately operated detention centers to hold immigration violators in custody while awaiting deportation or a court hearing.

Costs for those beds vary widely, and some county jails in rural areas have converted sections of their facilities into immigration detention centers by offering rock-bottom rates to the federal government.

The number of beds funded annually by Congress is based on the average daily cost for one detainee, so the agency can also hold more people in custody by using less-expensive facilities.

John Sandweg, who was acting director of ICE under President Obama and who held other senior positions at the agency, said the debate showed the necessity of devising more sophisticated ways to assess the flight risk of immigration violators that wouldn't require locking them up.

Because the U.S. immigration court system prioritizes the cases of those held in custody over those who have been paroled, it can give lawmakers a misleading impression that the only way to ensure someone shows up in court is to keep them jailed.

"Detention is not the key to deportation," said Sandweg, adding that immigration violators should be treated more like criminal defendants, with a greater range of cost-effective parole options.

But Albence said that such alternatives are ineffective. He said 72 percent of immigrants in ICE custody are subject to "mandatory detention" because of serious criminal records, a pending deportation order or some other administrative restriction on their ability to qualify for parole or GPS monitoring.

This article has been updated.

Josh Dawsey contributed to this report.

By Nick Miroff

Nick Miroff covers immigration enforcement and the Department of Homeland Security for The Washington Post. He was a Post foreign correspondent in Latin America from 2010 to 2017, and has been a staff writer since 2006. Twitter

AMERICAN OVERSIGHT

AMERICAN OVERSIGHT

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

STATE OF TEXAS, STATE OF LOUISIANA	)	
Plaintiffs,	)	
v.	)	No. 6:21-cv-00016
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF
MONICA BURKE

I, Monica Burke, declare the following under 28 U.S.C. § 1746:

1. I presently serve as Acting Assistant Director of Custody Management Division (CMD), Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS or Department). I have served in this capacity since August 2, 2021. I started my career at ICE in the Office of the Principal Legal Advisor, ERO Law Division (EROLD) in 2011. I was a Section Chief and Deputy Division Chief in EROLD. Prior to my current position, I was the Deputy Assistant Director for Custody Programs within CMD from March 2020 to August 2021.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005446

2. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of two divisions – the Oversight Compliance and Acquisitions Division (OCAD) and the Custody Programs Division (CPD).
3. As the Assistant Director, I am responsible for the effective and proficient performance of these divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 25,000 detainees daily at approximately 200 facilities nationwide.
4. This declaration is based on my personal knowledge and experience and information provided to me in my official capacity.
5. I have read and am familiar with the declaration of Thomas Homan submitted by Plaintiffs in this case.
6. If the court's order required ICE to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, ICE would need to contract and pay for orders of magnitude more detention beds than it currently possesses, especially when accounting for limitations required by the ongoing COVID-19 pandemic and pandemic guidance.
7. As an initial matter, reprogramming or transferring funds would not address the significant obstacles to identifying additional appropriate detention space. Over the past month, I have been working to identify additional beds and I am familiar with the many

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005447

challenges associated with this effort. Finding and contracting for additional detention beds is a complicated process that requires several months per facility. First, ICE must identify available facilities. Second, ICE must conduct multiple preoccupancy inspections to ensure the facility is suitable for civil immigration detainees. Third, ICE negotiates with the detention provider and awards the contract that must be funded.

8. This process is complicated by the fact that detention providers are facing challenges in hiring appropriate staff, especially medical staff, and after staff are identified, ICE needs several weeks to ensure that they have appropriate clearances.

9. Notably, some facilities have terminated their contracts with ICE during the pandemic. Further, civil immigration detention requires a heightened standard of care and Congress has regularly required DHS to monitor facilities and discontinue agreements under certain circumstances. Available facilities are also impacted by state laws prohibiting ICE detention. Further, ICE detention space is limited by ongoing litigation that enjoins ICE from using some of its detention capacity.

10. Based on the funding and operational challenges, I believe that ICE cannot readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained were the court to order it.

11. Any significant reprogramming or transferring of funds would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program. Beyond the custody sphere, there are many other significant programs within DHS and ICE that could be jeopardized by a court ordered mandate to reallocate funds without regard to the department's overall mission.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005448

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 23rd day of August 2021.

MONICA S BURKE

Digitally signed by MONICA S BURKE
Date: 2021.08.23 09:40:53 -04'00'

Monica Burke
Acting Assistant Director
U.S. Immigration and Customs Enforcement

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005449

2021 WL 3683913
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas, Victoria Division.

The STATE OF TEXAS; and the 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; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.

Civil Action No. 6:21-cv-00016
|
Filed 08/19/2021

MEMORANDUM OPINION AND ORDER

DREW B. TIPTON UNITED STATES DISTRICT JUDGE

***1** "No matter how successful Congress might be in crafting a set of immigration laws that would—in theory—lead to the most long-term benefits to the American people, such benefits will not actually occur if those laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996). That observation comes from a Senate Judiciary Committee Report addressing the problem of alien criminality in the United States. Similarly, the Supreme Court has stated "deportable criminal aliens who remain[ ] in the United States often commit[ ] more crimes before being removed." *Demore v. Kim*, 538 U.S. 510, 518, 123 S.Ct. 1708, 1715, 155 L.Ed.2d 724 (2003) (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). These observations, among others, led to the wholesale reform of our Nation's immigration laws in the 1990s.

Now, over two decades later, the States of Texas and Louisiana (the "States") seek to have the Executive Branch (the "Government")[1] adhere to two federal immigration statutes passed during that wholesale reform. The States want the Government to comply with 8 U.S.C. §§ 1226(c) and 1231(a)(2), which provide that the Government "shall" detain certain aliens when they are released from custody or during their removal period, respectively.[2] More specifically, the States move for a preliminary injunction to prohibit the Government from implementing two recent immigration memoranda which allegedly instruct Executive Branch officials to violate these laws.[3] (Dkt. No. 18).

These immigration memoranda, issued on January 20 and February 18, 2021 (the "Memoranda"), purport to "prioritize" certain categories of aliens for enforcement action. (Dkt. No. 1-1); (Dkt. No. 1-2). The States point out that the priority categories enumerated in these Memoranda omit certain others—namely, aliens convicted of serious drug offenses, aliens convicted of crimes of moral turpitude, and aliens subject to a final order of removal. The States argue that federal law requires the Government to take custody of aliens falling within these overlooked categories, and the Memoranda are grinding these required detentions to a halt. Unsurprisingly, the Government disagrees and argues that the Executive Branch is simply acting within its discretion.

***2** This case involves the intersection of several areas of administrative and immigration law. But more fundamentally, the claims made in this case implicate the separation-of-powers framework set forth in our Nation's Constitution. Put simply, the Government has instructed federal officials that "shall detain" certain aliens means "may detain" when it unambiguously mean *must* detain. Thus, the Court inquires whether the Executive Branch may direct officials to enforce a law enacted by Congress in a way that is contrary to the plain language of the law. That inquiry yields a clear answer: it may not. The Executive Branch may not instruct its officers to enforce a statute in a manner contrary to the law itself. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies ... , faithfully executes them. The

AMERICAN OVERSIGHT

power of executing the laws [however] ... does not include a power to revise clear statutory terms that turn out not to work in practice." (citing U.S. Const. art. II, § 3) (cleaned up)).

Having considered the pleadings, the record, and the applicable law, the Court finds the States have satisfied the requirements for a preliminary injunction. Accordingly, the States' Motion is **GRANTED**. [4]

I. BACKGROUND

At first glance, the background facts of this case are straightforward. The Government issued two memoranda concerning civil immigration enforcement which the States claim violate two immigration laws. But upon closer examination, the actions of the Government and the claims by the States are strikingly complex. Congress did not design our Nation's immigration laws on a whim. Therefore, to place this case in its proper context and facilitate understanding of the function of Sections 1226(c) and 1231(a)(2), the Court begins by briefly detailing some of the history behind those statutes. [5]

A. HISTORY OF SECTIONS 1226(C) AND 1231(A)(2)

The United States has long welcomed and benefited from immigration. [6] The Nation has, however, borne costs due to illegal immigration and the criminal conduct of illegal aliens. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 380–81 (2006). Congress in the 1990s was not blind to those concerns. As a legislative report from 1995 mentions, "[a]lthough immigrants to the United States have been, and continue to be, predominantly hard working and law abiding, there appears to be a growing criminal class among immigrants, especially among those here illegally." S. Rep. No. 104-48, at 7 (1995). Indeed, Congress directly linked illegal immigration with crime. The same legislative report provides:

> ***3** The fact that many criminal aliens have entered the U.S. illegally helps explain why so many aliens are involved in crime[.] [T]heir illegal situation conveys an "outlaw" status, often leading them into the shadowy realms of criminal lifestyles. The point was made succinctly in Congressional testimony by a former Commissioner of the INS, "[t]hose entering the United States illegally have no legitimate sponsors and are prohibited from holding jobs. Thus, criminal conduct may be the only way to survive."

Id. at 5.

Yet throughout much of its history, the United States had neither the means nor the ability to curb illegal immigration or alien criminality. Indeed, "[f]or much of this country's history there has been no comprehensive body of immigration law and no laws at all addressing criminal aliens." *Id.* at 10. Despite the enactment of the Immigration and Nationality Act in 1952—and numerous immigration bills signed into law in the subsequent decades—these issues were "dealt with ... mostly as an afterthought." *Id.* at 12. Prior to the 1990s, "no major immigration legislation ha[d] focused exclusively on the problem of criminal aliens." *Id.* And although there were attempts to solve the problem of illegal immigration and alien criminality, change happened in a "piecemeal fashion." *Id.* It is unsurprising, therefore, that the time leading up to the enactment of Sections 1226(c) and 1231(a)(2) has been regarded by the Supreme Court as a time of "wholesale failure by [the Executive Branch] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714 (citations omitted); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 698, 121 S.Ct. 2491, 2503, 150 L.Ed.2d 653 (2001). The Executive Branch's failures at that time led to costs and consequences borne by the states, the citizens of this country, and its legal immigrants. *See* *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; S. Rep. No. 104-48, at 1–2 (1995).

Congress's observations led to significant statutory reform in the federal detention of criminal aliens. Following numerous reports about the high rate of abscondment and recidivism among criminal aliens and the corresponding costs and negative effects, "Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. Section 1226(c)(1) reads:

> The Attorney General *shall take into custody* any alien who —
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

AMERICAN OVERSIGHT

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] [7] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

***4** 8 U.S.C. § 1226(c)(1) (emphases added) (footnote added). And to buttress this detention mandate, Congress in Subsection (2) provided detailed instructions on the narrow circumstances under which the Attorney General could release a detained illegal alien.

> The Attorney General *may* release an alien described in paragraph (1) *only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General 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. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

Id. § 1226(c)(2) (emphases added).

Congress's efforts to protect the states, citizens, and legal immigrants from criminal illegal aliens through the INA during the 1990s were not confined to Section 1226(c). Through other statutes, too, "Congress explicitly expanded the group of aliens subject to mandatory detention." *Zadvydas*, 533 U.S. at 698, 121 S.Ct. at 2503 (citing Antiterrorism and Effective Death Penalty Act of 1996, § 439(c), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009–585, 3009–598 to 3009–599; 8 U.S.C. § 1226(c); and 8 U.S.C. § 1231(a)). That expansion is evident in 8 U.S.C. § 1231(a)(2), which outlines the Attorney General's discretion regarding the detention of illegal aliens who have been ordered removed:

> During the removal period, the Attorney General *shall detain* the alien. *Under no circumstance* during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphases added).

In view of the historical context and text of Sections 1226(c) and 1231(a)(2), Congress designed these two provisions to curtail the effects of illegal immigration and the concomitant concerns of alien criminality. But, as the Senate Judiciary Committee Report mentioned earlier admits, these statutory policies are futile if the "laws cannot be enforced." S. Rep. No. 104-249, at 3 (1996).

B. DETENTIONS IN PRACTICE

Previously, in *Texas v. United States*, the Court provided an in-depth overview of the immigration removal process. ____ F. Supp. 3d ____, ____, 2021 WL 2096669, at *4–9 (S.D.

AMERICAN OVERSIGHT

Tex. Feb. 23, 2021) (hereinafter "*Texas I*"). That discussion touched upon parts of the detention process for aliens subject to removal proceedings, *id.* at *5, and aliens subject to final orders of removal, *id.* at *8–9. Given the specific focus on detentions in this Motion for Preliminary Injunction, it is appropriate to more fully discuss the detention process for aliens subject to Sections 1226 and 1231.

***5** To start, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, created a uniform procedure for deporting aliens or denying them entry into the United States. The detention and removal process under Section 240 of the Immigration and Nationality Act ("240 proceedings") commences when DHS files a Notice to Appear ("NTA") against an alien or noncitizen—who are designated as "respondents"—in immigration court. *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465 (2018); *see* 8 C.F.R. § 1003.14; Jennifer Williams, *The Potential Implications of the Supreme Court's Decision in* Pereira v. Sessions *on Prosecutions for Illegal Reentry Under 8 U.S.C. § 1326*, 67 DOJ J. Fed. L. & Prac. 141 (2019); *see also* (6:21-cv-3, Dkt. Nos. 82 at 12, 82-1 at 5, 83 at 14). Federal law then gives the Attorney General —and immigration judges by extension of DOJ's internal organizational structure—discretion on whether such an alien may continue to be detained during the proceedings or released on bond or conditional parole pursuant to Section 1226(a). 8 U.S.C. § 1226(a).

For criminal aliens, however, the start of the process is a bit different. Such aliens are taken into custody by officers within the Executive Branch (*i.e.*, Immigration and Customs Enforcement ("ICE") agents) in generally three ways: an ICE arrest; in execution of detainers after a local police stop, *see* 8 C.F.R. § 287.7(a) (2011); or after completion of incarceration for a prior criminal conviction, *see* 8 C.F.R. § 287.5(c) (2016). *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 302 (2013). Of the three, immigration detainers are particularly important:

> The Executive branch uses immigration detainers to control the release of non-citizens from state prisons and local jails. When federal immigration officials learn that a state or local law enforcement agency has custody of a non-citizen targeted for immigration proceedings or investigation, they issue a detainer to give notice to state or local officials that the federal government intends to take custody of the non-citizen upon release. The form detainer notice issued by federal immigration officials directs the recipient that federal regulations require the recipient agency to detain the non-citizen for a brief period of time after the non-citizen would otherwise be released from custody.[8] Absent the ability to issue detainers, immigration enforcement officials would have to be present at the gates of the state or local detention facility to apprehend the non-citizen upon release.

Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L. Rev. 164, 165 (2008) (footnote added) (citations omitted).[9]

***6** In the past, ICE and DHS have been known to "screen" state prison and local jail populations for criminal aliens who may be subject to Section 1226(c). *Id.* at 177 (citing U.S. Immigration and Customs Enforcement, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (Mar. 28, 2008), not available online (Aug. 2, 2021)). This screening takes place, at least in some circumstances, without cooperation from state and local authorities. *See, e.g., State v. Reyes-Armenta*, No. M2004-00419-CCA-R3-CD, 2004 WL 2804898, at *2 (Tenn. Crim. App. 2004) ("The codefendants were then taken to the Sumner County Jail for processing. The officers had made no attempt to contact federal immigration officials; however, Agent Robert Kinghorn, an immigration officer, happened to be at the Sumner County jail and issued detainers on the defendants."). Additionally, in the past, "DHS's practice appears to be to place a detainer as soon as DHS learns of a potentially deportable prisoner—in many cases before conviction, close in time to the alien's arrest." Lasch, *supra*, at 178.

AMERICAN OVERSIGHT

Once the alien is in mandatory custody pursuant to Section 1226(c), an NTA may be issued, formally beginning the immigration removal proceedings. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 83 (2012). Because certain criminal aliens are required to be detained, a Notice of Custody Determination ("Form I-286") may also be issued. *Id.* (citing 8 C.F.R. § 231.1(g)(1) (2011)). The Form I-286 explains an ICE officer's determination that an alien is subject to mandatory detention because the alien falls within certain categories of Section 1226(c). *Id.* For such aliens, "the NTA's removal charge will commonly be the [Form I-286] charge justifying mandatory detention." *Id.*

While in detention, the criminal alien is entitled to a "*Joseph* hearing." *Id.* at 63, 85–86; *see* *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). The hearing is the detainee's only chance to challenge the mandatory nature of his or her detention. *Joseph*, 22 I. & N. Dec. at 800; Noferi, *supra*, at 85–86; Savaresse, *supra*, at 303. The point of the *Joseph* hearing is to determine whether the detainee challenging mandatory detention was "properly included" within a mandatory detention category; that is, the categories enumerated in Section 1226(c). *See* *Joseph*, 22 I. & N. Dec. at 800; Savaresse, *supra*, at 303. If the detainee prevails, he or she is entitled to a bond determination. *See* *Joseph*, 22 I. & N. Dec. at 808–09.

The detention process is similar for aliens with final orders of removal, *i.e.*, those who exhausted the removal proceedings and were found to be deportable. *See* 8 U.S.C. § 1231(a)(2). Criminal aliens who were initially detained under Section 1226(c) must remain in ICE custody as their removals are processed. *See* 8 U.S.C. §§ 1226(c)(2) and 1231(a)(2). As for the aliens with final orders of removal who are not currently in ICE custody, ICE sends a "Bag-and-Baggage" letter requiring the aliens to report to an ICE facility for detention and deportation. *Qian Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007); *Bermudes-Cardenas v. Gonzales*, 184 F. App'x 406, 407 (5th Cir. 2006) (per curiam). An alien who fails to report is classified by ICE and the circuit courts as a "fugitive." *See, e.g., Giri v. Keisler*, 507 F.3d 833, 834–36 (5th Cir. 2007). Once an alien is in custody, ICE takes the lead in coordinating their removal from the country. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *9.

C. THE JANUARY 20 MEMORANDUM

More than two decades after Congress changed the way this country approached the issues of illegal immigration and alien criminality, the current Administration set forth its views advocating a different approach from its predecessor. *See* Revision of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021) ("[The current] Administration will *reset* the policies and practices for enforcing civil immigration laws to align enforcement with [certain] values and priorities." (emphasis added)).

*7 Once the current Administration assumed power on January 20, 2021, it wasted no time issuing its first memorandum on civil immigration enforcement (the "January 20 Memorandum"). (Dkt. No. 1-1). The January 20 Memorandum, signed by Acting DHS Secretary David Pekoske, announced changes to the enforcement of the Nation's immigration laws. (Dkt. No. 1-1). The January 20 Memorandum begins by acknowledging the current issues the federal government is encountering in enforcing immigration laws, noting the United States "faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century." (*Id.* at 2). The January 20 Memorandum goes on to say, "in light of those unique circumstances," DHS must substantially increase "resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security." (*Id.*) In Section A, the January 20 Memorandum calls for a "Department-wide review of policies and practices concerning immigration enforcement[.]" (*Id.* at 3). In Section B, the January 20 Memorandum articulates "interim enforcement priorities [that] shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the" Department-wide review. (*Id.* at 3–4). Pending completion of the Department-wide review, the January 20 Memorandum lists three DHS enforcement priorities:

1) **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise

AMERICAN OVERSIGHT

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). The January 20 Memorandum then qualifies its prioritization scheme by stating, "[w]hile resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." (*Id.* at 4).

In Section C, the January 20 Memorandum orders a temporary pause on removals of noncitizens, with some exceptions.[10] (*Id.* at 4–5). Specifically, the January 20 Memorandum directs "an immediate pause on removals of any noncitizen with a final order of removal ... for 100 days[.]" (*Id.* at 4). The January 20 Memorandum justifies this pause by pointing to DHS's "limited resources," which it claims "must be prioritized to ... provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently" and to "comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact." (*Id.*). Further, the January 20 Memorandum states, the pause is necessary for DHS to "ensure that [its] removal resources are directed to [its] highest enforcement priorities." (*Id.*).

This Court partially enjoined the January 20 Memorandum on January 26 with a temporary restraining order, *Texas v. United States*, ____ F. Supp. 3d ____, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021), and again on February 23 with a preliminary injunction, *Texas I*, ____ F. Supp. 3d ____, 2021 WL 2096669. Specifically, this Court enjoined Section C of the January 20 Memorandum, which paused removals of aliens with a final order of removal for 100 days. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52. In doing so, this Court explicitly left intact Section B of the January 20 Memorandum, which enumerates DHS's "enforcement priorities" going forward. (*Id.*). Section B is a subject of this litigation. (Dkt. No. 1-1 at 3–4).

D. THE FEBRUARY 18 MEMORANDUM

***8** On February 18, 2021, five days before the preliminary injunction was signed in *Texas I*, ICE Acting Director Tae D. Johnson issued the February 18 Memorandum to all ICE employees. (Dkt. No. 1-2). The February 18 Memorandum became "effective[ ] immediately" and controls to the extent it conflicts with the January 20 Memorandum. (*Id.* at 2). Designed to implement Section B of the January 20 Memorandum,[11] the February 18 Memorandum broadly delineates six "revisions":

1) authorization to apprehend presumed priority noncitizens in at-large enforcement actions without advance approval;

2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities;

3) authorization to apprehend without prior approval other presumed priority noncitizens who are encountered during enforcement operations;

4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended;

5) the further delegation of approval authority; and

6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

(*Id.* at 2–3).

Relevant to this case, the February 18 Memorandum lists three "criteria defining cases that are presumed to be priorities." (*Id.* at 5). The first priority category is national security.

> A noncitizen is *presumed* to be a national security enforcement and removal priority if: 1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-

AMERICAN OVERSIGHT

> related activities; 2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities; or 3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

(*Id.*) (emphasis in original). The second priority category is border security.

> A noncitizen is *presumed* to be a border security enforcement and removal priority if: 1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020; or 2) he or she was not physically present in the United States before November 1, 2020.

(*Id.*) (emphasis in original). And the final priority category is public safety.

> A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and: 1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA; or 2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

(*Id.* at 5–6) (emphasis in original).

In addition to the three enforcement priorities, the February 18 Memorandum explains, "[o]fficers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases"—*i.e.*, the three enforcement priorities—"beyond what existing policy requires and what a supervisor instructs." (*Id.* at 6). By contrast, preapproval is required for enforcement or removal actions that do not fall under the three enforcement priorities. (*Id.* at 7). But there are certain exceptions. The February 18 Memorandum, for example, posits that there are circumstances when "the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action." (*Id.*). But this is "generally ... limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*).

E. PROCEDURAL BACKGROUND

***9** The States filed this case on April 6, 2021. (Dkt. No. 1). In its six-count Complaint, the States allege the January 20 and February 18 Memoranda are unlawful because they violate:

1) the Administrative Procedure Act's ("APA") proscription of actions that are "not in accordance with law" and "in excess of ... authority" by transgressing a statutory duty of DHS to detain certain individuals pursuant to 8 U.S.C. § 1226(c) (Count I) and 8 U.S.C. 1231(a)(2) (Count II); [12]

2) the APA's proscription of actions that are "arbitrary [and] capricious" (Count III); [13]

3) the APA's requirement that agency rules be subject to notice and comment (Count IV); [14]

4) the Agreement between the States and DHS (Count V); [15] and

5) the Constitution's requirement that the President "take Care that the Laws be faithfully executed" (Count VI).

(Dkt. No. 1 at ¶¶ 94–131).

On April 27, 2021, the States filed a Motion for Preliminary Injunction moving to enjoin the implementation and enforcement of the January 20 and February 18 Memoranda. (Dkt. No. 18 at 43). The Government filed a Response in opposition, (Dkt. No. 42), to which the States filed a Reply. (Dkt. No. 51). Several amicus briefs have also been filed in support of and in opposition to the Motion. (Dkt. No. 25);

AMERICAN OVERSIGHT

(Dkt. No. 48); (Dkt. No. 49). The Motion is now ripe for review.

II. JURISDICTION AND JUDICIAL REVIEW

Before addressing the merits, this Court must consider the threshold issues of whether the States have standing to bring this action and whether the APA allows this Court to review the Memoranda challenged by the States. The States contend they have standing, and their claims are reviewable. (Dkt. No. 18 at 35–40). The Government disagrees. (Dkt. No. 48 at 22–36). Based on the following, the Court finds the States have standing and their claims are reviewable.

A. STANDING

Article III of the Constitution confines judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2. "For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, ____ U.S. ____, ____, 139 S.Ct. 2551, 2565, 204 L.Ed.2d 978 (2019). A plaintiff has standing to sue only where it satisfactorily shows it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 856, ____, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990)); *see also Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). In short, injury, traceability, and redressability comprise the "irreducible constitutional minimum" of standing. *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136).

***10** Under certain circumstances, states like Texas and Louisiana are not "normal litigants." *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). Where a state alleges a defendant violated a congressionally accorded procedural right which affected the state's "quasi-sovereign" interests, that state is afforded "special solicitude" in its quest to establish standing. *Id.* at 520–21, 127 S.Ct. at 1454–55; *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015) , *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*) (hereinafter "*Texas DAPA*"). Specifically, a state armed with special solicitude can more easily satisfy the traceability and redressability elements of the traditional standing inquiry. *Massachusetts*, 549 U.S. at 520–21, 127 S.Ct. at 1454–55; *Texas DAPA*, 809 F.3d at 151–55.

Here, the States assert they have standing under the traditional inquiry *and* because they are owed special solicitude. (Dkt. No. 18 at 35–37). The Government counters that the States fail all three prongs of the traditional inquiry, and they are not entitled to special solicitude because they do not assert a proper quasi-sovereign interest. (Dkt. No. 42 at 22–25 & n.5). Based on the following, the Court finds the States have satisfied the traditional inquiry and, regardless, are owed special solicitude which would satisfy any doubts.

1. Injury in Fact

The States' first task is to establish an injury in fact. A plaintiff satisfies that burden where it shows it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136). An alleged injury is sufficiently concrete if it is "*de facto*," meaning it "actually exist[s]" and is not merely "abstract." *Id.* (alteration added) (citations omitted). An alleged injury is sufficiently particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (alteration added) (quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. at 2136 n.1). And lastly, an alleged injury is sufficiently actual or imminent, respectively, if the plaintiff suffers "continuing, present adverse effects" or demonstrates he "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending." *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (emphases in original) (citations omitted).

The States assert the Memoranda will injure two basic interests: their financial interests and their interest as *parens patriae* in protecting their citizens from criminal aliens. (Dkt. No. 35–37). As it pertains to their financial interests, the States claim the Memoranda will require them to spend more on detention facilities and several public benefits and

AMERICAN OVERSIGHT

services. (*Id.* at 35–36). Regarding the States' interest as *parens patriae*, the States allege the Memoranda will result in an increase in crime from aliens within their borders, thus harming their citizenries' physical and economic well-being. (*Id.* at 37).

The Government does not seriously refute the Memoranda will result in "a drop" in immigration enforcement actions. (Dkt. No. 42 at 23). Nor could it. For example, Texas has put forth undisputed evidence 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. (Dkt. No. 19-3 at 5). That's 68 more rescinded detainers than during the same period the year prior. (*Id.* at 3, 8) (showing no detainers were dropped from January 20, 2020, to March 20, 2020). Of note, the list includes 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 the sexual assault of a child. (*Id.* at 6–7). And at least six had received a final order of removal. (*Id.* at 5). Importantly, current ICE officials "attribute" the Government's sharp decline in maintaining detainers "to the new 'enforcement priorities' established by the [M]emoranda during the Biden Administration."[16] (Dkt. No. 46 at ¶ 17).

***11** Rather than challenge the suffocating effect of the Memoranda on federal detentions of criminal aliens, the Government counters that any drop in detentions is of no real consequence to the States. It argues, even if the Memoranda cause detentions to decline, the States' theories of injury rely on a "speculative chain of events involving independent actions by third parties." (Dkt. No. 42 at 23). Specifically, the Government asserts the States would incur increased financial expenses and exposure to crime only if two conditions are satisfied: (1) the aliens who would have otherwise been detained commit crimes or choose to use public benefits and services; *and* (2) those aliens do so at a higher rate than the noncitizens who *are* removed as a result of the Memoranda. (*Id.* at 23–24).

The Government's concern over the causal chain of events involving third-party action is noteworthy but out-of-turn. These concerns pertain to the "fairly traceable" prong of the traditional standing inquiry. *See* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565–66 (finding "traceability ... satisfied" where the plaintiffs' theory "relies ... on the predictable effect of Government action on the decisions of third parties"); *Texas DAPA*, 809 F.3d at 156–60 (finding a plaintiff–state's financial injury was "fairly traceable" to the independent conduct of third-party aliens); *see also* *California v. Texas*, ____ U.S. ____, ____, 141 S.Ct. 2104, 2116–17 (2021) (finding "an individual's decision to enroll [in] Medicaid" was not "fairly traceable" to the Affordable Care Act's "minimum essential coverage provision" (alteration added)). Therefore, although the Government's third-party causation concerns will need to be addressed, the Court reserves its analysis on those issues for discussion of the traceability of the States' alleged injuries. For now, the Court inquires whether the States have presented a cognizable injury to their financial interests or interests as *parens patriae*. *See also* *Lujan*, 504 U.S. at 564 & n.2, 112 S.Ct. at 2138 & n.2 (explaining "imminence" is shown where a plaintiff "will soon expose *himself* to the injury" through "concrete plans" demonstrating his injury is "*certainly* impending" (emphases in original) (citations omitted)); *cf.* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565 (sidestepping the reliance of the plaintiff-states' "future" injuries upon independent decisions of third-party aliens to underreport in a census and holding the injuries were sufficiently "concrete and imminent" because the plaintiff–states demonstrated, "*if* noncitizen households are undercounted by as little as 2%[,] ... they will lose out on federal funds that are distributed on the basis of state population" (emphasis added)). They have.

a. Financial Injuries

Between the States, Texas marshals the lion's share of state-specific evidence concerning injury. *Compare* (Dkt. Nos. 19-5–19-9) *with* (Dkt. No. 19-12). The Court therefore focuses its attention on Texas's evidence. *See* *Texas DAPA*, 809 F.3d at 155 (same). Texas's alleged financial injury affects three categories of its public fisc: Texas's detention system, public education services, and healthcare-related costs. (Dkt. No. 18 at 35–36). Texas asserts that in these three categories it will incur unanticipated costs due to the "rushed implementation" of the Memoranda which "deprived [it] of the ability to adjust[ ] [its] policies in light of the federal shift." (*Id.* at 41).

To begin, Texas has alleged injury to a legally protected interest. *See* *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. Texas complains it will incur additional costs to its public

AMERICAN OVERSIGHT

fisc because of an unlawful and sudden shift in federal immigration policy. (Dkt. No. 18 at 35). Theories of injury to state or local financial interests predicated on the actions of the federal government are not novel. *See, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430–31, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393 (1998) (finding sufficient for standing purposes a local government's claim to suffering injury to its "borrowing power, financial strength, and fiscal planning"); *Texas DAPA*, 809 F.3d at 152–53 (finding sufficient for standing purposes several states' claims to suffering injury to their public fiscs); *see also* *Sch. Dist. of City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261–62 (6th Cir. 2009). And such financial harm is particularly acute in the context of federal immigration enforcement, where states have "an interest in mitigating the potentially harsh economic effects of *sudden shifts* in population." *Plyler v. Doe*, 457 U.S. 202, 228, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786 (1982) (emphasis added); *see id.* at n.23 (explaining, because the Constitution deprives states of any "direct interest in controlling entry into this country, ... unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service"); *Texas DAPA*, 809 F.3d at 152–54; *see also* *Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012) (acknowledging states "bear[ ] many of the consequences of unlawful immigration"); *DHS v. Regents of the U. of Cal.*, ____ U.S. ____, ____, 140 S.Ct. 1891, 1913, 207 L.Ed.2d 353 (2020) (finding a sudden shift in the government's immigration policy was arbitrary and capricious in part because the government "failed to address whether there was legitimate reliance" on the former immigration policy (quotation omitted)). In sum, the financial injuries incurred by states from "sudden shifts" in their population due to federal immigration policies are not nebulous. *Plyler*, 457 U.S. at 228, 102 S.Ct. at 2400. Rather, they are among the "serious and well recognized" vintage of legally protected interests. *Massachusetts*, 549 U.S. at 521, 127 S.Ct. at 1455. By requesting equitable relief from the impact of the Memoranda on its public fisc, then, Texas appropriately seeks judicial shelter.

***12** The remaining inquiries as to Texas's alleged financial injury concerns whether it is sufficiently concrete, particularized, and actual or imminent. *Spokeo*, 578 U.S. at ____, 136 S.Ct. at 1548. The Government does not contest that Texas's alleged injury is particularized to Texas, and the Court finds that it is. Texas can therefore establish an injury in fact for its financial injury if it is both concrete and actual or imminent.

Texas asserts a financial injury in the form of added costs to its detention system. Texas states the Memoranda will lead to an unanticipated rise in criminal activity from aliens the federal government would otherwise detain. (Dkt. No. 18 at 15–16, 35–36). On average, Texas spends $62.34 per day per inmate in its detention facilities. (Dkt. No. 19-6 at 3–4). In 2018, Texas detained 8,951 criminal aliens for a total of 2,439,110 days, costing $152,054,117.[17] (*Id.*). If even one alien not detained due to the Memoranda recidivates, Texas's costs "will increase" in accordance with its current cost per inmate. (*Id.* at 4); *cf.* *Dep't. of Com.*, ____ U.S. at ____, 139 S.Ct. at 2565.

The Court finds Texas's claimed injury from unanticipated detention costs is sufficiently concrete and imminent. The harm is concrete because Texas incurs real financial costs in detaining criminal aliens. And the harm is imminent because Texas currently operates a detention system holding criminal aliens and plans to continue doing so in the future.[18]

b. *Parens Patriae* Injury

In addition to its financial injury, the States assert they have been injured in their interests as *parens patriae*. (Dkt. No. 18 at 37). The Government counters that the States are precluded from bringing a *parens patriae* action against the federal government. (Dkt. No. 42 at 24 & n.5). Based on the following, the Court concludes the States properly lay claim to a *parens patriae* injury.

"*Parens patriae* means literally 'parent of the country.' " *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (quoting Black's Law Dictionary 1003 (5th ed. 1979)). The concept derives from the English constitutional system. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972). As that system developed, the Crown retained certain "duties and powers" referred to as the "royal prerogative." *Id.* (citation omitted). For example, as the "father of the country," the King served as the guardian of persons with legal disabilities.

AMERICAN OVERSIGHT
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Id. (internal quotations omitted). When the United States achieved independence, "the prerogatives of the crown devolved upon the people of the States." *Wheeler v. Smith*, 50 U.S. (9 How.) 55, 78, 13 L.Ed. 44 (1850). That is, "[t]he State, as a sovereign," became "the *parens patriae*." *Id.* Like the King before them, the states were now responsible for acting "in the interests of humanity" and "for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 808, 34 L.Ed. 478 (1890).

***13** Once vested in the states, the scope of a *parens patriae* action under American law "greatly expanded." *Hawaii*, 405 U.S. at 257, 92 S.Ct. at 889. The first such expansion is noteworthy. Coincidentally, in a previous dispute between the States in this case, Louisiana sought through a *parens patriae* action to enjoin Texas from continuing a trade embargo that was allegedly injuring Louisiana's economy. *Louisiana v. Texas*, 176 U.S. 1, 3–4, 11–12, 20 S.Ct. 251, 251–52, 254, 44 L.Ed. 347 (1900). Texas's lead health official had cinched the spigot on all commerce flowing between the city of New Orleans and the State of Texas "under the guise of a quarantine against yellow fever." *Id.* at 11, 20 S.Ct. at 254. A standing issue arose because Louisiana had simultaneously invoked the Supreme Court's original jurisdiction, which required a "controversy arising directly between" the states as sovereigns, *and* asserted an interest as *parens patriae*, which had traditionally been a tool for a state to vindicate "the grievances of particular individuals" within its borders. *Id.* at 16, 20 S.Ct. at 256. To reconcile this seeming conflict, the Court determined Louisiana had properly stated an interest as *parens patriae* in protecting "her citizens at large" from economic harm due to Texas's quarantine regulations. *Id.* at 19, 20 S.Ct. at 257. This interest, reasoned the Court, stemmed in part from the fact that Louisiana, as a state, held no right under the Constitution to regulate "the freedom of interstate commerce." *Id.* Although the Supreme Court ultimately held Louisiana lacked standing for other reasons, *id.* at 22–23, 20 S.Ct. at 258–59, the case is considered the first to expand the notion of *parens patriae* to a state's interest in protecting its citizens' interests broadly. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266.

Perhaps unsurprisingly, the concept of a *parens patriae* action to vindicate the rights of a state's citizens-at-large proved popular. *See id.* at 603, 102 S.Ct. at 3266–67 (listing cases brought by various states during the early 20th century). And not long after *Louisiana v. Texas*, Justice Holmes referred to a state's interests in such broader matters as "quasi-sovereign" interests. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907). The term stuck. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365, 374, 44 S.Ct. 138, 139, 68 L.Ed. 342 (1923); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447, 450, 65 S.Ct. 716, 721, 722, 89 L.Ed. 1051 (1945). And before long, the doctrine evolved to the point that the Supreme Court determined quasi-sovereign interests to be not simply a branch of traditional *parens patriae* actions, but the *sine qua non* of *parens patriae* actions. *See Snapp*, 458 U.S. at 602, 102 S.Ct. at 3266. ("[T]o have [*parens patriae*] standing, the State *must* express a quasi-sovereign interest[.]" (alteration and emphasis added)).

But lending this workable term to the abstract concept of a state's interest in its citizenry did not resolve all questions regarding *parens patriae* standing. Namely, the referent "quasi-sovereign interest," without more, proved useless in settling whether a state's injury is sufficiently "concrete" for purposes of Article III standing. *Id.* After all, a quasi-sovereign interest itself is nothing more than a "judicial construct" that does "not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. at 3265. On its surface, the term clearly was crafted to help distinguish from a state's "sovereign interests, proprietary interests, or private interests." *Id.* at 602, 102 S.Ct. at 3266. And an inch deeper, the term represented "a set of interests that the State has in the well-being of its populace." *Id.* But those broad contours alone, absent further granularity, "risk[ed] being too vague to survive the standing requirements" of the Constitution. *Id.*

Recognizing this concreteness issue, the Supreme Court in *Alfred L. Snapp & Son* took it upon itself to hammer out, as best it could, the notion of a quasi-sovereign interest. 458 U.S. 592, 102 S.Ct. 3260. While at once conceding that "the articulation of such interests is a matter for case-by-case development," the Supreme Court nevertheless provided "two general categories" into which characteristics of a true quasi-sovereign interest may fall.

AMERICAN OVERSIGHT

"First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. at 3269. Regarding the first category, the Supreme Court further elaborated, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the state standing to sue as *parens patriae* is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* And regarding the latter, the Supreme Court explained, "federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents." *Id.*

***14** Building on this rubric, the Fifth Circuit has concluded that a state's claim to a "quasi-sovereign" interest for standing purposes is sufficient when the state seeks to "protect[ ] its citizens from criminal activity." *Castillo v. Cameron County*, 238 F.3d 339, 351 (5th Cir. 2001) (citing *Snapp*, 458 U.S. at 602, 102 S.Ct. at 3260). In *Castillo*, Texas sought to overturn a federal district court's injunction which permitted a local County Sheriff to refuse to incarcerate alleged parole violators to reduce the county's jail population. 238 F.3d at 343–47. To prove standing in that circumstance, Texas was required to show, among other things, it had a "personal stake" in the outcome. *Id.* at 350–51. The panel held that Texas satisfied this showing in part by alleging a valid quasi-sovereign interest in protecting its citizens from criminal activity. *Id.* at 351. As a result of the injunction, the panel explained, "parole violators who should be incarcerated remain[ed] free, potentially increasing the level of criminal activity." *Id.* Although fully aware that "the concept of quasi-sovereign standing 'risks being too vague to survive the standing requirements of Article III,' " the panel found that Texas's interest in protecting its citizens from increased criminal activity "[fell] within the category of 'a quasi-sovereign interest in the health and well–being—both physical and economic—of its residents in general.' " *Id.* (quoting *Snapp*, 458 U.S. at 602, 102 S.Ct. 3260).

Bearing these principles in mind, the Court now turns to the States' basis for *parens patriae* standing in this case. The States assert a quasi-sovereign interest in protecting their citizens' physical and economic well-being "from crime caused by [the Government's] failure to detain criminal aliens." (Dkt. No. 18 at 37). As it pertains to "criminal activity" in general, *Castillo* resolves that the States here possess a quasi-sovereign interest in protecting their citizens. 238 F.3d at 351.

As it pertains to the criminal activity of "aliens" specifically, the States' interests are perhaps stronger than the circumstances presented in *Castillo*. Whereas in *Castillo* the State of Texas sought to protect its citizens from criminal activity in an area of law over which the State retained extensive authority—the procedure for detaining alleged parole violators—here the States retain *no* authority over the detention of criminal aliens upon their release from state prison and during the pendency of their removal proceedings. That is, the injury to the States' quasi-sovereign interest in protecting their citizens from criminal aliens is especially severe here because the States' hands are tied, in effect, when it comes to federal immigration policy. *See* U.S. Const. art. I, § 8, cl. 4 (conferring upon Congress the Power "[t]o establish an uniform Rule of Naturalization"); *Arizona*, 567 U.S. at 394–95, 132 S.Ct. at 2498 (holding that a state law "authorizing state officers to decide whether an alien should be detained for being removable ... violates the principle that the removal process is entrusted to the discretion of the Federal Government" (citations omitted)).

By seeking relief for an injury to their populace from which they have no constitutional mode of recourse, the States align themselves with the rationale employed by the Supreme Court to support the first expansion of *parens patriae* standing in *Louisiana v. Texas*. Just as Louisiana once sought "vindication of the freedom of interstate commerce" that was "not committed" to it by the Constitution, here the States seek protection from an effect of a federal immigration policy that the States possess no constitutional authority to change.[19] *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also* *Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269. Accordingly, the Court holds that the States possess a quasi-sovereign interest in protecting their citizens-at-large from the criminal activity of aliens subject to mandatory detention under federal law.

***15** The Government contends that the States nevertheless are barred from bringing a *parens patriae* action "against the federal government." (Dkt. No. 42 at 24). For this proposition the Government relies exclusively upon *Massachusetts v. Mellon*, where the Supreme Court denied *parens patriae* standing to a state suing the federal government to protect

AMERICAN OVERSIGHT

its citizens from the "operation of" a federal statute called the Maternity Act. 262 U.S. 447, 479, 485–86, 43 S.Ct. 597, 598, 600, 67 L.Ed. 1078 (1923). A critical feature of the Supreme Court's rationale was that the state had not identified any "rights of the state falling within the scope of the judicial power," such as "quasi sovereign rights." *Id.* at 485, 43 S.Ct. at 600. These twin aspects of *Mellon*—the challenge to the "operation of federal statutes" and the state's lack of an identifiable "right"—were later acknowledged by the Supreme Court as the defining characteristics of its bar on *parens patriae* actions *vis-à-vis* the federal government. *See* *Massachusetts*, 549 U.S. at 520 n.17, 127 S.Ct. at 1455 n.17; *Georgia*, 324 U.S. at 447, 65 S.Ct. at 721 (holding that Georgia could bring a *parens patriae* action to protect a quasi-sovereign interest because, unlike *Mellon*, it did not seek "to protect her citizens from the *operation of* federal statutes" and it possessed "rights ... based on federal [anti-trust] laws" (emphasis added)). And a long train of federal courts have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a *parens patriae* action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right. *See, e.g., Texas v. United States*, 328 F. Supp. 3d 662, 696–98 (S.D. Tex. 2018); *See* *Texas v. United States*, 86 F. Supp. 3d 591, 625–28 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*); *New York v. Sebelius*, No. 1:07-cv-1003, 2009 WL 1834599, at *12–13 (N.D.N.Y. June 22, 2009); *Puerto Rico Pub. Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *City of New York v. Heckler*, 578 F. Supp. 1109, 1122–25 (E.D.N.Y. 1984); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984).

The *parens patriae* injury set forth by the States safely navigates this well-trodden distinction from the *Mellon* rule. The States do not challenge the operation of any federal statute. Rather, they primarily challenge the Executive Branch's putative refusal to enforce certain immigration statutes which, they claim, should benefit their citizenries. (Dkt. No. 1 at 21–24). The States allege that the Executive Branch's policy of non-enforcement infringes upon rights they derive from the APA. (*Id.* at 21–27). Specifically, the States claim that the federal government's policy creating a categorical refusal to enforce certain immigration statutes is an unlawfully withheld agency action, contrary to law, arbitrary and capricious, procedurally defunct, and constitutionally injurious. By asserting these federal statutory rights, the States have not presented this Court with "abstract questions of political power." *Cf.* *Mellon*, 262 U.S. at 485, 43 S.Ct. at 600. Rather, the States have demonstrated concrete injuries to their quasi-sovereign interests as *parens patriae*. *See* *Castillo*, 238 F.3d at 351; *see also* *Snapp*, 458 U.S. at 608, 102 S.Ct. at 3269; *Louisiana*, 176 U.S. at 19, 20 S.Ct. at 257; *see also Texas*, 328 F. Supp. 3d at 697–98 (finding the state had "demonstrated a concrete injury to its quasi-sovereign interest in the economic well-being of its citizens" in a *parens patriae* action against the federal government (quotation omitted)). The Court therefore concludes that the States have demonstrated a cognizable *parens patriae* injury.

2. Traceability

The States must next establish a "fairly traceable link" between their injuries and the Government's allegedly unlawful action. They can establish this link with "no more than *de facto* causality." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). That is to say, a federal plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S.Ct. 1154, 1164, 137 L.Ed.2d 281 (1997); *see also* *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734–35, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008).

***16** Both States' injuries depend on the future behavior of criminal aliens whom the Government would otherwise detain. Regarding Texas's detention costs injury, the States argue the Memoranda will cause a significant number of criminal aliens who otherwise would have been detained by the federal government to be detained again or longer in Texas. (Dkt. No. 18 at 16, 18, 35–37). Regarding the States' *parens patriae* injury, the States urge that the Memoranda will lead to a significant number of criminal aliens who would otherwise have been detained by the federal

AMERICAN OVERSIGHT

government causing harm—both physical and economic—to their respective citizenries. (*Id.* at 37). Thus, at their core, both States' injuries depend upon criminal aliens behaving unlawfully in the future.

The Government contends that whether the aliens who would have otherwise been taken into custody will commit crimes is speculative. (Dkt. No. 42 at 23). The Government further contends that, even if the States can make this showing, they must also prove that those aliens would commit crimes at a higher rate than the aliens who *are* removed because of the Memoranda. (*Id.*).

Regarding the Government's first concern, the Supreme Court has traditionally denied standing wherever the traceable link between the government's action and the plaintiff's injury depends in part on the future behavior of third parties. *See* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S.Ct. 1138, 1150, 185 L.Ed.2d 264 (2013) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). This tradition is especially firm where, as here with the States' asserted injuries, it is alleged that the third parties' future behavior will be unlawful. *See* *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666–67, 75 L.Ed.2d 675 (1983).

That said, the Supreme Court embraces standing theories dependent on third parties' future behavior under certain circumstances. In *Department of Commerce*, for instance, the Supreme Court traced a governmental action to aliens' future unlawful behavior where evidence established a likelihood that aliens have "historically" behaved in a certain manner. ____ U.S. at ____, 139 S.Ct. at 2566. This type of evidence, the Supreme Court concluded, demonstrated that traceability was not "mere speculation," but rather, the product of a "predictable effect of Government action on the decisions of third parties." *Id.* (citations omitted). Similarly, in *Davis v. Federal Election Commission*, the Supreme Court traced a governmental action to the future behavior of the plaintiff's political opponent where evidence showed that "most candidates" had behaved in a certain manner and there was "no indication" the opponent would do otherwise. 554 U.S. at 734–35, 128 S.Ct. at 2769; *see also* *Texas DAPA*, 809 F.3d at 156 (finding a traceable link between DAPA and aliens' likelihood of obtaining driver's licenses where driving was a "practical necessity" for residents of the state). From these cases, it becomes apparent that an injury may be traced through third-party behavior to governmental action where the plaintiff demonstrates individuals similarly situated to the third party have a propensity to engage in the relevant behavior.

Considering this principle, the link between the States' alleged harm and the Memoranda is virtually unassailable. As mentioned, the undisputed evidence demonstrates that the Memoranda are *already* causing a dramatic increase in the volume of criminal aliens released into the public. The States further present evidence suggesting that criminal aliens, as a group, have a strong propensity to recidivate. (Dkt. No. 18 at 15–16). Indeed, the States submit evidence from a Texas Sheriff's Office showing that a group of 209 recently held criminal alien inmates with detainers had a recidivism rate of 73.68%. (Dkt. No. 19-5 at 3). The States also submit a 2018 study from the United States Department of Justice's Bureau of Justice Statistics showing that state offenders generally recidivate at 44% within the first year following release, 68% within the first three, 79% within the first six, and 83% within the first nine. (Dkt. No. 19-20 at 1). And these weren't one-time recidivists. The same study shows, during the nine-year period following release, there were on average five arrests per released *prisoner.* (*Id.*).

***17** This foregoing evidence confirms what the Supreme Court and Congress have long acknowledged: "deportable criminal aliens who remain[ ] in the United States often commit[ ] more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)); *see also* *Zadvydas*, 533 U.S. at 713–14, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (warning of the "risk to the community posed by the mandatory release" of criminal aliens when accounting for "statistical studies showing high recidivism rates for released aliens").

These facts and precedents should come as no surprise to the Government. Congress and the Executive have long provided financial aid to states to ameliorate the strain criminal aliens place on state detention facilities. Through the State Criminal Alien Assistance Program ("SCAAP"), the federal government partially reimburses states for costs associated with detaining criminal aliens.[20] (Dkt. No. 19-2 at 2–4). For example, in 2018 the federal government through SCAAP

AMERICAN OVERSIGHT

reimbursed Texas $14,657,739 of the total $152,054,117 Texas spent on detaining criminal aliens. (*Id.* at 4). Although amounting to less than 10% of Texas's actual costs in 2018, SCAAP payments demonstrate 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.

In sum, the States present evidence of criminal alien and state felon recidivism through a Texas Sheriff and the DOJ's own dataset, Supreme Court precedent citing the congressional record making similar findings as to criminal aliens, and the existence of the SCAAP program. Considering this substantial evidence, the Court is not persuaded that the link between the States' injuries and criminal aliens being released is "speculative" as the Government suggests. The Court finds that criminal aliens "historically" recidivate. *See* *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2566.

Next, the Government asserts that the risk of criminal aliens committing further crimes is insufficient for the States to trace their injuries to the Memoranda. (Dkt. No. 42 at 23). Rather, the Government hypothesizes that "it is possible" the Memoranda's reprioritization "will result in a net reduction in crimes." (*Id.*). This argument fails in three respects.

First, evidence already in the record demonstrates that the Government is not just refusing to detain its newly deprioritized categories of criminal aliens, but even the "prioritized" variety. For instance, in Texas alone, some of the 68 individuals whose detainers were dropped were serving time for an "aggravated felony," a supposedly prioritized category. *Compare* (Dkt. No. 19-3 at 6–7) *with* 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" under the INA).

Second, the Government provides no support for its contention that its enforcement of the prioritized categories of criminal aliens will exceed any decline in enforcement of the deprioritized categories. The Government's subjective belief cannot overcome the States' evidence demonstrating to the contrary.

Finally, even if the Government *could* demonstrate that increased enforcement in the prioritized categories might displace a drop in the total number of detained aliens resulting from the deprioritized categories, this "offset" would be irrelevant as a matter of law. The "standing analysis is not an accounting exercise." *Texas DAPA*, 809 F.3d at 156 (internal quotation omitted). Absent a "tight[ ] nexus" between the alleged "benefits" and the "costs" of the Memoranda, there can be no "offset." *Id.* Here, other than what it noted in the Memoranda, the Government makes no showing that the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories. And the evidence put forward by the States regarding a drop in enforcement actions—even for prioritized aliens—makes that "possibility" unlikely. Accordingly, there is no connection between the results of enforcement of prioritized categories and the results of enforcement of deprioritized categories.

***18** The Court further notes that the number of aliens who would otherwise be detained in the entire United States is relevant to estimating the impact of the Memoranda on the States in this case. The Fifth Circuit made clear in *Texas DAPA* that injury to a state can flow from the fact that aliens are "free to move among states." 809 F.3d at 188. Indeed, the States proffer evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Given the Fifth Circuit's acknowledgement of this interstate migration principle and the data provided by the States, the prospect that criminal illegal aliens falling within the deprioritized categories of the Memoranda who are not detained elsewhere in the Nation could move to the States' territories—thereby amplifying their injuries—is not mere "conjecture," as the Government posits. *See* (Dkt. No. 42 at 61).

Considering the foregoing, the Court holds that the States have established a traceable link between their injuries and the challenged Memoranda. The Memoranda are already leading to an increased volume of criminal aliens released into Texas who otherwise should have been detained by the federal government. Criminal aliens and state offenders have a demonstrable propensity to recidivate. The Memoranda will therefore cause a traceable injury to the States' financial and *parens patriae* interests.

3. Redressability

The States must next demonstrate that their requested relief would remedy their harm. The "redressability" element of the standing to sue doctrine requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332,

AMERICAN OVERSIGHT

341 (5th Cir. 2020) (cleaned up). The States' request for relief does that.

The States request two forms of injunctive relief. First, they ask this Court to *restrain* the Government from "enforcing and implementing the policies described" in Section B of the January 20 Memorandum and the February 18 Memorandum. (Dkt. No. 18-1 at 2). This Court will refer to this requested relief as the "negative injunction." Second, the States ask this Court to *order* the Government to comply with "the mandatory duty" to "take into custody" and "detain" aliens covered by 8 U.S.C. §§ 1226(c)(1) and 1231(a)(2), respectively, and to "refrain from releasing" aliens covered by Section 1226(c)(1) except as permitted by Section 1226(c)(2). (*Id.*). The Court will refer to this requested relief as the "positive injunction." The positive injunction relates directly to the States' Count I claim that the Government is "unlawfully withholding and unreasonably delaying agency action" pursuant to 5 U.S.C. § 706(1). (Dkt. No. 1 at 23). The States further seek to implement both the negative and positive injunctions nationwide. (Dkt. No. 18-1 at 2).

Assuming, as the Court must for purposes of standing, that the States are "correct on the merits of [their] claims," either form of requested relief is substantially likely to remedy the States' alleged injuries. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Regarding the requested positive injunction, it is perhaps self-evident that an order compelling the federal government to take criminal aliens into custody and detain them pursuant to the relevant statutes would relieve the States from harm they anticipate from the criminal behavior of criminal aliens. Requiring an agency action, the withholding of which is causing injury, will logically alleviate that injury. Notably, the Government offers no clear argument to the contrary regarding the benefit of a positive injunction. (Dkt. No. 42 at 25).

But even if the Court were to grant only the requested negative injunction, then, too, the States are substantially likely to obtain reprieve. Namely, the federal government would be *required* to act in conformance with the standards set by Congress in Sections 1226(c) and 1231(a)(2) as interpreted by this Court. The Government does not quibble with the notion that, under Congress's standards, the States' injuries would be redressed. Rather, the Government argues that, if the Memoranda are enjoined, the States are unable to show that "the resulting *prioritization scheme*" will "result in a decrease in crime levels" within the States' boundaries. (Dkt. No. 42 at 25) (emphasis added). The Government's argument misses the mark for two reasons.

***19** First, this argument suggests the Memoranda were issued in a vacuum in which no prior policy concerning the detention of criminal aliens ever existed. Of course, such a suggestion is demonstrably false: the Government's own affidavits demonstrate that the United States has "had policies guiding such exercise since as early as 1909." (Dkt. No. 42-6 at 6); (Dkt. No. 42-5 at 8).

Second, the Court's concern over redressability in an APA case such as this cuts not to the executive-level policy which would be applied in the absence of the faulty one, but rather, whether *Congress*'s express standards—both for the immigration laws challenged and the procedural standards allegedly discarded—if followed, would provide the States recourse. *See* *Texas DAPA*, 809 F.3d at 161. By nullifying the constraints flowing from the Memoranda's "prioritization," this Court would require that agency to return to or pursue a specific standard for exercising its discretion within the bounds set by Congress. The States have supplied evidence demonstrating that in times past, such an exercise of discretion led to significantly fewer criminal aliens who are not in custody and roaming their streets. (Dkt. No. 19-3 at 5). The Government's inability to refute this evidence is telling. It suggests that conformance with the strictures set by Congress in Sections 1226(c) or 1231(a)(2) as practiced prior to the issuance of the Memoranda would result in a reduction of the volume of criminal aliens moving freely within the interior of the States.

Accordingly, the Court finds that, regardless of which form it takes, the injunctions sought by the States would redress their injuries flowing from the Memoranda. The States have standing under the traditional inquiry.

4. Special Solicitude

Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. The Supreme Court in *Massachusetts v. EPA* determined that states are owed special solicitude wherever they assert a congressionally bestowed procedural right and the governmental action at issue affects the state's quasi-

AMERICAN OVERSIGHT

sovereign interests. 549 U.S. at 519–20, 127 S.Ct. at 1454–55. The Fifth Circuit has acknowledged that the holding in *Massachusetts* applies to procedural claims under the APA. *Texas DAPA*, 809 F.3d at 152–55. Specifically, the Fifth Circuit in *Texas DAPA* granted the state special solicitude where it sought judicial review of an immigration policy memorandum which imposed "direct, substantial pressure" on a state's "lawmaking authority"—that is, pressure to change its laws subsidizing driver's licenses for aliens. *Id.*

The States are likewise owed special solicitude here. The States seek judicial review of immigration policy memoranda which they allege constitute final agency action, and they assert that the resulting policies cause injury to Texas's public fisc because its budget for detention facilities "has been set months or years in advance." (Dkt. No. 18 at 41). Additionally, and as discussed above, the States have shown they possess a quasi-sovereign interest in protecting their citizenries from the unlawful activity of criminal aliens. The Government's sole argument in opposition is that special solicitude still requires an injury in fact. (Dkt. No. 42 at 24–25 n.7). But this argument falls short because, as detailed in this Memorandum Opinion and Order, *see supra* II.A.1., the States have demonstrated an injury in fact. Accordingly, the States have satisfied their burden to demonstrate they are entitled to special solicitude in the standing inquiry.

***20** In *Massachusetts*, a state armed with special solicitude was permitted to establish causation between the EPA's decision not to regulate certain greenhouse gas emissions and the state's interest in protecting its physical territory. 549 U.S. at 523–24, 127 S.Ct. at 1456–57. As detailed above, the links between the States' injuries and the Memoranda here are not perceptibly frailer than in *Massachusetts* and likely are firmer. *See also* *Lujan*, 504 U.S. at 572 n.7, 112 S.Ct. at 2142 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). The States have standing under the special solicitude inquiry. Accordingly, the Court finds it has jurisdiction to consider the States' claims. [21]

B. JUDICIAL REVIEW

The Court must next determine whether the States' claims are reviewable before turning to the merits of the Motion. *Lexmark*, 572 U.S. at 128, 134 S.Ct. at 1387–88. In so doing, the Court narrows the focus to the States' APA claims. The APA imposes four general requirements that must be satisfied before a federal court can review agency action. *See* *Bennett*, 520 U.S. 154, 117 S.Ct. 1154. To start, no statute may bar judicial review. *Id.* at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(1). Next, the new guidance outlined in the February 18 Memorandum must constitute a "final agency action." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 704. Third, the new guidance must not be "committed to agency discretion by law." *Bennett*, 520 U.S. at 175, 117 S.Ct. at 1167; 5 U.S.C. § 701(a)(2). Finally, the States must show that their injuries are within the "zone of interests" to be protected by the statutes allegedly violated by the Government. *Bennett*, 520 U.S. at 163, 117 S.Ct. at 1161; 5 U.S.C. § 702. The Court finds that the States have met each of these requirements.

1. Statutory Bars to Judicial Review

Under the APA, an action may not proceed when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). With respect to immigration, Congress enacted "many provisions ... aimed at protecting the Executive's discretion from the courts[.]" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S.Ct. 936, 945, 142 L.Ed.2d 940 (1999). Banking on this, the Government contends that Sections 1252, 1231(h), and 1226(e) protect the Executive Branch's discretion from the States' claims before this Court. (Dkt. No. 42 at 30–35). The Court will address each in turn.

First, the Government makes the same arguments it articulated in *Texas I* that 8 U.S.C. § 1252(a)(5) and (b)(9) bar judicial review of the States' APA claims. (*Id.* at 30–31); *see also* (6:21-cv-3, Dkt. No. 83 at 27). [22] The States disagree arguing that the provisions are irrelevant to this case because they apply "only with respect to review of an order of removal under subsection (a)(1)." (Dkt. No. 51 at 27–28) (quotations omitted). As in *Texas I*, the Court agrees with the States and incorporates by reference its decision on the issue in that case. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42; *see also* *Nielsen*

AMERICAN OVERSIGHT

v. Preap, ____ U.S. ____, ____, 139 S.Ct. 954, 962, 203 L.Ed.2d 333 (2019) (holding that Section 1252(b)(9) does not preclude judicial review of respondents' challenge to the Government's detention authority under Section 1226 because respondents "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal as opposed to the decision to deny them bond hearings; and they are not even challenging any part of the process by which their removability will be determined" (quotations omitted)); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("[W]hile [Sections 1252(a)(5) and 1252(b)(9)] limit *how immigrants* can challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel *judicial review over final orders of removal to the courts of appeals*."(emphases added)).

***21** Next, the Government, again repeating its stance in *Texas I*, argues that any of the States' claims brought under Section 1231 are precluded from judicial review by Subsection (h). (Dkt. No. 42 at 34); *see also* (6:21-cv-3, Dkt. No. 83 at 30–32). Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). In this case, the Government rehashes its prior argument in *Texas I* that the meaning of "party" in Section 1231(h) includes the States. This time around, it argues that because Black's Law Dictionary defines the word "party" as "one by or against whom a lawsuit is brought," the Court was in error when it concluded that "party" in that section narrowly means "alien in a removal proceeding." (*Id.* at 34–35); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. For their part, the States unsurprisingly agree that the Court got it right the first time around and succinctly agrees with the Court's disposition. (Dkt. No. 51 at 28–29). The Court agrees with the States.

Although the Government is correct in arguing that "party" may have a broad dictionary definition, statutory construction is more complex. On the surface, the plain meaning of "party" in Section 1231(h)—even when accounting for the dictionary definition—could refer to (1) any party *to the removal proceedings* or (2) *any* party to *any* proceeding. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24. This potential for multiple meanings of "party" in Section 1231(h) does not necessarily render the text ambiguous; if "all but one of the meanings" of the word *party* in Section 1231(h) can be "ordinarily eliminated by context," that remaining meaning is correct.[23] *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 1996–97, 124 L.Ed.2d 44 (1993) (superseded by statute on other grounds). The well-established process for interpreting a text with *potential* ambiguity focuses on "text, context, structure, and history." *See Texas v. EPA*, 983 F.3d 826, 836 (5th Cir. 2020). "Statutory language has meaning only in context." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *24 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415, 125 S.Ct. 2444, 2449, 162 L.Ed.2d 390 (2005)). While a dictionary can illuminate the "core meanings of a term," "the meanings of common words (which typically have multiple definitions) must be determined in the context in which they appear." *Texas*, 983 F.3d at 837 n.2 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 418–19 (2012)). In short, the Court in *Texas I* conducted an in-depth analysis of the term "party," the statute, and the history of the statutory scheme and, having done so, the Court determined that "party" in Section 1231(h) means "alien in a removal proceeding." *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–28. The Government has offered nothing to convince the Court that its analysis and conclusion in *Texas I* were in error. Thus, the Court adopts its prior reasoning and conclusion in *Texas I* with respect to Section 1231(h).

Lastly, the Government contends that Section 1226(e) bars the States' claims as they relate to Section 1226(c). (Dkt. No. 42 at 32–33). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding

AMERICAN OVERSIGHT

> the detention or release of any alien or the grant, revocation, or denial of bond or parole.

***22** 8 U.S.C. § 1226(e). The Government insists that determinations under Section 1226(c) are discretionary because the federal government "may detain a noncitizen under § 1226—under either subsection (a) or subsection (c)—only 'pending a decision' on removal." (Dkt. No. 42 at 32). According to the Government, "[d]etention authority is thus contingent on the Secretary's separate, predicate, and discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear." (*Id.*) (citations omitted).

Voicing their disagreement, the States allege that Subsection (e) is irrelevant to the action since it applies only to discretionary decisions to detain *individual* aliens and not to lawsuits on the Government's detention authority. (Dkt. No. 18 at 39); (Dkt. No. 51 at 28). And because Section 1226(c) imposes a mandatory duty to detain, as the States argue, it follows that Section 1226(e) does not apply to Subsection (c). (*Id.*); *see infra* II.B.3.a. The Court agrees with the States.

The Supreme Court has clearly stated that Subsection (e)'s limitation "applies only to 'discretionary' decisions about the 'application' of § 1226 to *particular cases*." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added). Section 1226(e), therefore, "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*, ____ U.S. ____, ____, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (quoting *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714)). Indeed, "Section 1226(e) ... deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions." *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). So, for instance, Subsection (e) poses no hurdle for a respondent who challenges the statutory framework that permits his detention without bail under Section 1226. *See* *Demore*, 538 U.S. at 517, 123 S.Ct. at 1714. Section 1226(e) does not preclude challenges to the Government's alleged authority to detain certain aliens without a bond hearing under Sections 1225(b), 1226(a), and 1226(c). *Jennings*, ____ U.S. at ____, 138 S.Ct. at 839, 841. It also does not bar habeas corpus petitions. *See* *Parra*, 172 F.3d at 957. Further, Subsection (e) does not prevent plaintiffs from questioning whether the Government has the power under Section 1226(c) to detain certain aliens despite failing to detain the aliens *immediately after* they were released as required by Section 1226(c). *Preap*, ____ U.S. at ____, 139 S.Ct. at 961–62; *see also infra* II.B.4. Thus, Section 1226(e) does not prohibit parties from "disput[ing] the *extent of the statutory authority* that the Government claims." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962 (emphasis added).

Here, the States' claims against the Government clearly "dispute the extent of the statutory authority that the Government claims." *See id.* In their Complaint, the States allege the Government does not have any discretion under Section 1226(c) to determine whether certain aliens must be detained when released from custody. *See* (Dkt. No. 1 at ¶¶ 35, 37–38, 94–101); *see also* (Dkt. No. 18 at 39). In effect, "the general extent of the Government's authority under § 1226(c) is precisely the issue here." *Preap*, ____ U.S. at ____, 139 S.Ct. at 962. Thus, "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*, ____ U.S. at ____, 138 S.Ct. at 841.

***23** Accordingly, the Court concludes Sections 1252(a)(5) and (b)(9), 1231(h), and 1226(e) do not preclude the States' claims. There are no statutory bars to reviewing these claims.

2. Final Agency Action

The Court next considers whether the enforcement priorities set forth in the January 20 and February 18 Memoranda constitute "final agency action" subject to judicial review. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). "Under the APA, an aggrieved party may file suit in a federal district

AMERICAN OVERSIGHT

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 Def.*, ____ U.S. ____, ____, 138 S.Ct. 617, 626, 199 L.Ed.2d 501 (2018) (citing 5 U.S.C. § 704) (internal quotations omitted). The States and the Government agree on the standard used to determine whether an agency action is "final." *See* (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26). That standard requires two conditions to be satisfied. *See* *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 1129, ____, 136 S.Ct. 1807, 1813, 195 L.Ed.2d 77 (2016). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168). The Parties disagree whether the Memoranda constitute final agency action. (Dkt. No. 18 at 37–38); (Dkt. No. 42 at 26–28). The Court finds that they do for the following reasons.

a. The Consummation of the Agency's Decision-Making Process

The first condition that must be satisfied for a court to find that an agency's action is final is that the action constitutes "the consummation of the agency's decisionmaking process." *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. A consummation of this decision-making process is present when the action is "definitive [in] nature" rather than "advisory in nature." *Id.* The Court finds the Memoranda easily satisfy this condition.

As an initial matter, the text of the February 18 Memorandum indicates the Memoranda are the consummation of DHS's decision-making process. It states, "[t]his interim guidance is effective *immediately.*" (Dkt. No. 19-2 at 2) (emphasis added). Moreover, the February 18 Memorandum states, "[i]t applies to *all* U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning." (*Id.*) (emphasis added). The immediacy and definite nature of the application of this guidance to *all* enforcement actions and custody decisions made by *all* ICE Directorates and Program Offices strongly suggest the agency's decision is final. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813.

The Government attempts to overcome these indicia of final agency action by arguing "the Secretary retains the discretion to change or abandon these policies at any time[.]" (Dkt. No. 42 at 27). This argument stems from the February 18 Memorandum, which states, "[t]his interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines," which will occur "only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices." (Dkt. No. 19-2 at 2). The Government's argument is unpersuasive. The mere fact that an agency *says* an action is not final because it maintains "discretion" to alter a policy is insufficient to *render* an action nonfinal. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." (citation omitted)); *Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

***24** Here, the Government's insinuation that agency action is not final simply because the agency says so, would produce the absurd result of precluding judicial review of *any* policy that the agency says is not final. Indeed, if such a rule were followed, then an agency could avoid judicial review of its action in perpetuity simply by labeling its action as "interim" or "temporary" and stating that the agency maintains the ability to repeal or revise it in the future. In fact, this case demonstrates how an agency could potentially tie the judiciary's hands if the agency's action is not final simply because the agency says it is not.

In this case, the February 18 Memorandum took effect immediately upon issuance. (Dkt. No. 19-2 at 2). The Memorandum states it would "remain in effect until Secretary Mayorkas issues new enforcement guidelines." (*Id.*). It also states Secretary Mayorkas "anticipate[d] issuing these guidelines in less than 90 days," meaning the new guidance would be issued before May 19, 2021. (*Id.*). But that did not happen. *See* (Dkt. No. 63 at 3–4). In fact, in a separate challenge to the February 18 Memorandum, the Government represented to the district court that it "currently expect[s]

AMERICAN OVERSIGHT

that the Secretary will issue new immigration priorities in the beginning of July." *Arizona v. Dep't of Homeland Sec.*, No. 2:21-cv-00186-SRB, 2021 WL 2787930 (D. Ariz. June 7, 2021), Dkt. No. 85 at 2. Once again, the new guidance was not released. *See* (Dkt. No. 63 at 3–4). The Government now projects "the Secretary will issue new immigration enforcement priorities by the end of August or the beginning of September." (Dkt. No. 63 at 3–4). Notably, the Government "caution[s] that this is *only* [*its*] *current expectation*." (*Id.* at 4) (emphasis added). In other words, the Government's expectation could once again change, and the issuance of the new guidance could be delayed even longer. Thus, a purely subjective definition of nonfinality would be awfully convenient for the Government—but that is not what the law provides. Rather, because the agency-wide application of this guidance has an immediate and definite nature, it objectively demonstrates the agency's decision is indeed final. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Court therefore finds that the Memoranda satisfy the first condition.

b. Rights, Obligations, and Legal Consequences

The second condition that must be satisfied for a court to find that an agency's action is final is that the challenged action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *See* *Hawkes Co.*, 578 U.S. at ____, 136 S.Ct. at 1813. The Government argues the Memoranda do not satisfy this condition because the Memoranda do not change DHS's legal obligation to enforce the law in the manner prescribed in Sections 1226(c) and 1231(a)(2). (Dkt. No. 42 at 26–28). The Government also argues the Memoranda do not "change any person's legal status, confer any legal benefits, or have any 'legal consequences.' " (*Id.* at 27). Stated differently, the Government contends the Memoranda do not affect the rights or obligations of the States, aliens, or any other person or entity. In support, the Government points to the February 18 Memorandum, which states that the Memorandum does not "create any right or benefit, substantive or procedural, enforceable at law." (*Id.* at 27) (citing (Dkt. No. 19-2 at 8)). But once again, what the Memoranda say and do are different. The Court finds the Memoranda satisfy the second condition.

First, the Government's assertion that the Memoranda do not alter DHS's legal obligations to detain certain aliens under Sections 1226(c) and 1231(a)(2) is demonstrably false. In deciphering the meaning of Sections 1226(c) and 1231(a)(2) below, *see infra* II.B.3.a., the Court goes to great lengths to discuss what obligations those statutory provisions create for DHS. In sum, Section 1226(c) obligates DHS to detain *all* aliens who fall within the ambit of that provision *when they are "released" from state custody.* Section 1231(a)(2) requires DHS to detain *all* aliens with final orders of removal "*during the removal period.*"

***25** The Memoranda require something quite different. Specifically, the February 18 Memorandum effectively substitutes a prioritization scheme in place of the enforcement mandates set forth in these statutory provisions. This new scheme creates two categories of aliens who are required to be detained: priorities and nonpriorities. *See* (Dkt. No. 19-2 at 4–7). It also sets forth a requirement that ICE agents obtain preapproval to detain aliens who are deemed nonpriorities. (*Id.* at 7). The plain meaning of Sections 1226(c) and 1231(a)(2) allows for neither this specific prioritization scheme nor its preapproval process; they simply require DHS to detain *all* aliens described therein at a certain time or for a specific duration. Because the Memoranda *require* DHS to enforce the law in a different way than what Sections 1226(c) and 1231(a)(2) prescribe, the Memoranda constitute a change in DHS's legal obligations. Such a change weighs in favor of classifying the Memoranda as final agency action. *See* *Texas*, 86 F. Supp. 3d at 648–49 (finding that DAPA is a final agency action, in part, because "[a]s evidenced by the mandatory language throughout the DAPA Memorandum requiring USCIS and ICE to take certain actions, the Secretary's Directive clearly establishes the obligations of the DHS and assigns specific duties to offices within the agency").

Next, the Government contends the Memoranda do not alter the rights or obligations of the States or aliens in the country. The Court disagrees. Based on the record before the Court, the Memoranda affect Texas's legal obligation to provide Emergency Medicaid to certain noncitizens. "Emergency Medicaid is a *federally required* program *jointly funded* by the federal government and the *states*." (Dkt. No. 19-7 at ¶ 7) (emphases added). Illegal aliens are eligible to participate in this program. *See* (*Id.*); 8 U.S.C. § 1611(b)(1)(A). An alien in Texas who is eligible for Emergency Medicaid and

AMERICAN OVERSIGHT

presently in state custody can benefit from the program after being released. [24] Texas is therefore legally obligated to bear part of the cost of Emergency Medicaid for aliens who qualify for the program and are not detained by ICE after being released from state custody.

But as should be clear by now, not all aliens released from state incarceration are returned to society. And that is because of Sections 1226(c) and 1231(a)(2). Again, pursuant to Section 1226(c), DHS is *required* to detain *all* aliens who have committed certain serious offenses *as soon as* they are released from state custody. And per Section 1231(a)(2), DHS is *required* to detain certain aliens during their removal period. Instead, because of the Memoranda, DHS is no longer detaining all of these aliens as soon as they are released from state custody or during their removal periods. Texas will therefore have a legal obligation to share the cost of providing Emergency Medicaid to aliens who qualify for the program and, under the Memoranda, are not detained by ICE after being released from state custody. [25]

***26** As for the rights of aliens, another district court has already concluded the Memoranda affect the rights of certain aliens presently detained. *See Hussein S.M. v. Garland*, No. CV 21-348 (JRT/TNL), 2021 WL 1986125, at *3 (D. Minn. May 18, 2021). As this Court noted in *Texas I*, "an [alien] who has been detained for six months may be entitled to release if 'it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.' " ____ F. Supp. 3d at ____, 2021 WL 2096669, at *31 (quoting *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505). In *Hussein S.M.*, a detained alien with a final of order of removal filed a petition for a writ of habeas corpus to secure his release from detention. 2021 WL 1986125, at *1. The district court granted the petition, relying on the civil immigration enforcement priorities set forth in the January 20 Memorandum and later reaffirmed in the February 18 Memorandum. *Id.* at *3. Because the alien in *Hussein S.M.* did not fall within one of the priority groups, the district court found "his removal is *unlikely to be imminent* despite ongoing removal enforcement." *Id.* (emphasis added). In short, *Hussein S.M.* demonstrates the Memoranda directly affect an alien's right to be free from prolonged detention. The Court therefore concludes the Memoranda affect the rights of and have significant legal consequences for detained aliens with final orders of removal.

In sum, the Court finds the Memoranda are the consummation of DHS's decision-making process and determine certain rights and legal obligations. Therefore, the Court concludes the Memoranda constitute final agency action under Section 704 of the APA. [26]

3. Committed to Agency Discretion by Law

In determining whether an agency action is reviewable, the Court must also determine whether the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Accordingly, the Court now inquires whether the implementation of the new guidelines found in the Memoranda is "committed" to the Government's discretion by law.

The APA embodies a "basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). But this is "just" a presumption. *Lincoln*, 508 U.S. at 190, 113 S.Ct. at 2030. " '[R]eview is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Id.* at 191, 113 S.Ct. at 2031 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985)). Where there is no meaningful standard to apply, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Lincoln*, 508 U.S. at 191, 113 S.Ct. at 2031 (quoting *Heckler*, 470 U.S. at 830, 105 S.Ct. at 1655).

One category of administrative decisions that courts "traditionally have regarded as 'committed to agency discretion' " is relevant to this discussion. *Id.* (citation omitted). Namely, "an agency's decision not to institute enforcement proceedings." *Id.* (citing *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655–56). Non-enforcement decisions, however, are only "presumptively unreviewable." *Heckler*, 470 U.S. at 832–33, 105 S.Ct. at 1656. The Supreme Court has outlined a narrow but clear roadmap to overcoming that presumption and a second, less–traveled path. As for the first: "the presumption may be rebutted

AMERICAN OVERSIGHT

where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* As for the second: it may be "justifiably ... found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4, 105 S.Ct. at 1656 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Although the Supreme Court has not (yet) found this latter type of "abdication," it has nevertheless instructed that any such inquiry should focus on "the statute conferring authority on the agency," which "might indicate that such decisions were not 'committed to agency discretion.' " *Heckler*, 470 U.S. at 833 n.4, 105 S.Ct. at 1656 n.4; *see also* *Texas DAPA*, 809 F.3d at 166–67.

***27** In this case, the Government argues the States' claims are unreviewable because the new guidelines contained in the February 18 Memorandum are committed to agency discretion by law. More precisely, the Government argues: (1) the substantive statutes in question, Sections 1226(c) and 1231(a)(2), do not set out the specific mandatory duties the States assert, that is, the duty to detain certain aliens subject to those two sections; (2) even if these statutes establish mandatory duties, the new guidelines "simply establish[ ] enforcement priorities" since they do "not direct ICE officials to cease detaining any particular noncitizen subject to either § 1226(c) or § 1231(a)(2)"; and (3) assuming the first two arguments fail, the Executive Branch may, in effect, dispense with a congressional mandate because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President." (Dkt. No. 42 at 28–30). Opposing the Government's suppositions, the States contend that, although the Government wields tremendous discretion in this area of immigration law, Sections 1226(c) and 1231(a)(2) limit this discretion by mandating the detention of certain aliens when they are released or during the removal period. (Dkt. No. 51 at 29–30). The Court now turns to each of these arguments.

a. Whether "Shall" Means "Must"

The Government first argues that "shall" in Sections 1226(c) and 1231(a)(2) does not impose any mandatory duties or guidelines for the Government to follow. The Court disagrees. Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable under the INA "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

Recent Supreme Court precedent establishes "shall" means "must" in these sections. In *Johnson v. Guzman Chavez*, the Supreme Court noted "detention is mandatory" during an alien's removal period, as prescribed by Section 1231(a)(2). ____ U.S. ____, ____, 141 S.Ct. 2271, 2281 (2021) (citing 8 U.S.C. § 1231(a)(2)). And under Section 1226(c), "detention is mandatory and release is permitted in very limited circumstances" "[f]or certain criminal aliens and aliens who have connections to terrorism." *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)). In light of *Guzman Chavez*, it seems there is no dispute that Sections 1226(c) and 1231(a)(2) are mandatory.

This is not surprising. *Guzman Chavez*'s holding follows the well-established principle that Sections 1226(c) and 1231(a)(2) mandate the detention of certain aliens at specific points in time. *See* *Preap*, ____ U.S. at ____, 139 S.Ct. at 959 (finding under Section 1226(c) certain criminal aliens "*must* be arrested when 'they are released' from custody on criminal charges and ... *must* be detained without a bond hearing until the question of their removal is resolved" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 835 ("§ 1226(c) makes clear that detention of aliens within its scope *must* continue 'pending a decision' on removal" (citing 8 U.S.C. § 1226(c)) (emphasis added)); *Zadvydas*, 533 U.S. at 683, 121 S.Ct. at 2495 ("After entry of a final removal order and during the 90-day removal period, however, aliens *must* be held in custody." (citing 8 U.S.C. § 1231(a)(2)) (emphasis in original)); *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716 (noting Section

AMERICAN OVERSIGHT

1226 "*requir[ed]* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability" (emphasis added)); *Hosh v. Lucero*, 680 F.3d 375, 377, 381 (4th Cir. 2012) ("Section 1226(c) *requires* the mandatory federal detention, without the possibility of bond, of certain deportable criminal aliens '*when*' those aliens are released from other custody." (emphases added)); *Rodney v. Mukasey*, 340 F. App'x 761, 764 & n.3 (3d Cir. 2009) (per curiam) (interpreting "shall" in Section 1231(a)(2) to mean the Attorney General "*must*" detain the alien for a certain period (emphasis added)); *Khotesouvan v. Morones*, 386 F.3d 1298, 1300 (9th Cir. 2004) (observing that, in *Demore*, the Supreme Court "approved the *mandatory* detention of a criminal alien during removal proceedings under 8 U.S.C. § 1226(c) even in the absence of an individualized finding that the alien was unlikely to appear for his removal hearing if released on bond" (emphasis added)); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 & n.4 (9th Cir. 2008) (noting that detention under Section 1231(a)(2) is *mandatory*); *Nyonton v. Brackett*, No. 18-CV-481-PB, 2019 WL 1082203, at *2 (D.N.H. Mar. 7, 2019) (holding Section 1231(a)(2) is "crystal clear" in mandating the detention of aliens subject to Section 1231, especially with respect to individuals "who have been found inadmissible because of a controlled substance violation"); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 235 (S.D.N.Y. 2010) (explaining that, while Section 1226(a) provides ICE with the discretion to detain any alien pending a decision in removal proceedings, "[a]liens who have been convicted of certain enumerated offenses, however, including drug crimes ... *are subject to mandatory detention*" pursuant to Sections 1226(c)(1)(B), 1227(a)(2)(B), and INA § 126(c) (emphasis added)).

***28** Accordingly, the Court concludes, following *Guzman Chavez* and the foregoing overwhelming precedent, the word "shall" means "must" in Sections 1226(c) and 1231(a)(2). Consequently, the Government is required to detain certain criminal aliens and aliens with final orders of removal at certain points in time to comply with those statutes.

Despite the Supreme Court's clear interpretation of Sections 1226(c) and 1231(a)(2), the Government nevertheless argues that *Guzman Chavez* and, by extension, all other related court rulings are irrelevant here. The Government contends *Guzman Chavez* "did not address the Department of Homeland Security's discretion whether to detain individuals covered by 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a)(2)." (Dkt. No. 67 at 1). "Rather," according to the Government, *Guzman Chavez* "addressed under which authority certain individuals were detained and whether such individuals were entitled to bond hearings." (*Id.*). In short, the Government argues the Court should disregard *Guzman Chavez*'s statements on Sections 1226(c) and 1231(a)(2)—and the numerous court holdings that precede *Guzman Chavez*—because those were not central to the case's holding and thus were dicta that need not be followed. The Court disagrees.

Guzman Chavez's treatment of Sections 1226 and 1231 were central to its holding. The case's key question was whether certain aliens could be released on bond while petitioning for relief from removal. That question was necessarily answered by analyses of both sections—analyses that included looking at the mandatory nature of Sections 1226(c) and 1231(a)(2)'s detention provisions. The respondents in *Guzman Chavez*—aliens who were detained following their unlawful reentrance into the United States after previously being removed—sought release on bond while they were pursuing relief from removal. *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280. The respondents argued that Section 1226, which generally conferred discretion to the Government to detain aliens, provided them an avenue to be released on bond. *Id.* at ____, 141 S.Ct. at 2283–84. However, the Government in that action contended that Section 1231, which mandates detention of aliens with orders of removal, applied to the respondents, effectively requiring their detention to be *without* bond. *Id.*; *see also* Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897), 2020 WL 4938065. The Supreme Court was thus required to determine which INA provision applied to the respondents. This task necessitated a finding as to whether, and in what circumstances, detention was mandatory under the relevant statutes. *See Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2280–82.

Guzman Chavez ultimately held Section 1231 applies to the respondents since they had effectively been ordered removed through the reinstatement of their previous orders of

AMERICAN OVERSIGHT

removal. *See id.* at ____, 141 S.Ct. at 2287–91. In reaching this conclusion, the Supreme Court compared Section 1226, which, again, applies to the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States," *id.* at ____, 141 S.Ct. at 2281, with Section 1231, which applies to an alien ordered removed, *id.* In the Supreme Court's discussion of Section 1226, it noted "DHS," pursuant to that provision, "*may* arrest and detain the alien," pending that alien's removal decision. *Id.* Such an alien "may generally apply for release on bond or conditional parole." *Id.* Nevertheless, the Supreme Court probed further, stating "there is one exception" to this general rule: for certain criminal aliens, "*detention is mandatory*" under Section 1226(c). *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2 (citing 8 U.S.C. § 1226(c)) (emphasis added). Like Section 1226(c)'s exception, the Supreme Court stated Section 1231's detention is "mandatory" precisely because of Section 1231(a)(2). *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2281 (citing 8 U.S.C. § 1231(a)(2)). Thus, *Guzman Chavez*'s interpretation of Sections 1226(c) and 1231(a)(2) as mandating detention was essential to the case's holding.

***29** Tellingly, the Government itself admitted during briefing in *Guzman Chavez* that Section 1226(c) imposed a mandatory duty to detain certain criminal aliens.[27] The Government explained, although "Section 1226(a) makes detention discretionary," "a separate provision, Section 1226(c), *makes an exception* to that general rule, providing that the government 'shall' take into custody and not release certain criminal aliens." Brief for Petitioner, 2020 WL 4938065, at *5 (No. 19-897) (emphasis added). The Government also argued in its reply brief that the Supreme Court's "intervention" in *Guzman Chavez* would "determine[ ] whether Section 1226(c)—which provides for the *mandatory* detention of certain criminal aliens—applies to aliens who have reinstated orders of removal and are in withholding-only proceedings." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 3124376, at *7 (emphasis added). Likewise, with respect to Section 1231(a)(2), the Government stated it had "long read" the statute "to *require* the detention of terrorist and *criminal* aliens." Reply Brief for Petitioner, *Johnson v. Guzman Chavez*, ____ U.S. ____, 141 S.Ct. 2271 (2021) (No. 19-897) 2020 WL 7249055, at *17 & footnote (emphases added). Thus, in conjunction with *Guzman Chavez*, the Court takes the Government at its word and finds "shall" means "must" in Sections 1226(c) and 1231(a)(2) with respect to the detention of certain criminal aliens.

Second, even if the clear principles delineated in *Guzman Chavez, Preap, Zadvydas*, and the like are dicta, they are persuasive, nonetheless. As the Fifth Circuit has noted, "[i]t is well established in this circuit that, although we are 'not bound by dicta, even of [this court,] [d]icta of the Supreme Court are, of course, another matter.' " *Peake v. Ayobami (In re Ayobami)*, 879 F.3d 152, 154 n.3 (5th Cir. 2018) (quoting *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015)).[28] Thus, the Court follows the Fifth Circuit and its sister circuits and defers to *Guzman Chavez, Preap, Zadvydas*, and other related Supreme Court precedent even if the statements on Sections 1226(c) and 1231(a)(2) in those cases were dicta, as the Government contends. The Court is not free to treat Supreme Court dicta as cavalierly as the Government suggests. Accordingly, the Court applies the caselaw discussed above and holds that the "shall" found in Sections 1226(c) and 1231(a)(2) means "must," imposing on the Government a duty to detain certain criminal aliens and those with final orders of removal when released and during the removal period, respectively.

***30** Arguments about dicta aside, the Court's own statutory interpretation of Sections 1226(c) and 1231(a)(2) also leads to the conclusion that "shall" means "must" in those sections. *See* Scalia & Garner, *supra*, at 53 ("*Every* application of a text to particular circumstances entails interpretation." (emphasis added)).

"The task of statutory interpretation begins and, if possible, ends with the language of the statute." *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013). "When the language is plain, [the court] 'must enforce the statute's plain meaning, unless absurd.' " *Id.* (quoting *In re Nowlin*, 576 F.3d 258, 261–62 (5th Cir. 2009)); *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means

AMERICAN OVERSIGHT

in a statute what it says there.' " (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))). "A statute is ambiguous if it is susceptible of more than one accepted meaning." *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003). Thus, as before, regarding interpreting Section 1231(h), the Court must initially determine whether "all but one of the meanings" of the word "shall" in Sections 1226(c) and 1231(a)(2) is "ordinarily eliminated by context." *Deal*, 508 U.S. at 132–33, 113 S.Ct. at 1996–97.

For this analysis, the Court applies "the traditional means of statutory interpretation, which include the text itself, its history, and its purpose." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) (citation omitted). Put differently, the Court must initially "look first to the word's ordinary meaning," *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 131 S.Ct. 1885, 1891, 179 L.Ed.2d 825 (2011), since "[s]tatutory language has meaning only in context." *Graham Cnty.*, 545 U.S. at 415, 125 S.Ct. at 2449 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 382, 160 L.Ed.2d 271 (2004)). Only "when traditional methods of statutory construction fail to reveal a provision's meaning" may the Court "conclude that it is ambiguous." *Perry*, 102 F.3d at 147.

"[T]he word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, ____ U.S. ____, ____, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020); *see also* Scalia & Garner, *supra*, at 112 ("When drafters use *shall* and *may* correctly, the traditional rule holds—beautifully."). The Supreme Court has nonetheless cautioned, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co. v. Hecht*, 95 U.S. 168, 170, 24 L.Ed. 423 (1877).

This need for legislative intent to demonstrate "shall" should be construed as "must" against the government is present in Supreme Court jurisprudence. In *Texas I*, this Court identified *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), a Supreme Court case upon which the Government relies, (6:21-cv-3, Dkt. No. 82 at 19); (6:21-cv-3, Dkt. No. 83 at 25–26, 34); (6:21-cv-16, Dkt. No. 42 at 36–38), as an apt example of the need for legislative intent to determine that "shall" connotes a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *33. In *Castle Rock*, the respondent claimed her due process rights were violated because a police department refused to enforce restraining orders despite language printed on the orders themselves stating that an "officer shall arrest" a restrained person where probable cause of a violation was evident. 545 U.S. at 754, 759, 125 S.Ct. at 2802, 2805. The Supreme Court, however, found "the presence of seemingly mandatory legislative commands" like "shall" could not automatically impose a "true mandate" against the police. *Id.* at 760–61, 125 S.Ct. at 2805–06. What was needed—and lacking in *Castle Rock*—was "some stronger indication" from the legislature. *Id.* at 761, 125 S.Ct. at 2806. Such an "indication" was not present because the "shall" used in the restraining orders was "not perceptibly more mandatory than" other state statutes using the word "shall" where the police force was traditionally accorded discretion. *Id.*; *see also Chicago v. Morales*, 527 U.S. 41, 61–62 n.32, 119 S.Ct. 1849, 1861 n.32, 144 L.Ed.2d 67 (1999) (noting that interpreting "shall" as mandatory in the context of police action "flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances").

***31** With the foregoing in mind, this Court in *Texas I* previously explained how a "stronger indication" from Congress may be gleaned. In *Richbourg Motor Co. v. United States* and *Escoe v. Zerbst*, the Supreme Court noted one "indication" sufficient to conclude that the word "shall" in a statute imposes an obligation upon the Government is present when the statute's manifest purpose is to protect the public or private interests of innocent third parties. *See Richbourg Motor Co. v. United States*, 281 U.S. 528, 533–34, 50 S.Ct., 385, 387–88, 74 L.Ed. 1016 (1930); *Escoe v. Zerbst*, 295 U.S. 490, 494, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34. The Court finds it appropriate to reiterate its explanations of these cases here.

AMERICAN OVERSIGHT

In *Richbourg Motor Co.*, the Supreme Court expressly found reason to avoid the rule in *Hecht* where a statute provided that an officer "shall" take possession of a vehicle used in the act of transporting liquor. 281 U.S. at 533–34, 50 S.Ct. at 387–88. After noting that the statute in question was "in form mandatory throughout," the Court explained it "detail[ed] ... successive steps to be taken, which, if followed, [led] unavoidably to forfeiture under that section ... , *with the important consequence of protecting the interests of innocent third persons.*" *Id.* (emphasis added). These qualities of the relevant text, the Supreme Court explained, "suggests a definite purpose to make the protection effective" by imposing a mandatory duty. *Id.*

Five years after *Richbourg Motor Co.*, the Supreme Court in *Escoe* concluded that any doubt regarding the mandatory nature of a statutory "shall" is "dispelled when we pass from the words alone *to a view of ends and aims.*" 295 U.S. at 492–93, 55 S.Ct. at 819–20 (emphasis added). In *Escoe*, the relevant statute appeared to require a trial court to bring a probationer to court to revoke his probation. *Id.* The Supreme Court determined, because it was "[c]lear[ ] [that] the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation," the presentment of the probationer was "necessary, or so the Congress must have thought, to protect the individual against malice or oppression." *Id.* at 493, 55 S.Ct. at 820. Thus, *Escoe* concluded the "shall" in the relevant statute was "mandatory in meaning as well as mandatory in form." *Id.* at 494, 55 S.Ct. at 820. Leaving no doubt, the Supreme Court stated, "[s]tatutes are not [optional] when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect." *Id.*; *see also* *Ralpho v. Bell*, 569 F.2d 607, 627–28 & n.149 (D.C. Cir. 1977) (applying *Escoe* to "prefer a construction" of mandatory language in a statute guiding governmental officials' discharge of duties "that bestows the benefits of the Act on those for whom it was chiefly intended").

Given the caselaw, the key in this case is whether Sections 1226(c) and 1231(a)(2) demonstrate a purpose to protect public or private interests. If so, the word "shall," as used in both sections, would connote a requirement against the Government in the manner envisioned by *Richbourg Motor Co.* and *Escoe*. Based on the following, the Court finds that the statutes do indeed demonstrate such a purpose.

The Supreme Court in *Demore* clearly explains that the purpose of Section 1226(c) was to protect third-party interests: that of the states, citizens, and legal immigrants of this country. Essentially, Section 1226(c) was enacted "against a backdrop of wholesale failure by the INS [ICE's predecessor] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. "INS' near-total inability to remove deportable criminal aliens imposed" overpopulation in federal and state prisons, caused monetary costs, took away immigration opportunities that could have been provided to others, and increased crime in the Nation's communities. *Id.* at 518–20, 123 S.Ct. at 1714–15. Crucially, "Congress also had before it 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, 123 S.Ct. at 1715. Before Section 1226, "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society." *Id.* (citing 8 U.S.C. § 1252(a) (1982 ed.)). Thus, to alleviate these issues, Congress "enacted 8 U.S.C. § 1226, *requiring* the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521, 123 S.Ct. at 1716 (emphasis added). Given *Demore*'s findings, the purpose of Section 1226 is to protect the public and private interests of third parties, namely, the states, the citizens, and legal immigrants of the United States.

***32** Considering the context and purpose of Section 1226, it is no wonder why Subsection (c) "subtract[s]," from the discretion given to the Government in Section 1226(a). *See* *Preap*, ____ U.S. at ____, 139 S.Ct. at 966. In fact, it does more than that. Subsection (c) also subtracts from the general "broad discretion" that the Attorney General originally had prior to the enactment of Section 1226. *See* *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716. "Shall" in Section 1226(c), therefore, must be construed to mean "must."

AMERICAN OVERSIGHT

Like Section 1226(c), Section 1231(a)(2) was enacted to protect public and private interests of the states and the people of the United States. As the Supreme Court noted in *Zadvydas*, "protecting the community from dangerous aliens" is a "statutory purpose" of that section. 533 U.S. at 697, 121 S.Ct. at 2502. What's more, Section 1231 "is part of a statute that has as its basic purpose effectuating an alien's removal," a purpose related to the community's protection. *Id.* Coupled with *Demore*'s detailed explanation of the burdens criminal aliens impose on both the country and its people when the Government fails to deport them, 538 U.S. at 518–20, 123 S.Ct. at 1714–15, it is evident that Section 1231(a)(2)'s purpose was to similarly protect the states, the citizens, and legal immigrants' interests against the harmful effects the Government's failure to remove certain aliens would bring about.

Additionally, numerous federal courts—including this Court—have recognized *other* parts of Section 1231 use "shall" as a mandatory command. *See Shuaibu v. Gonzales*, 425 F.3d 1142, 1144 (8th Cir. 2005) (interpreting the "shall" in Section 1231(b)(1)(C) to mean the Attorney General "must" attempt to remove the alien to certain countries); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (interpreting "shall" in Section 1231(a)(3) to mean all aliens ordered released "must" comply with supervision requirements); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *32–37 (analyzing Section 1231(a)(1)(A) and holding the "shall" in that provision imposes a mandate on the Government to deport aliens with final orders of removal within 90 days). These interpretations of "shall" as mandatory in other parts of Section 1231 are yet further indication the "shall" in Section 1231(a)(2) bears the same meaning, because "a word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra*, at 170; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Thus, for all these reasons, the "shall" in Section 1231(a)(2) necessarily means must.

The Government does not disagree that Congress enacted Sections 1226(c) and 1231(a)(2) to protect public or private interests. Rather, the Government demurs that a statutory purpose of protecting third parties, as held in *Richbourg Motor Co.* and *Escoe*, is not a "stronger indication," per *Castle Rock*, to make "shall" mandatory against any governmental actor. (Dkt. No. 42 at 36–38); *see Richbourg*, 281 U.S. at 533–34, 50 S.Ct., at 387–88; *Escoe*, 295 U.S. at 493–94, 55 S.Ct. at 820; *Castle Rock*, 545 U.S. at 761, 125 S.Ct. at 2806. In making this argument, the Government reasons that the "protection of a third party" rationale *cannot* serve as a stronger indication because, it claims, the very "statute [in *Castle Rock*] concerned enforcement of restraining orders entered to benefit a 'protected person.' " (*Id.* at 37–38) (emphasis omitted) (quoting *Castle Rock*, 545 U.S. at 758–59, 125 S.Ct. at 2804–05). In doing so, however, the Government ignores the Supreme Court's holdings in *Richbourg Motor Co.* and *Escoe*. *See* (*Id.* at 36–39). In short, the Government implies that *Castle Rock* overruled *Richbourg Motor Co.* and *Escoe sub silentio*. That argument fails.

***33** As an initial matter, this Court cannot ignore *Richbourg Motor Co.* and *Escoe* where the Supreme Court or the Fifth Circuit has not expressly instructed it to do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Lopez v. City of Hous.*, Civil Action No. H-09-0420, 2009 WL 1456487, at *15 (S.D. Tex. May 22, 2009) (Lake, J.) ("[I]t is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals." (quoting *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 925 (S.D. Tex. 1997) (Jack, J.))). The Court did not disregard those cases in *Texas I*, nor will it disregard them here. [29]

But even if the Court could ignore *Richbourg Motor Co.* and *Escoe*, *Castle Rock* is easily distinguishable from this case. The state statute ostensibly mandating the police to enforce restraining orders in *Castle Rock* was drafted upon a background of "[a] well established tradition of police discretion" that "ha[d] long coexisted with apparently

AMERICAN OVERSIGHT

mandatory arrest statutes." *Castle Rock*, 545 U.S. at 760, 125 S.Ct. at 2805–06 (citing 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980)). A similar tradition is not present with respect to Sections 1226(c) and 1231(a)(2). As explained above, it was precisely the federal government's "wholesale failure" "to deal with increasing rates of criminal activity by aliens" that prompted Congress to *limit* the Executive's discretion in such matters by enacting Section 1226. *See* *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. Such specific legislative intent, backed by Supreme Court acknowledgment, was not present in the statute interpreted in *Castle Rock*. *Cf.* 545 U.S. at 760–61, 125 S.Ct. at 2805–06.

***34** Furthermore, the Government's contention that Sections 1226(c) and 1231(a)(2) do not confer a mandatory duty against the Government goes against an analysis of the statutes' text within the whole statutory scheme. The Supreme Court has noted that "[t]he word 'may' customarily connotes discretion" and that such a "connotation is particularly apt where ... 'may' is used in contraposition to the word 'shall.' " *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (citing *Haig v. Agee*, 453 U.S. 280, 294 n.26, 101 S.Ct. 2766, 2775 n.24, 69 L.Ed.2d 640 (1981)). That principle proved crucial in *Jama*, where the Supreme Court held that because Section 1231(b)(2) of the INA states that the Attorney General "shall remove" an alien to a designated country, it would be inappropriate to read as mandatory another provision explaining that the Attorney General "may" disregard the designation if certain circumstances arise. *Id.* This principle applies to this case as well.

Section 1231(a)(2) states that the Attorney General "shall" detain certain aliens "during the removal period," which is defined to be a period of 90 days when an alien is ordered removed. 8 U.S.C. § 1231(a)(1)–(2). Before Section 1231(a)(2), Subsection (a)(1)(C) provides that the removal period "shall" be extended beyond 90 days if certain circumstances arise, and the alien "may" remain in detention during that extended period. *Id.* § 1231(a)(1)(C). Again, it would be absurd if Section 1231(a)(2)—with its use of "shall"—is read to provide merely discretionary authority to the Government to detain people during the removal period when Section 1231(a)(1)(C)—using "may"—clearly provides discretion to the Government to detain people *after* the initial 90-day removal period.

Likewise, Section 1226(c) clearly juxtaposes "may" and "shall" so that there is no ambiguity as to whether the "shall" used in 1226(c)(1) imposes a mandatory duty. Subsection (c)(1) states that the Attorney General "shall" detain certain aliens "when the alien is released." 8 U.S.C. § 1226(c)(1). Just right after that, Subsection (c)(2) notes that the Attorney General "may" release aliens described in Subsection (c)(1) "only if" certain circumstances are present. *Id.* § 1226(c)(2). As such, for Subsection (c)(2) to have any meaning, Subsection (c)(1) must be read as a mandate: the Attorney General *must* detain aliens when released and such aliens *may* be released *only if* certain situations call for it. If Subsection (c)(1) is not interpreted in this way, then Subsection (c)(2)—the release provision—loses its significance. It would be superfluous for Congress to state how certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place. This analysis of the two statutes within the overall scheme indeed tracks how the Supreme Court and other federal courts have construed Sections 1226(c) and 1231(a)(2), as described more fully above.

b. Whether "Prioritization" Contravenes Congressional Mandates

Having concluded that "shall" means "must" in Sections 1226(c) and 1231(a)(2), the Court turns to the Government's second argument in support of its assertion that the new guidelines in the February 18 Memorandum are committed to agency discretion by law. That is, regardless of the relevant sections' mandatory nature, the new guidelines "simply establish[ ] enforcement priorities" because they do "not direct ICE officials to cease detaining any particular noncitizen." (Dkt. No. 42 at 28–29). Put differently, the Government argues that the guidelines do not *actually* stop detentions and, instead, merely prioritize who gets detained first. As a result, the Government concludes that the guidelines do not contravene the statutes. *See* (*Id.*). Thus, in essence, the Government argues that it has discretion to determine the *timing* of when certain aliens should

AMERICAN OVERSIGHT

be detained—if not the discretion to determine *who* gets detained. This argument fails as well.

***35** Although the Government describes the February 18 Memorandum as only a reprioritization of immigration enforcement priorities, a review of the Memorandum itself establishes that it is more than that. *See* *Texas DAPA*, 809 F.3d at 171–72 ("Although the DAPA Memo facially purports to confer discretion, the district court determined that nothing about DAPA genuinely leaves the agency and its employees free to exercise discretion." (cleaned up)). The new guidelines violate the statutory commands of Sections 1226(c) and 1231(a)(2) which are: to detain certain aliens "when the alien is released," per Section 1226(c), or "during the removal period," per Section 1231(a)(2).

The Government opines that the February 18 Memorandum "directs 'officers and agents ... to exercise their discretion thoughtfully' after consideration 'of all relevant facts and circumstances' " concerning the arrest, detention, or removal of criminal illegal aliens. (Dkt. No. 42 at 29) (alteration in original) (citing Dkt. No. 42-2 at 4). That statement demonstrates that the new guidelines wade into areas that are not committed to agency discretion. *See* (*Id.*). Because "shall" means "must" in Section 1226(c), the Executive Branch is required to detain criminal aliens who have committed "*any* offense covered in section 1182(a)(2)," "*any* offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)," or *any* alien who "is deportable under section 1227(a)(2)(A)(i)," "inadmissible under section 1182(a)(3)(B)," or "deportable under section 1227(a)(4)(B)." 8 U.S.C. § 1226(c)(1)(A)–(D) (emphases added). This leaves no room for the Executive's agent to "thoughtfully" exercise discretion. *See* (Dkt. No. 42 at 29). And crucially, to protect the public, Congress mandated that *any* alien falling under any of these categories must be detained "when the alien is released" from state custody. *Id.* Likewise, Section 1231(a)(2) requires both the detention of aliens who possess orders of removal *and* aliens who have been found "inadmissible under section 1182(a)(2)," "1182(a)(3)(B)," or "deportable under section 1227(a)(2) or 1227(a)(4)(B)."[30] *Id.* § 1231(a)(2). And, like Section 1226(c), Congress in Section 1231(a)(2) mandated the timing of such detention: the aliens must be detained "during the removal period." *Id.*

***36** Because of the clear mandates set forth in Sections 1226(c) and 1231(a)(2), determining whether and when an alien should be detained is not a decision committed to agency discretion. And by prioritizing the detention of some aliens over others, the Government has effectively conferred upon itself discretion as to the timing of detention—discretion it does not have. Put differently, the Government has assumed a discretionary power that Congress has explicitly foreclosed. Such a maneuver is impermissible. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446 ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." (alteration in original) (citation omitted) (citing U.S. Const. art. II, § 3)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 956, 151 L.Ed.2d 908 (2002) (finding that an agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute").

"Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets." *Preap*, ____ U.S. at ____ n.6, 139 S.Ct. at 969 n.6 (emphasis in original). In this case, Section 1226(c)'s "when ... released" language "clarifies when the duty to arrest is triggered: upon release from criminal custody." *Id.* at ____, 139 S.Ct. at 969. And as a logical extension of that reasoning, Section 1231(a)(2)'s "during the removal period" language also clarifies when a duty to arrest is triggered: when the alien is provided with a final order of removal.[31] *See* 8 U.S.C. § 1231(a)(1)–(2). In sum, Congress has clearly specified when the *duty* to detain is *triggered*: when the alien is released as provided by Section 1226(c) and during the removal period for Section 1231(a)(2). *When* that duty to detain is triggered is not left for the agency to decide. Thus, choosing to detain certain aliens "when ... released," *see* Section 1226(c), or "during the removal period," *see* Section 1231(a)(2), over others who are mandated to be detained at

AMERICAN OVERSIGHT

those specific points in time is not left to agency discretion. Indeed, it is a violation of the clear letter of the law. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446.

c. Whether the Executive may "Dispense" with Laws

Finally, the Government argues that the Memoranda are committed to agency discretion because "[t]he exercise of prosecutorial discretion is inherent to the Executive power that the Constitution confers on the President" and that such "discretion" is "greatly magnified" in the immigration law context. (Dkt. No. 42 at 29–30) (citing *Reno*, 525 U.S. at 490, 119 S.Ct. at 946). As this Court stated in *Texas I*, "whatever 'inherent authority' the Executive may have in the area of immigration, that authority—along with the executive Power—does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws." ____ F. Supp. 3d at ____, 2021 WL 2096669, at *36. The Government's suggestion that the Executive's discretion is so significant that it may, in effect, dispense with laws has significant implications for the separation-of-powers system enshrined in the Constitution. The subject is therefore worth addressing, albeit briefly, at this early stage in the litigation. However grand the Executive's discretion might be in enforcing immigration laws, the Constitution does not empower the Executive to set forth a policy that, in effect, dispenses with a congressional immigration mandate.[32]

***37** Concern over the Executive's power to dispense with laws dates back to before the founding of this Nation. The Framers of the Constitution were well aware of how the English Crown had abused the dispensing power a century prior to the ratification of the Constitution. *See* Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 118 (2020) (concluding that the Framers addressed the royal "prerogatives of suspending or dispensing with the laws" in the Take Care Clause "[g]iven that the Committee [of Detail] explicitly dealt with virtually every one of the royal prerogatives, and especially the notorious prerogatives that had animated the overthrow of Charles I and James II"); Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell & Samuel L. Bray, *The Constitution of the United States* 317 (Robert C. Clark et al. eds., 2d ed. 2013) (opining that the President's duty to " 'take care that the laws be faithfully executed' ... means that the president is not permitted to dispense with or suspend statutes the way King James II did before the Glorious Revolution of 1688"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 797–98 & n.95, 804–09 (2013) (detailing how the "suspending power" was abused by English Monarchs, such as James II, and how that history influenced Americans in limiting "[t]he executive Power"); *see also* Randy Barnett & Evan Bernick, *The Letter & The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 20–21 (2018) (contending the Founding Fathers constructed the new American government as a fiduciary of We the People, "bound by fiduciary duties to *honor the law*, ... *remain loyal to the public interest*, ... and *account for violations of these duties*." (emphasis added) (citations and quotations omitted)). As a prime example, King James II dispensed with the Test Acts,[33] which effectively barred Catholics from holding government or military office, "to create an enlarged standing army under the control of Catholic officers ... and ... put Catholic peers in key positions in the Privy Council and the government" because he did "[n]ot trust[ ] Protestant militias and gentry to protect him from rebellion[.]" McConnell, *supra*, at 116; *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 691 (2014) ("King James enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters."); Delahunty & Yoo, *supra*, at 805–06 ("James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics."). This decision angered many Englishmen[34] and played a significant role in igniting the Glorious Revolution, which resulted in William III and Mary II replacing James II on the throne. Delahunty & Yoo, *supra*, at 807. Although no longer on the throne, James II had already left his mark on the future powers of the Crown. Indeed, the English Bill of Rights of 1689 barred William III and Mary II and all future monarchs from suspending or dispensing with laws.[35]

By 1776, Americans had developed a similar sentiment about the dispensing power as had the English in 1689. *See* Price, *supra*, at 692. Notably, one of the grievances against King George III articulated in the Declaration of Independence[36] was that he "often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing him to halt their execution." Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy

AMERICAN OVERSIGHT
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Rabkin as Amici Curiae Supporting Respondents at 5–6, *United States v. Texas*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (mem) (per curiam) (citing Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 224–27, 256–68 (1934)). This "allowed the king not only to dispense with the implementation of statutes, but also to force changes to their content—an essentially legislative power." *Id.* at 5–6; *see also* Declaration of Independence ¶¶ 3–4.

***38** Prior to the United States Constitution's ratification, states were aware of this sentiment and crafted state constitutions of their own that barred the Executive from exercising the suspending or dispensing power. *See* Price, *supra*, at 692 ("Drawing from this English model, several states during the American revolutionary period adopted constitutions including prohibitions on executive suspension of laws."); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights In 1787 and 1791: What Individual Rights Are Really Deeply Rooted In American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1534–35 (2012) (explaining that, at the time of the founding, "state constitutions ... had constitutional clauses restricting the power to suspend or dispense with laws to the legislature"); *cf.* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425–26 (1999) (noting that, "[i]n the 1760s and 1770s, during the crisis that eventually tore apart the British empire, the American colonists had this long English heritage of popular rights to draw upon," including the English Bill of Rights, which "declared illegal certain actions of the crown, including its dispensing with laws"). By 1787, six states—Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia—had state constitutions containing provisions barring the Executive from exercising the suspending or dispensing power. *See* Del. Const. of 1776 Decl. of Rights, § 7 ("That no power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature."); Md. Const. of 1776 Decl. of Rights, § VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); Mass. Const. of 1780 pt. 1, art. XX ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."); N.H. Const. of 1784 pt. 1, art. XXIX ("The power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for."); N.C. Const. of 1776 Decl. of Rights, § V ("That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised."); Va. Const. of 1776 Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."); *see also* Calabresi, Agudo & Dore, *supra*, at 1534. This number soon grew to eight after Pennsylvania added a provision prohibiting the Executive from suspending or dispensing with laws to its constitution in 1790, and Vermont, which already had such a provision in its constitution, became a state in 1791.[37] *See* Pa. Const. of 1790 art. IX, § 12 ("That no power of suspending laws shall be exercised, unless by the legislature, or its authority."); Vt. Const. of 1786 Decl. of Rights, § XVII ("The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for."); *see also* Calabresi, Agudo & Dore, *supra*, at 1535.

Although the Constitution does not contain a provision of its own explicitly prohibiting the Executive from dispensing with laws,[38] it in no way sanctions such action by the Executive for at least two reasons. First, the Constitution separates power among three branches, vesting executive power *exclusively* in the President and legislative power *exclusively* in Congress. *See* U.S. Const. art. I, § 1; U.S. Const. art. II, § 1; U.S. Const. art. III, § 1; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 130 S.Ct. 3138, 3146, 177 L.Ed.2d 706 (2010) ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.' " (quoting *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983))); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949) ("When the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."). Dispensing of laws

AMERICAN OVERSIGHT

is, in effect, a *legislative* power. *See* *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13, 9 L.Ed. 1181 (1838); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (stating that the President does not have the dispensing power, in part, because only Congress has "dominion" over the laws—*i.e.*, the legislative power); *see also* Del. Const. of 1776 Decl. of Rights, § 7; Md. Const. of 1776 Decl. of Rights, § VII; Mass. Const. of 1780 pt. 1, art. XX; N.H. Const. of 1784 pt. 1, art. XXIX; N.C. Const. of 1776 Decl. of Rights, § V; Va. Const. of 1776 Bill of Rights, § 7; Pa. Const. of 1790 art. IX, § 12; Vt. Const. of 1786 Decl. of Rights, § XVII. As such, the Executive does not possess this power. *See* *Kendall*, 37 U.S. (12 Pet.) at 612–13 (stating that giving the President the dispensing power "would be clothing the President with a power entirely to *control the legislation of congress*, and paralyze the administration of justice" (emphasis added)); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids[.]"); *cf.* *Clinton*, 524 U.S. at 438, 118 S.Ct. at 2103 ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

***39** Second, the dispensing power conflicts with the Executive's *duty* to *faithfully* execute the laws. *See* U.S. Const. art. II, § 3. In vesting the executive power in the President,[39] the Constitution requires the President to channel that power to perform certain duties and prescribes how he or she is to carry out those duties.[40] *See id.* One of those duties, contained in the Take Care Clause, is that "he *shall take Care*[41] that the Laws be *faithfully*[42] executed[43] ...."[44] *Id.* (emphasis added) (footnotes added); *see* *Morrison v. Olson*, 487 U.S. 654, 689–90, 108 S.Ct. 2597, 2618, 101 L.Ed.2d 569 (1988) ("The analysis contained in our removal cases is designed ... to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his *constitutionally appointed duty* to 'take care that the laws be faithfully executed' under Article II." (emphasis added) (footnote omitted)); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863, 102 S.Ct. 3440, 3444, 73 L.Ed.2d 1193 (1982) ("The Constitution imposes on the President the *duty* to 'take Care that the Laws be faithfully executed." (emphasis added) (quoting U.S. Const. art. II, § 3)); *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 25, 71 L.Ed. 160 (1926) ("Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his *duty expressly declared* in the third section of the article to 'take care that the laws be faithfully executed.' " (emphasis added)); *see also* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, ____ U.S. ____, ____, 140 S.Ct. 2183, 2228, 207 L.Ed.2d 494 (2020) (Kagan, J., concurring in part) ("To begin with, the provision—'he shall take Care that the Laws be faithfully executed'—speaks of *duty*, not power." (emphasis added) (quoting U.S. Const. art. II, § 3)); Letter from George Washington to Alexander Hamilton[45] (Sept. 7, 1792) (on file with the National Archives) ("It is my *duty* to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it; nor can the Government longer remain a passive spectator of the contempt with which they are treated." (emphasis added)); Letter from John Adams to Roger Sherman[46] (July 18, 1789) *reprinted in* 6 *The Works of John Adams, Second President of The United States* 427, 429–30 (Charles Francis Adams ed., 1851) (stating that it is the President's "*duty* to take Care that the Laws be faithfully executed" (emphasis added)); Saikrishna B. Prakash, *Faithless Execution*, 133 Harv. L. Rev. F. 94, 97 (2020) ("The *duty* to see the laws faithfully executed implies that the President has the power—the executive power—to see the laws faithfully executed." (emphasis added)); Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014) ("To be sure, the President has the *duty* to take care that the laws be faithfully executed." (emphasis added)).

***40** Given this duty to take care that the laws are faithfully executed, the Constitution's system of separation-of-powers, and the treatment of the dispensing power in American history and tradition, the Court is hard pressed, at this early stage of the litigation, to see how the Government can suggest that the Constitution confers upon the Executive the "discretion" to ignore clear congressional commands contained in Sections 1226(c) and 1231(a)(2). *See* *Kendall*, 37 U.S. (12 Pet.) at 612–13 ("It was urged at the bar, that the postmaster general was alone subject to the

AMERICAN OVERSIGHT

direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a *dispensing power*, which has no countenance for its support in any part of the constitution .... To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." (emphasis added)); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (stating that, because the President has the "high duty ... to 'take care that the laws be faithfully executed,' " he must enforce a law in accordance with congressional commands where Congress has "prescribed ... the manner in which [the] law shall be carried into execution"); *Smith*, 27 F. Cas. at 1230 ("The president of the United States cannot control the statute, *nor dispense with its execution*, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government." (emphasis added)); *see also* *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435, 110 S.Ct. 2465, 2477, 110 L.Ed.2d 387 (1990) (White, J., concurring) ("The Executive Branch *does not have the dispensing power* on its own[.]" (emphasis added) (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 505, 35 S.Ct. 309, 325, 59 L.Ed. 673 (1915) (Day, J., dissenting) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." (citing *Kendall*, 37 U.S. (12 Pet.) at 613)); McConnell, *supra*, at 119 ("The Dispensing Power must not be confused with the exercise of prosecutorial discretion. The executive decision not to prosecute a particular person or class of persons for actions in violation of the law does not give them the legal right to violate the law."); Paulsen, Calabresi, McConnell & Bray, *supra*, at 317; Joseph Story, *Commentaries on the Constitution of the United States* 316 (Quid Pro Brooks 2013) (1833) ("[T]he duty imposed upon [the President] to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will 'preserve, protect, and defend the constitution.' The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people."); Kavanaugh, *supra*, at 1911 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch —at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws *regulating the executive branch.*" (emphasis added)); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 620 (1994) (noting that the "Committee of Detail [may have] added the requirement that the President 'take care' that the laws be 'faithfully' executed" out of a "desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it"); Delahunty & Yoo, *supra*, at 797–98 & n.95, 804–09; Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873–74 (1994) ("The duty to execute the laws faithfully means that the President may not —whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection." (footnotes omitted)); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 18 n.80 (1993) (quoting William Rawle, *A View of the Constitution of the United States of America* 148–49 (2d ed. 1829), for the proposition that the Take Care Clause "declares what is [the President's] *duty*" and that "[h]e is *bound* to enforce" the laws (first alteration in original) (emphases added)); William P. Marshall & Saikrishna B. Prakash, *Common Interpretation: Article II, Section 3*, National Constitution Center[47] ("At a minimum, the [Take Care] Clause means that the President may neither breach federal law *nor order his or her subordinates to do so*, for defiance cannot be considered faithful execution. *The Constitution also incorporates the English bars on dispensing or suspending the law*, with some supposing that the Clause itself prohibits both." (emphases added)).

Instead, the Executive—and thus, the Attorney General or the Secretary of DHS—must exercise any discretion accorded to it by statute in the manner which Congress has prescribed. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Vigil*, 508 U.S. at 193, 113 S.Ct. at 2032

AMERICAN OVERSIGHT

("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."); *Heckler*, 470 U.S. at 832–34, 105 S.Ct. at 1656–57; *see also* *Regents*, ____ U.S. at ____, 140 S.Ct. at 1926 (Thomas, J., concurring in part) ("It is axiomatic that an administrative agency's power ... is limited to the authority granted by Congress." (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988))). Accordingly, the Executive Branch, including its agencies, may not dispense with a clear congressional mandate under the guise of exercising "discretion."

d. The Memoranda are not Committed to Agency Discretion

In sum, the Court finds that Sections 1226(c) and 1231(a)(2) impose mandatory detention at specific points in time for certain aliens. The Executive Branch may neither alter these statutory obligations through reprioritization nor dispense with them. Accordingly, the Court concludes that the detention of certain aliens subject to Sections 1226(c) and 1231(a)(2) is not committed to agency discretion.

4. Zone of Interests

The States must next show that their injuries are within the "zones of interest" the two laws were intended to protect. Congress has placed limits on *how* the Executive may be sued for violating the law and *who* can do it. Congress, through the APA, has provided a cause of action for those seeking redress against the federal government for violating other federal laws. *See* 5 U.S.C. §§ 702, 706. But Congress has limited the availability of an APA cause of action to those who allege an injury that is "arguably" within the "zone of interests" to be protected or regulated by the relevant statutes. *Collins v. Mnuchin*, 938 F.3d 553, 573–74 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, ____ U.S. ____, 141 S.Ct. 1761 (2021); *see also* *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (hereinafter "*Match-E*") (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)).

***41** The zone of interests test is not "especially demanding" in the APA context. *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389). Indeed, the Supreme Court has "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389 (quoting *Match-E*, 567 U.S. at 225, 132 S.Ct. at 2210). The zone of interests 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 authorized that plaintiff to sue." *Collins*, 938 F.3d at 574 (quoting *Lexmark*, 572 U.S. at 130, 134 S.Ct. at 1389).

Importantly, the relevant statute in whose zone of interests the plaintiff's injury must reside "is to be determined not by reference to the overall purpose of the Act in question," but rather, "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–76, 117 S.Ct. at 1167. In other words, a court must review those "substantive provisions" of law that the plaintiff relies on for "the gravamen" of its complaint. *Id.*

In this case, the States essentially bring three APA claims asserting that the Government violated federal law: (1) the Memoranda are contrary to Sections 1226(c) and 1231(a)(2) of the INA, (Dkt. No. 1 at ¶¶ 94–107); (2) the policy set forth in the Memoranda is arbitrary and capricious, (*id.* at ¶¶ 108–17); and (3) the Government was required but failed to follow notice and comment procedures in issuing the Memoranda, (*id.* at ¶¶ 118–121).

As in *Texas I*, the Government solely—and narrowly—maintains that "the States do not come within the relevant zone-of-interests" because "no entity can enforce § 1231" because Subsection (h) bars any party from enforcing Section 1231 against the Government.[48] (Dkt. No. 42 at 35–36); *see* (6:21-cv-3, Dkt. No. 83 at 30–32); *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *22–23. For their part, the States briefly address the Government's suppositions, arguing they "fit within the zone of interests both because [the Government is] wrong about Section 1231(h) and for the

AMERICAN OVERSIGHT

reasons this Court has already explained" in *Texas I*. (Dkt. No. 51 at 29) (citing *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *23–29). The Court agrees with the States.

For starters, the Government cannot refute the States' position that their injuries are within the zones of interests of Sections 1226(c) and 1231(a)(2), particularly in light of this Court's discussions of *Demore* and *Zadvydas* concerning the development and purpose of Sections 1226 and 1231. *See supra* I.A, II.B.1 & II.B.3. This discussion makes clear that Sections 1226(c) and 1231(a)(2)—and indeed the INA itself, *see* *Texas DAPA*, 809 F.3d at 163 & n.80—were enacted to protect and benefit the states, the citizens of this country, and the legal immigrants of the United States. *See supra* I.A, II.B.1 & II.B.3. As such, the injuries the States suffer due to the Memoranda, *see supra* II.A.1–4, fall within the relevant statutes' zones of interests. *See* *Texas DAPA*, 809 F.3d at 163 (finding that Texas satisfies the zone-of-interest test as a result of the same injuries that give Texas Article III standing).

***42** The Government, indeed, does not dispute that the States' injuries fall within Sections 1226(c) and 1231(a)(2)'s zones of interests. Rather, the Government focuses its attention on Section 1231(h), in essence arguing that because Subsection (h) bars parties from enforcing Section 1231, any injury stemming from violations of the section does not fall within the statute's zone of interests. *See* (Dkt. No. 42 at 35–36). But, as explained earlier, Section 1231(h) does not bar the States' claims. *See supra* II.B.1; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *29–30 & n.42. Thus, the Government's lone contention fails. The Court finds that the States' injuries fall within the zones of interest of Sections 1226(c) and 1231(a)(2).

III. DISCUSSION OF PRELIMINARY INJUNCTION

Having determined the Court has jurisdiction over the action and nothing precludes judicial review under the APA, the Court now turns to the merits of the States' Motion for Preliminary Injunction.

A. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, ____ U.S. ____, ____, 138 S.Ct. 1942, 1943, 201 L.Ed.2d 398 (2018) (quotation omitted). Indeed, the decision to grant a preliminary injunction is "to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Thus, "[i]n each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008) (quotation omitted). And in determining whether injunctive relief is proper, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*

A preliminary injunction "issue[s] only where (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). As such, "[t]he party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated" in order for a preliminary injunction to be granted. *Id.*

Note, however, that "none of the four prerequisites has a fixed quantitative value." *Texas v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975). "Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id.* (citing *Siff v. State Democratic Exec. Comm.*, 500 F.2d 1307 (5th Cir. 1974)). For instance, "a preliminary injunction does *not* follow as a matter of course from a plaintiff's showing" of the first element, "a likelihood of success on the merits." *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1943–44 (emphasis added). Thus, federal courts must consider whether the movant has established the three other elements as well for a preliminary injunction to issue. *Id.* at ____, 138 S.Ct. at 1944.

B. APPLICATION

AMERICAN OVERSIGHT

1. Substantial Likelihood of Success on the Merits

a. Counts I & II: Contrary to Law

As described above, the Court determined that "shall" in Sections 1226(c) and 1231(a)(2) means "must." *See supra* II.B.3.a. This conclusion means that the Attorney General must detain certain aliens subject to those sections. The Court also found that both statutes mandate detention of certain aliens at specific points in time: for Section 1226(c), the Attorney General is required to detain certain aliens "when the alien is released from custody," while for Section 1231(a)(2), the Attorney General is obligated to detain certain aliens "during the removal period." The policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur. This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2). Thus, the States have demonstrated a substantial likelihood of success on Counts I & II.

b. Count III: Arbitrary and Capricious

***43** The States argue that the Government's Memoranda establishing new guidelines and priorities for the detention of certain aliens are arbitrary and capricious because they "failed to consider important aspects of a problem." (Dkt. No. 18 at 28). Specifically, the States allege that the Memoranda: (1) "failed to consider the risks of recidivism among criminal aliens who are not detained;" (2) "ignore the effects non-detention will have on future removal efforts," especially on the costs that delays in deportation often produce and the rate of abscondment of released aliens; (3) "do not discuss the costs that [the new guidance] will impose on [the] States;" (4) "did not consider more limited policies that would have retained congressionally mandated detention of criminal aliens and those with final orders of removal;" and (5) "do[ ] not explain Defendants' choice[ ]"of prioritizing the detention of aliens who have aggravated felonies over others who have committed drug offenses and crimes of moral turpitude or those with final orders of removal. (*Id.* at 27–29). The Government disagrees with the States' contentions. Countering the States point-by-point, the Government argues that it "considered the relevant factors and reached a reasonable decision." (Dkt. No. 42 at 42–47). Reviewing these assertions, the Court finds the States have demonstrated a substantial likelihood of success in establishing that the policy set forth in the Memoranda is arbitrary and capricious as alleged in Count III.

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). With that in mind, federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 826, 139 L.Ed.2d 797 (1998) (internal quotation omitted). This necessarily means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be *logical and rational*." *Id.* (emphasis added). More specifically, "the 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.*' " *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)) (emphasis added).

When final agency action is challenged as arbitrary and capricious, "[t]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989) (internal quotations omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. If a court finds that an administrative agency failed to engage in reasoned decision-making, the reviewing court "shall hold unlawful and set aside" such "agency action, findings, and conclusions" as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

AMERICAN OVERSIGHT

"Because the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.' " *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) (quoting *State Farm*, 463 U.S. at 50, 103 S.Ct. at 2870). As such, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[49] *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). The administrative record need only "indicate[ ] the determinative reason for the final action taken," *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973), and courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974).

***44** Finally, the Court is mindful that the arbitrary and capricious standard is "highly deferential." *Garner*, 767 F.2d at 116. Courts must "accord the agency's decision a presumption of regularity" and "are prohibited from substituting [the courts'] judgment for that of the agency." *Id.* (citation omitted). But "while the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *Id.* Based on the following, the Memoranda fail to indicate that the Government engaged in reasoned decision-making, thereby rendering them arbitrary and capricious.

At their core, the Memoranda reprioritize certain classes of aliens for immigration enforcement action. In the February 18 Memorandum specifically, the Government states that it is establishing enforcement and removal guidelines with respect to immigration enforcement and removal priorities pursuant to the January 20 Memorandum.[50] *See* (Dkt. No. 19-2 at 5). As discussed above, if a criminal illegal alien falls under a category deemed to be a priority, no preapproval is required for an enforcement or removal action. On the other hand, if the criminal illegal alien does not fall under any of the categories, an enforcement or removal action "will require preapproval." (*Id.* at 7). The Memorandum states that "ICE operates in an environment of limited resources," and thus, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." (*Id.* at 3). In addition to "resource constraints," "several other factors," according to the Memorandum, "render ICE's mission particularly complex." These factors include "ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal." (*Id.*). Given these considerations, the Memorandum states that the Government "must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission." (*Id.* at 4).

As described here, the February 18 Memorandum indeed enumerates quite a few factors that make the Government's "mission particularly complex" in this field. But the Memorandum itself does not directly state whether these factors were considered while the Government was actually formulating the guidance in question. Assuming they were considered and were the bases for the new guidance, *see* *Pitts*, 411 U.S. at 143, 93 S.Ct. at 1244, the February 18 Memorandum (along with its predecessor, the January 20 Memorandum) still does not demonstrate reasoned decision-making. The February 18 Memorandum does not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued. In short, both Memoranda fail to establish any rational connection or logical link between any of these factors and the new guidance. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866.

***45** First, the February 18 Memorandum does not offer even a brief explanation of how "ongoing litigation in various fora" affected the Government's decision-making in promulgating the new guidance. It is simply a vague and conclusory statement. Did the Government mean to say that *Texas I* or other pending cases were considered when crafting the new guidance? If so, how did the disposition of *Texas I* or other cases affect the reprioritization? Those questions have yet to be answered.

Second, the Government's stated responsibility and desire to ensure that eligible aliens may be afforded relief from removal is commendable but likewise lacks any rational connection with the new guidance. The new guidance reprioritizes the detention and deportation of criminal illegal

AMERICAN OVERSIGHT

aliens. But the February 18 Memorandum does not explain how or why prioritizing, for instance, the detention or deportation of "border security risks" (aliens who entered the country on or after November 1, 2020) over aliens who have drug offenses or crimes of moral turpitude would ensure that eligible noncitizens will obtain relief in their own removal proceedings. There does not seem to be any connection between reprioritizing the detention and removal of certain aliens to whether other aliens may be afforded legally authorized relief from deportation. The February 18 Memorandum does not shed light on this disconnect.

Third, although the Court acknowledges as a general matter that interactions and relationships with other sovereign nations "may place constraints" on the Government's ability to "execute final orders of removal," *see* (Dkt. No. 19-2 at 4), there is no rational link between any of these factual constraints to the reprioritization scheme the Government has chosen to pursue. For example, do these international relationships make it more inefficient to deport aliens with drug offenses over so-called "national security risks" or "border security risks"? If so, what are the facts that justify such conclusions? Those questions are also unanswered. Like the considerations described above, the Memorandum does not state any facts or findings with respect to why international relations apparently factored in the Government's decision-making.

Lastly, the Government's written concern for the health and safety of ICE workers in the midst of the COVID-19 pandemic is not rationally relevant to the new guidance. Will COVID-19 infections among the ICE workforce be substantially reduced if the Government prioritizes the deportation of one category of criminal illegal aliens over another? How does reprioritization alleviate those health concerns, if any? On these points the February 18 Memorandum is, unfortunately, silent.

The Court further notes that, out of all these considerations, the cursory use of the COVID-19 pandemic to justify the new guidance comes across as implausible. Throughout the last year, institutions, including federal and state governments, have used the pandemic to rationalize policies found to be unlawful or unconstitutional. *See, e.g., Chrysafis v. Marks*, ____ U.S. ____, 2021 WL 3560766 (U.S. Aug. 12, 2021) (enjoining the part of New York's COVID Emergency Eviction and Foreclosure Prevention Act that precluded landlords from contesting a tenant's self-certification of financial hardship on the grounds that "no man can be a judge in his own case" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955))); *Tandon v. Newsom*, ____ U.S. ____, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam) (enjoining California officials from enforcing occupancy limits on at-home religious exercise in response to COVID-19 when other policies treated comparable secular activities that did not pose a lesser risk of transmission more favorably); *Roman Cath. Diocese v. Cuomo*, ____ U.S. ____, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam) (enjoining the Governor of New York from enforcing occupancy limits on religious services in response to COVID-19 that would have violated the Free Exercise Clause of the First Amendment); *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 289 (D.D.C. 2020) (finding that the District's COVID-19-related prohibition of religious gatherings of more than 100 people, even those with appropriate precautions, substantially burdens the plaintiff's exercise of religion in violation of the Religious Freedom Restoration Act). And now the Government has added immigration to the mix.

***46** The Government used the pandemic to reason that the January 20 Memorandum's 100-day pause on removals—the precursor to the February 18 Memorandum—was borne out of reasoned decision-making. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40. But, as the Court noted in *Texas I*, the U.S. Department of Health and Human Services Centers for Disease Control and Prevention ("CDC"), on October 13, 2020, authorized the CDC Director "to suspend the right to introduce persons into the United States" because of the COVID-19 pandemic. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *40 & n.46 (citing CDC, *Order Suspending Introduction of Certain Persons Where a Communicable Disease Exists*, (Mar. 20, 2020), available at https://bit.ly/3736Lue (updated Oct. 2020)). The relevant CDC Order "applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to [certain] exceptions." *Id.* Considering the CDC Order, the Government's new guidance is puzzling. The new guidance effectively introduces and keeps more people—specifically, criminal illegal aliens—in the Nation's communities. But, per the CDC Order, the COVID-19 pandemic would likely justify a different course of action. Throughout this time, the Government has not introduced any further papers or discussed anything in the February 18 Memorandum that

AMERICAN OVERSIGHT

show it is following different health guidelines related to COVID-19 that speak to the safety of introducing aliens into the country and its communities. The February 18 Memorandum likewise does not grapple with or otherwise explain how the new guidelines are consistent with these CDC policies. Thus, like in *Texas I*, the Government's consideration of the COVID-19 pandemic not only is implausibly connected to the new guidance, it also "runs counter to the evidence before the agency." *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. In other words, the Government cannot use the pandemic as a blanket reason—devoid of explanation—to justify its choices, especially when these choices run afoul of another agency's published health directives. [51]

"[A]gency action must be based on *non-arbitrary, relevant* factors." *Judulang v. Holder*, 565 U.S. 42, 55, 132 S.Ct. 476, 485, 181 L.Ed.2d 449 (2011) (internal quotation omitted) (emphasis added). In this case, the factors apparently considered in the February 18 Memorandum and its predecessor, the January 20 Memorandum, are, after a thorough review, arbitrary and irrelevant to the new guidance. The link between the new guidance and the factors enumerated are so contradictory to the evidence and "implausible" that the States' challenge cannot be said to be differing policy preferences or views. *See* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009) (explaining that when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account, [i]t would be arbitrary or capricious to ignore such matters," and "[i]n such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" (internal citation omitted)); *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.' " (quoting *Chenery*, 332 U.S. at 196, 67 S.Ct. at 1577)); *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n*, 2 F.4th 421, 452 (5th Cir. 2021) (explaining that, when considering an agency's cost-benefit analysis in the scope of the arbitrary and capricious standard, the Court's "job 'is not to undertake [its] own economic study, but to determine whether the [agency] 'has established in the record a reasonable basis for its decision' " (quoting *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 251 (5th Cir. 1989))); *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) ("The agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866)); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (noting the Court must "ensure that the agency examined the relevant data and articulated a satisfactory explanation for its action, and assess whether the agency's decision was based on a consideration of the relevant factors" (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (cleaned up)). Thus, the Court finds that the Government failed to engage in the reasoned decision-making required by law.

***47** What's more, while the Government argues it actually did consider certain relevant factors in crafting the new guidelines (thus engaging in reasoned decision-making), the Court finds that the Government's briefs actually establish that it *did not* consider those factors. To begin with, "*[p]ost 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, 103 S.Ct. [at 2870]). Therefore, this Court finds it inappropriate to consider each of the Government's arguments in their briefing that were not included in the Memoranda. Even assuming they were relevant, however, the Government's in-brief explanations are meritless.

First, the Government states that it considered the prospect of recidivism when crafting the new guidance found in the February 18 Memorandum. (Dkt. No. 42 at 44). Specifically, the Government alleges that "DHS weighed the threat to public safety from criminal noncitizens reoffending in prioritizing certain noncitizens for removal." (*Id.*). In support, the Government cites to passages from the February 18 Memorandum that, according to the Government, (a) "focused on the degree of threat to public safety" the "different criminal noncitizens presented," which, apparently, is akin to considering the risk of recidivism; and (b)

AMERICAN OVERSIGHT

allowed immigration officers, in making "individualized determinations" for enforcement and removal, to "consider public interest factors, which include the risk of recidivism." *See* (*Id.* at 44). These points miss the mark entirely.

With respect to the first, the Government's decision to "focus[ ] on the degree of threat to public safety" establishes that the Government either did not consider the risk of recidivism or created a policy contrary to the evidence before it. In their claim, the States argue that, in choosing which policy to pursue, the Government did not consider the risks of recidivism of *all* criminal aliens. *See* (Dkt. No. 18 at 44). Indeed, the Supreme Court has stated that "*deportable* criminal aliens who remained in the United States"—notably *not* a certain subset or category of such aliens—"often committed more crimes before being removed." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715 (emphasis added); *see also* *Zadvydas*, 533 U.S. at 713–714, 121 S.Ct. at 2511 (Kennedy, J., dissenting) (discussing rates of recidivism for released criminal aliens and their threat to public safety, noting the "high recidivism rates for released aliens"). Despite the Supreme Court's recognition of the risks deportable criminal aliens pose, the February 18 Memorandum requires prioritization of criminal aliens who *both* pose a threat to public safety *and* have had a prior aggravated felony conviction or criminal gang affiliation. *See* (Dkt. No. 19-2 at 5–6). The States correctly point out that by prioritizing certain aliens, the Memorandum "omit[s] aliens" who are solely "threats to public safety," in other words, potential recidivists. (Dkt. No. 51 at 14). Nothing in the February 18 Memorandum explains that criminal illegal aliens who are only "threats to public safety" are at a much lower risk of recidivism compared to criminal aliens who have had prior felonies or criminal gang convictions. Put differently, the new guidelines do not establish that the Government considered recidivism since the reprioritization leaves so many other "deprioritized" criminal illegal aliens free to recidivate—to harm the public. And crucially, the Government has not rebutted or clarified the well-established concept that *all* criminal illegal aliens or "deportable aliens pose high risks of recidivism." *See* *Demore*, 538 U.S. at 518, 123 S.Ct. at 1715. Instead, the February 18 Memorandum, without any support or evidence, implements new guidelines stemming from an idea that it is merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations—who have a much higher risk of recidivism. Such a *conclusion* is without any foundation in the record and shows that the Government either failed to consider recidivism as a factor in its decision-making or it explained its decision in a manner which contradicts the evidence before it. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867.

***48** Moreover, it is irrelevant whether immigration officers have the capability, pursuant to the February 18 Memorandum, to "consider public interest factors" that "could" include the risk of recidivism. *See* (Dkt. No. 42 at 44). Arbitrary and capricious review calls for the Court to examine the rationality of agency decision-making and not the actual decision. *Garner*, 767 F.2d 104 at 116. Even if the new guidelines give some leeway to immigration officers to consider "public interest factors," this does not establish that the Government considered the risk of recidivism when crafting the new guidelines. As the Government frankly admits, the Memoranda "do not use the term 'recidivism' " anywhere. (Dkt. No. 42 at 44). The February 18 Memorandum is, thus, devoid of any references to recidivism or other statements tending to show that the risk of recidivism that criminal illegal aliens pose was considered when drafting the new policy.

Second, the Government asserts that it has limited resources and must prioritize certain enforcement and removal actions under Section 1226(c). (*Id.* at 45). But, as the States point out, this contention "dodges the key issue" of whether the Government actually considered the effects of the new guidelines to costs of delaying deportations and the overall rate of abscondment of criminal illegal aliens. (Dkt. No. 51 at 15); (Dkt. No. 18 at 27–28). The costs of the non-detainment of criminal aliens are substantial. For instance, in the past, "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." *Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14. Even "[c]ourt ordered release" itself "cannot help but encourage dilatory and obstructive tactics by aliens." *Zadvydas*, 533 U.S. at 713, 121 S.Ct. 2491 (Kennedy, J., dissenting). "An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility." *Id.* And following this line, a Senate Report from 1995 noted that "[d]elays" in deportation "can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U.S. citizenship." S. Rep. No. 104–48, at 2 (1995). The costs from non-detainment rival the costs of abscondment. The same Senate Report found that "[o]ver

AMERICAN OVERSIGHT

20 percent of nondetained criminal aliens fail to appear for deportation proceedings." *Id.* This Court, as well, found the rate of abscondment to be substantial even for aliens who have been "thoroughly vetted" in order for them to be placed in an "alternative to detention program." *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *19. Even in light of these effects and costs, the February 18 Memorandum is silent on whether these were considered while crafting the new guidelines. The Court, therefore, finds that the Government failed to consider this relevant factor.

Third, the Government argues that, with regard to the additional costs the States will incur, "the States are wrong to argue that DHS was required to expressly evaluate the costs to each State," and, regardless, the Government "did consider how the Priority Framework would impact public safety ... which should reduce the costs from crime to the States." (Dkt. No. 42 at 45–46). Rephrased, the Government argues that state costs and expenses are not relevant factors, but, nevertheless, the February 18 Memorandum indirectly considered them since it factored in the new guidelines' impact to public safety. The Government is incorrect on both issues.

State costs and expenses are, indeed, relevant factors. That was the case in *Texas I, see* ____ F. Supp. 3d at ____, 2021 WL 2096669, at *41, and the Government takes issue with the Court's prior holding, *see* (Dkt. No. 42 at 46 & n.16). Thus, to be clear, a more descriptive analysis of the caselaw is in order.

***49** As stated earlier, an "agency rule would be arbitrary and capricious" if the relevant agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. The Supreme Court has noted that immigration "ha[s] a discernable impact on traditional state concerns," owing to the fact that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Plyler*, 457 U.S. at 228, n.23, 102 S.Ct. at 2400, n.23 (citing *DeCanas v. Bica*, 424 U.S. 351, 354–56, 96 S.Ct. 933, 935–36, 47 L.Ed.2d 43 (1976)). Indeed, immigration policy is important to the states since they "bear[ ] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500. Obviously, as *Plyler* noted, some of those problematic consequences stem from a newly promulgated immigration policy's effect on the state's economy and its services; in other words, state costs and expenses. *See Texas DAPA*, 809 F.3d at 153 (holding that Texas had standing to challenge the federal government's DAPA policy in part because the policy "would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone" and "would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury"). In *Regents*, for instance, the Supreme Court held that the federal government's recission of its DACA policy was arbitrary and capricious in part because the government failed to consider the loss of state and local tax revenue stemming from the policy's rescission. ____ U.S. at ____, 140 S.Ct. at 1914. Along with a few other concerns, the Supreme Court characterized the loss of local and state tax revenue as "noteworthy," but "not necessarily dispositive." *Id.* Nevertheless, the Supreme Court found that the federal government needed to *consider* that factor—along with many others—and weigh them all together to ultimately decide whether to retain DACA or not. *Id.* As in this case, "[m]aking that difficult decision was the agency's job, but the agency failed to do it." *Id.*

Further, the Supreme Court has indicated that, in the context of immigration policy, an agency's approach to decision-making "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 565 U.S. at 55, 132 S.Ct. at 485. One broad purpose of immigration law and policy is to minimize the costs and expenses related to the presence of illegal aliens in the country. *See Demore*, 538 U.S. at 530 n.14, 123 S.Ct. at 1721 n.14 (noting that "prior to the enactment of 8 U.S.C. § 1226(c)," a vast majority of deportable criminal aliens were free during their deportation proceedings and many filed frivolous appeals to delay deportation); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. 1995) (noting 8 U.S.C. § 1252(i) (1986) was enacted "to ease financial burdens on federal, state and local prisons resulting from lengthy detention of aliens awaiting deportation"); *Giddings v. Chandler*, 979 F.2d 1104, 1109 (5th Cir. 1992) (noting that the main purpose of Section 1252(i) was to "reduc[e] prison overcrowding and cost to the government"); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990) (explaining that Section 1252(i) was enacted because there was a concern in Congress with prison overcrowding in "local and State jails"). While the Government is correct that immigration policy "affect[s]

AMERICAN OVERSIGHT

trade, investment, tourism, and diplomatic relations," among other things, *see* (Dkt. No. 42 at 46, n.16) and *Arizona*, 567 U.S. 387 at 395, 132 S.Ct. at 2498, that list of considerations is not exhaustive. Therefore, the Court finds the Government's argument that it need not consider the States' costs and expenses stemming from the new guidelines to be without merit.

Likewise, the Court finds that the Memoranda did not consider the States' costs and expenses even though, according to the Government, DHS considered the new guidelines' impact to public safety. In fact, the Memoranda did not consider or failed to substantially consider the new guidelines' effects on public safety. Indeed, both Memoranda are devoid of explanation as to how or why prioritizing the detention or deportation of some criminal illegal aliens, while effectively delaying the detention or deportation of and releasing so many other criminal illegal aliens, positively impact public safety. Moreover, the Memoranda provide no indication that any relevant data or facts were considered in ultimately concluding that the public will be safer by releasing more criminal illegal aliens into communities from detention while fewer are detained or deported. *See* *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866 (explaining that an agency "must examine the relevant data" in order to explain its policy choices).

***50** Additionally, even if the Government did consider public safety, the Memoranda—and the February 18 Memorandum most crucially—do not state or explain how that consideration connects with concerns regarding state costs and expenses. The Government in its brief argues that, by focusing its "limited resources" on enforcement actions against "the most significant threats to public safety," the Memoranda "should reduce the costs from crime to the States." (Dkt. No. 42 at 46). Leaving aside that the new guidelines practically provide for the non-detention of many criminal illegal aliens who are not within the ambit of any of the prioritized categories, the Government's assertion still fails. "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87, 63 S.Ct. at 459. And the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime.

Next, the Government argues that, contrary to the States' allegations, DHS "need not 'consider all policy alternatives in reaching [its] decision.' " (Dkt. No. 42 at 46) (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2870). Instead, the Government states that "it need only 'consider the alternative[s] that are within the ambit of the existing [policy].' " (*Id.*) (quoting *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913). In this case, per the Government, "the States fail to identify a single policy alternative" that would be "within the ambit of existing policy," or would otherwise be "obvious," "significant and viable." (*Id.*) (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013)). The Court disagrees with the Government's contentions.

The States do propose that, instead of the prioritization scheme found in the February 18 Memorandum, the Government should have considered policies "that would have retained congressionally mandated detention of criminal aliens and aliens with final orders of removal." (Dkt. No. 18 at 28). The foregoing is simply asking that the Government follow the law.[52] Of course, such policies are "within the ambit of existing policy." After all, the February 18 Memorandum states that its reprioritization scheme "covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning," (Dkt. No. 19-2 at 2), and congressional statutes mandating the detention of aliens go to the explicit focus of the Memorandum. *See* *State Farm*, 463 U.S. at 51, 103 S.Ct. at 2871. But despite all this, the February 18 Memorandum never considered the limited policies the States proposed. It failed to discuss how a policy enabling the Government to detain all criminal illegal aliens subject to congressional mandates compares with the opted-for guidelines. It did not even state whether the new guidelines even considered *any* other policy. In short, the Government did not grapple with or provide any alternatives when it was required to do so. *See* *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913 ("*State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis *must* consider the 'alternative[s]' that are 'within the ambit of the existing [policy].' " (citing *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856) (emphasis added)). "That omission alone" makes the new guidelines arbitrary and capricious. *Regents*, ____ U.S. at ____, 140 S.Ct. at 1913.

***51** Lastly, the States argue that the February 18 Memorandum failed to rationally explain why criminal

AMERICAN OVERSIGHT

illegal aliens who have committed aggravated felonies or who are affiliated with criminal gangs are prioritized over other criminal illegal aliens and aliens with final orders of removal. (Dkt. No. 18 at 29). The Government responds that the Memorandum "provides a clear, rational justification for prioritizing" such aliens. (Dkt. No. 42 at 43–44). As the Government writes, "the former category presumptively presents a more significant threat to public safety." (*Id.*). In mandating the detention of criminal aliens convicted of serious drug offenses, crimes of moral turpitude, and some other specified offenses, *see* 8 U.S.C. § 1226(c), as well as aliens with final orders of removal during the removal period, *see* 8 U.S.C. § 1231(a)(2), Congress did not differentiate among certain "types" or "categories" of deportable and detainable persons. These laws plainly mandate the detention of *all* the deportable criminal aliens subject to the relevant statutes. The new guidelines directly go against these congressional mandates, opting instead to prioritize certain criminal illegal aliens' detention and deportation over others because of an assertion that such aliens "presumptively present[ ] a more significant threat to public safety" than "one million noncitizens with final orders of removal," (Dkt. No. 42 at 44), and—necessarily—other criminal aliens with convictions for drug offenses or crimes of moral turpitude. But the February 18 Memorandum does not ground this otherwise unsupported assertion. It does not even explain or state how it considered, compared, and ultimately concluded that criminal illegal aliens of a certain category must be prioritized over others. Despite Sections 1226(c) and 1231(a)(2), nowhere in the February 18 Memorandum do the new guidelines even contemplate the prioritization of these "other" criminal illegal aliens. As the States correctly surmise, "[t]he very reason the February 18 Memorandum provides for prioritizing aggravated felonies also supports prioritizing drug offenses, crimes of moral turpitude, and final orders of removal." (Dkt. No. 18 at 29). Without more explanation grounded on relevant data and facts, it is unknown why the priorities were implemented in that way. The new guidance, therefore, indeed appears to be the product of arbitrary and capricious decision-making.

In sum, the Government's failure to rationally explain and connect the basis for the new guidance, along with the Government's failure to consider certain relevant factors and alternative policies, establish that there is a substantial likelihood that the reprioritization is an arbitrary and capricious policy. As the above discussion shows, the Government certainly did not engage in reasoned decision-making as required by the APA. The Court therefore finds that the States have established a substantial likelihood of success on this claim.

c. Count IV: Notice and Comment Rulemaking

The States' next claim is similar to one Texas raised in *Texas I*. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *42–47. In *Texas I*, this Court enjoined Section C of the January 20 Memorandum, in part, because Section C did not undergo notice and comment as required by the APA. *See id.* In this case, the States ask this Court to enjoin Section B of the January 20 Memorandum and the February 18 Memorandum for the same reason. The States argue that "[t]he January 20 and February 18 Memoranda are subject to notice and comment rulemaking because they are substantive or legislative rules." (Dkt. No. 18 at 30). The Government disagrees, raising nearly identical arguments to those it raised in *Texas I*. *See* (Dkt. No. 42 at 47). Namely, the Government contends that the Memoranda are exempt from the APA's notice and comment requirement as "general statement[s] of policy" or, alternatively, as "procedural rules." (*Id.*). For the following reasons, the Court disagrees with the Government's characterizations of the Memoranda and finds that the States have a substantial likelihood of success on the merits of their procedural APA claim.

Rulemaking under 5 U.S.C. § 553

As in *Texas I*, no Party disputes that the Memoranda are rules of some kind and, therefore, that the rulemaking provisions of the APA apply.[53] *See* (Dkt. No. 18); (Dkt. No. 42); *see also* ___ F. Supp. 3d at ____, 2021 WL 2096669, at *42. Nor does any Party contend that the Memoranda underwent any notice and comment. (*Id.*). The question, then, is whether the Memoranda are the type of rules that *should* have undergone notice and comment but did not.

The Court begins with an overview of the APA's notice and comment requirement and the exceptions thereto. The APA requires rules to undergo notice and comment unless they are exempt. *See* 5 U.S.C. § 553.[54] Section 553 sets forth two such categories of exemptions to the notice and comment requirement, one of which is relevant to this case. *Id.* § 553(b). That category exempts "interpretative rules,

AMERICAN OVERSIGHT

general statements of policy, or *rules of* agency organization, *procedure*, or practice" from notice and comment. *Id.* § 553(b)(A) (emphases added). Thus, if an agency proposes a rule that is either a general statement of policy or a procedural rule, the agency is not required to conduct notice and comment on the proposed rule. *See id.*

***52** The Fifth Circuit has made clear that exemptions to the notice and comment requirement "must be narrowly construed." *Texas DAPA*, 809 F.3d at 171. A narrow reading of the exemptions safeguards the vital interests notice and comment is intended to protect. *See* *Dep't of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984) ("Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." (quotations omitted)). Indeed, notice and comment ensures that those affected by a proposed rule have a voice in the rule-making process and assist the agency in crafting rules that better account for the costs and benefits of agency action. *See* *id.* at 1153. *But see id.* ("Inevitably, in determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension.").

In harmony with the Fifth Circuit's warning to narrowly construe exemptions to APA's procedural strictures, the Supreme Court has recognized that states like Louisiana and Texas offer important perspectives on illegal immigration issues. *See* *Arizona*, 567 U.S. at 397, 132 S.Ct. at 2500 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."); *see also* *Texas DAPA*, 809 F.3d at 163. States can assist an agency in crafting rules addressing important immigration issues. Mindful of the importance of notice and comment in this context, the Court now considers whether the reprioritization scheme contained within the Memoranda is exempt from the notice and comment requirement as either a general statement of policy or as a procedural rule.

General Statement of Policy

The Court first considers whether the Memoranda are general statements of policy. If so, notice and comment is not required. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see also* 5 U.S.C. § 553(b)(A). "In analyzing whether an agency pronouncement is a statement of policy or a substantive rule, the starting point is the agency's characterization of the rule." *Shalala*, at 596. As in *Texas I*, the Court would likely be convinced that the Memoranda are general statements of policy if it could rely on the Government's characterization of the Memoranda alone. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *43. Both the Government in its brief and the Memoranda themselves declare that the Memoranda are mere statements of policy. (Dkt. No. 42 at 47–49); (Dkt. No. 19-1); (Dkt. No. 19-2). Indeed, the January 20 Memorandum explicitly declares that it "should be considered Department-wide *guidance*[.]" (Dkt. No. 19-1 at 2) (emphasis added). The January 20 Memorandum also states that the "guidelines and priorities" contained therein "are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party[.]" (*Id.* at 5).

The February 18 Memorandum contains similar language. It begins by declaring that it "establishes interim *guidance*[.]" (Dkt. No. 19-2 at 2) (emphasis added). The February 18 Memorandum goes on to say that "[t]hese guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 8).

But an agency's characterization of its rule is just that—its *own* characterization. Indeed, "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. 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." *Azar v. Allina Health Servs.*, ____ U.S. ____, ____, 139 S.Ct. 1804, 1812, 204 L.Ed.2d 139 (2019) (emphasis in original). The Fifth Circuit, too, cautions courts to be "mindful but suspicious of the agency's own characterization." *Texas DAPA*, 809 F.3d at 171 (quotation omitted). The Fifth Circuit therefore demands more of a district court than simply taking an agency at its word when determining whether the challenged rule is a general statement of policy or a substantive rule requiring notice and comment. *See* *Shalala*, 56 F.3d at 596 ("The label that the particular agency puts upon its given exercise

AMERICAN OVERSIGHT

of administrative power is not, for [this court's] purposes, conclusive; rather, it is what the agency does in fact.").

***53** Specifically, the Fifth Circuit instructs district courts to also "evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (quotation omitted).[55] The Fifth Circuit has acknowledged that "[t]here is some overlap in the analysis of those prongs because if a statement denies the decisionmaker discretion in the area of its coverage ... then the statement is binding and creates rights or obligations." *Id.* (cleaned up). Moreover, these "criteria" are merely intended to guide a court in "fathom[ing] the interpretative/legislative distinction." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). In other words, "[t]hese 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*, 328 F. Supp. at 730 (citing *Am. Bus Ass'n v. United States*, 627 F.2d 525, 530 (D.C. Cir. 1980)).[56] The Court now weighs these criteria to determine whether the Memoranda are general statements of policy or substantive rules requiring notice and comment.

The Court first considers whether the Memoranda impose any rights or obligations. *See* *Texas DAPA*, 809 F.3d at 171. In doing so, the Court is mindful that "a substantive rule—or a legislative-type rule, is one that affects individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979) (citation and quotation omitted) (cleaned up). "This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' " *Id.* (citation omitted).

At the outset, it is worth noting that the Court has extensively described how the Memoranda affect rights and obligations in its analysis on whether the Memoranda constitute final agency action. *See supra* II.B.2. As a review, the Memoranda affect rights and obligations in at least three ways. First, the February 18 Memorandum commands that DHS abdicate its obligations under Sections 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. *Compare* §§ 1226(c) and 1231(a)(2) *with* (Dkt. No. 19-2 at 4–7).

Second, the Memoranda also create financial obligations for Texas that would not have existed but for the Memoranda. Based on the record, Texas will be required *by law* to bear some of the cost of providing Emergency Medicaid to eligible aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2). *See supra* II.B.2.b. The legal obligation to provide these aliens with these services would not exist if deprioritized aliens were taken into federal custody at the time of their release from state custody as mandated by Section 1226(c), or if they were detained during the removal period, as required by Section 1231(a)(2).

***54** Finally, as described above, the Memoranda affect the rights of some aliens already in detention. *See supra* II.B.2.b. As another court has already found, the Memoranda make a nonpriority alien's removal "unlikely to be imminent." *See Hussein S.M.*, 2021 WL 1986125, at *3. This status, in turn, entitles certain aliens to release from detention. *See id.*; *see also* *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. That is an effect on rights.

For these reasons, the Court finds that the Memoranda affect the rights and obligations of those within the Memoranda's regulatory sphere—DHS, the states, and certain aliens. This consideration weighs against finding that the Memoranda are general statements of policy.

Next, the Court considers whether the Memoranda give the agency and its decisionmakers sufficient discretion to be considered a general statement of policy. They do not.

"General statements of policy" are those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197, 113 S.Ct. at 2034 (quotations omitted). The Fifth Circuit has described the inquiry for determining whether a rule gives an agency and its decisionmakers sufficient discretion to be classified as a general statement of policy:

> The key inquiry ... is the extent to which the challenged policy leaves the

AMERICAN OVERSIGHT

> agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Shalala, 56 F.3d at 596–97 (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, 466 U.S. 927, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984)). Applying this inquiry to the Memoranda, the Court is of the opinion that the amount of discretion they afford is insufficient for them to be classified as general statements of policy.

The core feature of the Memoranda is their prioritization of immigration enforcement actions for some classes of aliens to the exclusion of others. The Memoranda state explicitly that "[e]nforcement and removal actions [against aliens who fall within] the [priority groups] described ... are *presumed* to be a justified allocation of ICE's limited resources." *See, e.g.*, (Dkt. No. 19-2 at 4–6) (alterations added) (emphasis added). And although the February 18 Memorandum purports to say that actions against nonprioritized aliens "may also be justified" and that "the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen," an agent's discretion in this regard appears so constrained as to be illusory. (*Id.* at 4). Specifically, the February 18 Memorandum stipulates that "[*a*]*ny* civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases *will require* preapproval from the [Field Office Director (FOD)] or [Special Agent in Charge (SAC)]." (*Id.* at 7) (emphasis added). The preapproval constraint *greatly* constricts the normal discretion ICE agents enjoy while exercising their statutory and regulatory duties on behalf of the agency. *See* (Dkt. No. 19-4 at ¶ 29) ("This policy requires field agents to obtain special permission before engaging in routine enforcement."); *cf.* 8 U.S.C. § 1357; 8 C.F.R. § 287.5. Put differently, agents now need the approval of a FOD or SAC to conduct otherwise routine enforcement operations. (Dkt. No. 19-2 at 7); (Dkt. No. 19-4 at ¶ 29).

***55** Moreover, the Memorandum details a mandatory process for receiving such preapproval. Indeed, "[i]n deciding to undertake an enforcement action or removal, the agent or officer *must* consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors." (Dkt. No. 19-2 at 7) (emphasis added). "In requesting ... preapproval, the officer or agent *must* raise a written justification *through the chain of command*, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place." (*Id.*) (emphases added). In other words, 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. *See* (*Id.*); (Dkt. No. 19-4 at ¶ 29).

If this cumbersome preapproval requirement and process were not enough in general to limit the agents' usual discretion, the February 18 Memorandum goes even further by expressly describing two specific scenarios in which an agent's decision-making power is greatly reduced. First, the February 18 Memorandum states that "[t]he approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other [nonprioritized] noncitizens encountered during an operation."[57] (Dkt. No. 19-2 at 7). Simply put, the February 18 Memorandum flatly denies agents the ability to exercise discretion over non-preapproved, nonprioritized aliens "during an operation." Second, the February 18 Memorandum limits agency discretion in detaining and conducting other enforcement actions against nonpriority aliens where exigent circumstances exist. *See* (Dkt. No. 19-2 at 7). To be sure, the Memorandum allows for detention of, and other enforcement actions against, nonpriority aliens without preapproval when obtaining such preapproval would be "impracticable." (*Id.*). And while the Memorandum acknowledges that "it is impossible to preconceive all such circumstances" in which obtaining preapproval may be impracticable, it nevertheless states that circumstances where obtaining preapproval is impracticable "generally

AMERICAN OVERSIGHT

will be *limited* to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property." (*Id.*) (emphasis added). Yet, even in these circumstances, the February 18 Memorandum requires approval, albeit after the enforcement action is conducted. (*Id.*). Specifically, the agent is *required*, within 24 hours of the enforcement action having been conducted, to "explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained." (*Id.* at 7 n.7).[58] Once again, in a situation in which the agent's discretion is likely at its zenith—where exigent circumstances exist—the February 18 Memorandum severely restricts the agent's ability to exercise it.

In light of these policies, it is perhaps no surprise that the States provide evidence suggesting that ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance. *See* (Dkt. No. 19-4 at ¶ 36). Specifically, a former Acting Director of ICE with more than 32 years of service in the agency testified that, "[a]s 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." (*Id.* at ¶ 29). Also unsurprisingly, there is evidence in the record tending to show that these "categorical rules" in the February 18 Memorandum are already hampering enforcement actions and will continue to deter agents and officers from exercising their discretion in determining whether to conduct enforcement actions in the future. *See* (Dkt. No. 19-3 at 3–8); (Dkt. No. 46 at ¶ 17); *cf.* *Texas DAPA*, 809 F.3d at 173 (assessing how DAPA has been applied in practice in determining whether it conferred sufficient discretion to be considered a general policy statement).

***56** In addition to limiting the discretion of individual ICE agents and officers, the Memoranda also restrict the discretion of entire ICE field offices. *See* (Dkt. No. 19-2 at 6); (Dkt. No. 42-2 at 6). Specifically, the February 18 Memorandum states that "ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases." (*Id.*). In other words, the Memoranda not only require individual agents and officers to receive preapproval before conducting enforcement actions against aliens falling outside the three priority groups; they also appear to bind *the field offices themselves* to the preapproval process delineated in the February 18 Memorandum.

For these reasons, the Court finds that the amount of discretion that the February 18 Memorandum confers to the agency and its decisionmakers in conducting routine enforcement actions weighs against classifying the Memorandum as a general statement of policy. Weighing this factor along with the rights and obligations affected, the Court concludes that the Memoranda do not constitute a general statement of policy.

Procedural Rule

Even if the February 18 Memorandum is not a general statement of policy, it may nevertheless be exempt from notice and comment if it is a rule "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also* *Texas DAPA*, 809 F.3d at 176. The Government does not assert that the February 18 Memorandum is a rule of DHS organization or practice; rather, the Government contends that it is one of agency procedure. (Dkt. No. 42 at 47–50). The Fifth Circuit employs two tests to determine whether a rule is one of agency procedure. *See* *Texas DAPA*, 809 F.3d at 176–77; *see also Texas*, 328 F. Supp. 3d at 728. Here, both tests yield the same conclusion: the Memoranda do not constitute a procedural rule that is exempt from the APA's notice and comment requirement.

The first test used by the Fifth Circuit to determine whether a rule is procedural is the "substantial impact test." *See* *Texas DAPA*, 809 F.3d at 176. This test "is the primary means by which [the court] look[s] beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *Id.* (citing *Kast Metals*, 744 F.2d at 1153). "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Texas DAPA*, 809 F.3d at 176 (quoting *Kast Metals Corp.*, 744 F.2d at 1153).

In making this determination, the question is not "whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir.), *modified on reh'g*, 36 F.3d 89 (5th Cir. 1994), for text, *see* No. 93-1377, 1994 WL 484506 (5th Cir. Sept.

AMERICAN OVERSIGHT

7, 1994). This distinction makes good sense, as "the notice and comment provisions 'were designed to assure fairness and mature consideration of rules of general application,' " *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969)), and to "afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.' " *Phillips Petroleum Co.*, 22 F.3d at 620 (quoting *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)).

In determining whether the rule will have a "substantial impact" on those regulated, the Court may consider whether the rule creates legal or financial obligations for the plaintiff and whether the rule restricts the discretion of agency officials. *See* *Texas DAPA*, 809 F.3d at 176 (concluding DAPA "undoubtedly [satisfies the substantial impact] test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes"); *Phillips Petroleum Co.*, 22 F.3d at 620 (concluding the rule at issue was not procedural because, in part, "[t]he rule narrowly restrict[ed] the discretion of MMS officials in determining the value of NGLP's" and "[i]t foreclose[d] other valuation methods by prescribing binding valuation criteria"); *see also Texas*, 328 F. Supp. 3d at 728 (concluding DACA is not a procedural rule, having found it "undoubtedly satisfies [the substantial impact] test because it has forced the states to spend money on various social services costs, which are clearly modif[ications] of substantive rights" (quotation omitted)). If the rule has a substantial impact on "the regulated industry, or an important class of the members or the products of that industry," then "notice and opportunity for comment should first be provided" because "[t]he exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated." *Phillips Petroleum Co.*, 22 F.3d at 620.

***57** Considering these criteria, the Memoranda satisfy the substantial impact test. First, as discussed above, the Memoranda affect at least one of Texas's legal obligations. *See supra* II.B.2.b. Specifically, they affect Texas's legal and financial obligations to partially fund Emergency Medicaid to aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2) but, pursuant to the Memoranda, are not detained by ICE when they are released from state custody or during the removal period. The Memoranda also have a substantial impact because, as just described, they limit the discretion exercised by ICE field offices, agents, and officers. In sum, the February 18 Memorandum mandates a process for ICE field offices and agents to follow for obtaining preapproval to detain aliens the Memoranda deem to be nonpriorities. This mandatory policy restricts DHS from exercising discretion and conducting routine enforcement actions against aliens the Memoranda classify as nonpriorities. This curtailment of agency discretion in conducting routine civil immigration enforcement actions is yet another substantial impact the Memoranda have on those they regulate.

Finally, the Memoranda have a substantial impact on certain aliens already in detention. As discussed above, *see supra* II.B.2.b, and as another district court's ruling demonstrates, the Memoranda make certain nonpriority aliens' removal "unlikely to be imminent," thus entitling some of those aliens to be released from detention. *Hussein S.M.*, 2021 WL 1986125, at *3; *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. Considering the many ways the Memoranda affect rights and obligations, it is clear that the Memoranda have a substantial impact and, therefore, the substantial impact test weighs against classifying the Memoranda as procedural rules.

The second test for determining whether a rule is procedural asks the Court to weigh two considerations. First, the Court must consider the "effect on those interests ultimately at stake in the agency proceeding." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns. v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013)) (quotation omitted). "Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive." *Texas DAPA*, 809 F.3d at 176 (citing *Nat'l Sec. Couns.*, 931 F. Supp. 2d at 107). This consideration clearly weighs against characterizing the Memoranda as procedural rules, given that the Court has already found that the Memoranda affect the rights and obligations of Texas, DHS, and certain aliens. *See supra* II.B.2.b.

AMERICAN OVERSIGHT

Second, the Court must assess whether the Memoranda affect the substantive standards by which DHS determines whether to detain certain aliens. *See* *Texas DAPA*, 809 F.3d at 176–77 ("[R]ules are generally considered procedural so long as they do not 'change the substantive standards by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide." (quotation omitted)). Here, the Memoranda alter the substantive standards by which DHS determines whether and when to detain certain aliens by departing from the plain statutory requirements in Sections 1226(c) and 1231(a)(2) and effectively replacing them with new standards for making such determinations. As discussed above, Section 1226(c) requires DHS to detain aliens falling within the ambit of that provision when they are released from state custody. *See supra* II.B.3.a. Section 1231(a)(2) requires DHS to detain an alien with a final order of removal during the removal period. *See supra* II.B.3.a. The Memoranda, however, require DHS to do something different, setting forth a prioritization scheme that declares some aliens falling within the ambit of Section 1226(c) and 1231(a)(2) as enforcement "priorities" and others also falling within those same statutory categories as "nonpriorities." *See* (Dkt. No. 19-2 at 4–7). And to detain nonpriorities, the February 18 Memorandum *requires* ICE agents to obtain preapproval. *See* (*Id.* at 7). No such prioritization scheme or preapproval process exists in Sections 1226(c) and 1231(a)(2). Rather, these provisions plainly require DHS to detain *all* aliens who meet the enumerated statutory criteria and that DHS detain them at or during the time stated in the provisions. *See* 8 U.S.C. §§ 1226(c), 1231(a)(2). Thus, the Memoranda change the "substantive standards by which [DHS] evaluates" whether or not to detain an alien who falls within the ambit of Section 1226(c) and 1231(a)(2). *See* *Texas DAPA*, 809 F.3d at 177 ("DAPA establishes the substantive standards by which the agency evaluates applications which seek a benefit that the agency purportedly has the power to provide—a critical fact requiring notice and comment." (cleaned up)). Therefore, this test also weighs against classifying the Memoranda as procedural rules.

Texas Has Met Its Burden on Its Procedural APA Claim

***58** In sum, the Court finds that the Memoranda do not constitute a rule that is exempt from the notice and comment requirements of Section 553. The 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. Likewise, the Memoranda are not procedural rules because they have a significant impact on DHS, the states, and certain aliens. Therefore, the Court finds Texas has shown a substantial likelihood of success on the merits of its procedural APA claim.

2. Irreparable Harm

In addition to demonstrating a substantial likelihood of success on the merits, the States must demonstrate "a substantial threat of irreparable injury if the injunction is not issued." *Texas DAPA*, 809 F.3d at 150. Put another way, the States must show they are "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20, 129 S.Ct. at 374 (emphasis added). For an injury to be sufficiently "irreparable," the States need only show 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 States argue their injuries are irreparable because they will incur financial costs that are unrecoverable. (Dkt. No. 18 at 40–41); (Dkt. No. 51 at 31). The States also argue they will suffer irreparable harm because non-detention will result in increased crime. (*Id.*). In response, the Government contends there is no irreparable harm because "there is not a significant impact on the States." (Dkt. No. 42 at 50). The Court concludes the States have demonstrated they are likely to suffer irreparable harm for the following reasons.

As discussed in this Court's standing analysis, the States have presented evidence demonstrating the Memoranda cause financial harm in the form of increased costs for detention facilities. *See supra* II.A.1.a. The States have also demonstrated the Memoranda harm their interests as *parens patriae* because of an increase in criminal activity resulting from the Memoranda's implementation. *See supra* II.A.1.b. The Court found these two injuries were concrete, imminent, and traceable to the Memoranda. The Court also concludes

AMERICAN OVERSIGHT

the threat of injuries to the States is "likely" as that term is used by the Supreme Court. *See* *Winter*, 555 U.S. at 20, 129 S.Ct. at 374.

There is also no indication the States can recover for their injuries. Indeed, there is no immediately discernable theory under which a state can "pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm." *Texas I*, ____F. Supp. 3d at ____, 2021 WL 2096669, at *47. To that point, no Party has suggested the States can recover any of their likely financial injuries here. And the Fifth Circuit rebuffed an attempt by Texas in the late 1990s to force the federal government to pay medical, educational, and criminal justice expenditures caused by immigration. *See* *Texas*, 106 F.3d at 663–64 ("The State of Texas and its political subdivisions ... appeal a Fed.R.Civ.P. 12(b)(6) dismissal of their complaint seeking declaratory and injunctive relief which would require that the United States pay the educational, medical, and criminal justice expenses allegedly incurred as a result of the presence of undocumented or illegal aliens in Texas. Concluding that the complaint raises questions of policy rather than colorable claims of constitutional or statutory violations, we affirm."). Thus, any financial injury is irreparable. *See* *Burgess*, 871 F.3d at 304.

***59** As for injuries to the States' interests as *parens patriae*, the Supreme Court has determined that "law enforcement and public safety interests" can constitute irreparable harm. *See* *Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (granting a stay of a judgment after finding Maryland experienced ongoing irreparable harm because it was enjoined from effectuating a statute that assisted government officials in investigating crimes and arresting violent offenders). Here, law-enforcement and public-safety interests underlie the States' *parens patriae* injuries. Accordingly, the States have demonstrated they are "likely to suffer irreparable harm in the absence of preliminary relief." *See* *Benisek*, ____ U.S. at ____, 138 S.Ct. at 1944.

3. The Balance of Equities and the Public's Interest

Having concluded the States have satisfied the first two elements for obtaining a preliminary injunction, the Court must now determine whether "the threatened injury outweighs any harm that may result from the injunction to the non-movant" and whether "the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051, 1056 (5th Cir. 1997); *accord* *Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294 (5th Cir. 2020). Federal courts have considered the balance-of-equities and public-interest elements together as they overlap considerably. *Texas DAPA*, 809 F.3d at 187; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 n.36 (N.D. Tex. 2016). And because the Government is the nonmoving party, these two elements "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 1762, 173 L.Ed.2d 550 (2009); *accord* *Texas DAPA*, 809 F.3d at 187.

In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376. As for determining whether an injunction will undermine the public interest, a court should consider the public interests that may be injured and those that may be served by granting or denying a preliminary injunction. *See* *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997–98 (8th Cir. 2011) (citing *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *abrogated on other grounds by* *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)).

The States argue the Government has no interest in the implementation and enforcement of the unlawful policy contained in the Memoranda. (Dkt. No. 18 at 41–42). The States contend the public interest is furthered when the Executive Branch follows congressional mandates. *See* (*Id.* at 42); (Dkt. No. 51 at 31–32). In response, the Government characterizes any injunction as a restraint on "core Article II authority" which "outweighs any harm to the States and undermines the public interest." (Dkt. No. 42 at 55). In the Government's view, an injunction would inhibit its ability to prioritize limited resources, cause confusion within the Executive Branch, and impede any effort to draft final guidance. (*Id.* at 55–56). The Government also contends the public interest is served when it has the ability "to prioritize national security, border security, and public

AMERICAN OVERSIGHT

safety." (*Id.* at 57). Considering these arguments, the Court finds the States have the upper hand.

Notably, without a preliminary injunction, the States will be "threatened with substantial harm" to their state budgets and interests as *parens patriae*. *See* *Burwell*, 227 F. Supp. 3d at 694. As discussed earlier, the Court is unpersuaded by the Government's claim that the States' injuries are "speculative." *See* (Dkt. No. 42 at 22–23). Instead, the Court has found the States' injuries from costs relating to detention facilities and increased criminal activity are traceable to the implementation of the Memoranda. *See supra* II.A.2.

***60** Although the States face substantial harm from the implementation of the Memoranda, the Government nevertheless attempts to show that the harm it faces is worse. The Government, however, postulates harms "that are less substantial" and "vague." *See* *Texas DAPA*, 809 F.3d at 186. Specifically, the Government makes much of an injunction's supposed harm to the Executive Branch's authority. *See* (Dkt. No. 42 at 55–56). Although it is true that the Executive Branch retains vast discretion in immigration enforcement, *see* *Arizona*, 567 U.S. at 396, 132 S.Ct. at 2499; *Reno*, 525 U.S. at 490, 119 S.Ct. at 946, that discretion ebbs when Congress sets forth a statutory mandate. Indeed, "[i]t is undisputed that Congress may *mandate* that the Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring) (emphasis added). Sections 1226(c) and 1231(a)(2) do just that: they *require* the Executive Branch to detain certain aliens at or for a specified time.[59] Any harm to the Government is therefore exaggerated and should be addressed to Congress.

The Government next complains that an injunction would create inefficiency because it would inhibit the Executive Branch's ability to prioritize limited resources.[60] (Dkt. No. 42 at 55–56). The Court is unpersuaded. First, in at least one case, the Fifth Circuit has concluded that any inefficiency resulting from an injunction inhibiting the Executive's ability to prioritize certain immigration-enforcement actions is "outweighed by the major financial losses [that] states face." *See* *Texas DAPA*, 809 F.3d at 187. Here, the Court, in its standing analysis, has already found the Memoranda will result in significant financial losses for the States. *See supra* II.A.1.a. Second, the Government overestimates the effect of an injunction on the Executive's limited resources. Rather than dictate the use of resources, the injunction precludes the Executive Branch from instructing officials to act in a manner contrary to a clear congressional mandate. In other words, the Government remains free to expend its resources in a *lawful* manner.

To this point, "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), 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. *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."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases) ("[T]he public interest in enforcement of the immigration laws is significant."); *cf.* *Nken*, 556 U.S. at 436, 129 S.Ct. at 1762 ("There is always a public interest in prompt execution of removal orders[.]"). The public interest is particularly strong here because, as fully described earlier, Sections 1226(c) and 1231(a)(2) are statutes that Congress enacted for the benefit of the United States, its citizens, and its legal immigrants. *See supra* I.A.; *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16; *Zadvydas*, 533 U.S. at 697, 121 S.Ct. at 2502.

***61** Finally, the Government argues an injunction would result in confusion inside the Executive Branch because immigration officials will be left with little to no guidance on how to exercise their enforcement discretion. (Dkt. No. 42 at 56). Relatedly, the Government also theorizes that injunctive relief would impede its effort to draft final guidance. (*Id.* at 56–57). These arguments are puzzling because, with or without an injunction in place, the Government is free to craft new guidance or instruct Executive Branch officials to act in a certain manner *so long as such guidance and instructions comport with the law* (*i.e.*, congressional mandates).

Given the discussion above, the Court concludes the potential harms to the States arising out of the Memoranda outweigh any potential harms to the Government. The Court also concludes the public interest is served, rather than undermined, by an injunction. Thus, the States have satisfied all four elements for a preliminary injunction.

AMERICAN OVERSIGHT

C. SCOPE OF RELIEF

The States have satisfied the standard for a preliminary injunction. This conclusion raises two additional inquiries: the geographic scope of the injunction as well as the nature of the injunctive remedy. The Court addresses each in turn.

1. Geographic Scope

The States request a nationwide injunction. (Dkt. No. 18 at 42–43). The Court has expressed its substantial skepticism of nationwide injunctions. *Texas*, ____ F. Supp. 3d at ____, 2021 WL 247877, at *6–7; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51. Indeed, nationwide injunctions of executive actions are an area of fierce disagreement in the courts and in legal academia. *See id.* But, as with any case, this Court is bound by applicable Fifth Circuit precedent in determining whether a nationwide scope for an injunction is appropriate. That precedent explains that a federal district court, under "appropriate circumstances," has authority "to issue a nationwide injunction." *Texas DAPA*, 809 F.3d at 188. One such appropriate circumstance is when a nationwide injunction is necessary is to ensure uniformity in immigration policies as prescribed by federal law. *Id.* at 187–88; *see also E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("[C]ases implicating immigration policy have a particularly strong claim for uniform, nationwide relief." (citation omitted)). Another such circumstance is when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries [of the unlawful policy] would be free to move among states." *Texas DAPA*, 809 F.3d at 188.

The Court finds both circumstances exist here. First, the Memoranda affect national immigration policy, which is designed to be uniform. *See id.* at 187–88. Second, given what has been detailed in the Court's standing analysis, 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. *See supra* II.A.2 & II.A.3; *see also Texas DAPA*, 809 F.3d at 188. The States submitted evidence showing that "more than 50,000 noncitizens moved into Texas from another U.S. State in 2019." (Dkt. No. 18 at 42) (citing Dkt. No. 19-21); *see also* (Dkt. No. 51 at 35) (citing Dkt. Nos. 19-21–19-23). Accordingly, a nationwide injunction is appropriate. *See Texas DAPA*, 809 F.3d at 187–88; *see also Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *50–51.

The Government offers a handful of arguments in opposition to issuing a nationwide injunction. None carry the day.

***62** First, the Government argues nationwide relief is inappropriate because lawsuits concerning the Memoranda in other jurisdictions have been unsuccessful. (Dkt. No. 42 at 60). This misses the point. In determining the appropriate scope of an injunction, the Court's task is to fashion a remedy that prevents the plaintiffs *in this case* from suffering irreparable harm. *See ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) ("When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.' " (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979)); *see also Dep't of Homeland Sec. v. New York*, ____ U.S. ____, ____, 140 S.Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring in the grant of a stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a *particular plaintiff in a particular lawsuit.* When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place." (emphasis added)); *ODonnell v. Goodhart*, 900 F.3d 220, 224 (5th Cir. 2018) ("The district court must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order." (emphasis added) (quoting *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004))). In concluding the States are entitled to injunctive relief, this Court has determined, based on Fifth Circuit precedent and the record before it, that a nationwide injunction is appropriate to prevent the States from suffering irreparable harm.

Next, the Government argues nationwide relief is generally ill-advised because, in effect, any attempt by the Government to create a new federal policy is thwarted by "a single successful challenge" to the policy, even if other challenges to the policy are unsuccessful. (Dkt. No. 42 at 60) (quoting *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct.

AMERICAN OVERSIGHT

at 601 (Gorsuch, J., concurring in the grant of a stay)). Frankly, the Court shares these concerns. Nonetheless, the Court, in fashioning a proper remedy, is bound by precedent, *see* *Texas DAPA*, 809 F.3d at 187–88, and "must narrowly tailor an injunction to remedy the *specific action* which gives rise to the order," *Goodhart*, 900 F.3d at 224 (emphasis added) (quoting *Veneman*, 380 F.3d at 818); *see also* *Dep't of Homeland Sec.*, ____ U.S. at ____, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of a stay). The Court therefore finds the Government's argument unpersuasive.

Third, the Government attempts to distinguish this case from *Texas DAPA* and *Texas I* by asserting that this case involves *individual* detention decisions rather than a blanket policy pausing enforcement actions against aliens. (Dkt. No. 42 at 60). To be sure, individual enforcement decisions are "inherently discretionary and non-uniform," *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *51, but the States are not challenging individual enforcement decisions. Rather, the States, like the plaintiffs in *Texas DAPA* and *Texas I*, are challenging a blanket policy. *See* *Texas DAPA*, 809 F.3d at 146–49; *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *30. Specifically, the States are challenging the Memoranda, which implement and enforce a blanket policy regarding the detention of certain aliens—a policy that contravenes congressional mandates. Accordingly, the Government's argument that this case is distinguishable from *Texas I* and *Texas DAPA* falls short.

Finally, the Government argues that, because the States' injuries are supposedly premised on detainers in Texas and Louisiana, an injunction limited in geographic scope to the boundaries of those two states will sufficiently protect them from any irreparable harm they may suffer due to the Memoranda. (Dkt. No. 42 at 60–61). The Court disagrees for two reasons. First, the Government incorrectly asserts that the States' injuries are premised on detainers when the States' injuries are, in fact, premised on the increased costs to their detention systems and their interests as *parens patriae*. *See* (Dkt. No. 1 at 15–16); (Dkt. No. 18 at 15–16, 18, 35–37). Second, in arguing that the geographic scope of the injunction should be limited to the boundaries of Texas and Louisiana, the Government ignores that, if aliens are not detained in other states, those aliens can migrate to Texas and Louisiana thus causing them harm. *See* *Texas DAPA*, 809 F.3d at 188 (recognizing that "there is a substantial likelihood that a geographically-limited injunction would be ineffective because" the beneficiaries of the unlawful policies "would be free to move among states"). Indeed, the evidence produced in this case regarding the migration patterns of aliens to Texas and from other states buttresses this point. *See supra* II.A.2 & II.A.3; (Dkt. No. 19-21 at 5–7); (Dkt. No. 19-22 at 5–7, 14); (Dkt. No. 19-23 at 2). The Government's argument is therefore meritless.

***63** Thus, for the foregoing reasons, the States are entitled to a nationwide injunction.

2. Remedy

As stated above, "the scope of injunctive relief is dictated by the extent of the violation established." *ODonnell*, 892 F.3d at 163 (quoting *Califano*, 442 U.S. at 702, 99 S.Ct. at 2558); *see also* *Goodhart*, 900 F.3d at 224 ("The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." (quoting *Veneman*, 380 F.3d at 818)). Since the States have satisfied the four elements required for a preliminary injunction, the Court finds that it is appropriate to enjoin the Executive Branch from implementing and enforcing the Memoranda. Specifically, the Court enjoins (1) Section B of the January 20 Memorandum, and (2) the sections from the February 18 Memorandum entitled "Civil Immigration Enforcement and Removal Priorities" and "Enforcement and Removal Actions: Approval, Coordination, and Data Collection." (Dkt. No. 1-2 at 4–8). These sections implement and enforce a policy that directly contravenes congressional mandates. As stressed above, agency policies that contravene congressional mandates are unlawful—plain and simple. *See* *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446; *Barnhart*, 534 U.S. at 462, 122 S.Ct. at 956. Moreover, the States have met their burden to show a substantial likelihood that the Memoranda's policy prioritizing the detention of certain aliens over others is arbitrary and capricious and fails to comply with the APA's notice and comment requirement. The Court therefore enjoins the implementation and enforcement of these sections. [61]

IV. CONCLUSION

Although this case involves many issues of administrative and immigration law, its core concerns whether the Executive Branch may implement a policy that directly conflicts with

AMERICAN OVERSIGHT

laws that Congress enacted. The answer is no. In the end, through all their detailed explanations of the Executive's seemingly unending discretion, the Government substantially undervalues the People's grant of "legislative Powers" to Congress.

Because the States have demonstrated that there is a substantial likelihood that portions of the Memoranda direct Executive Branch officials to act in a way that is contrary to Sections 1226(c) and 1231(a)(2), those sections of the Memoranda cannot stand and are hereby enjoined. Additionally, the Court enjoins the sections of the Memoranda described above because the States have demonstrated a substantial likelihood that the policy concerning detention of certain aliens set forth in the Memoranda is arbitrary and capricious under the APA and the Memoranda fail to comply with the APA's notice and comment requirement.

***64** For the foregoing reasons, the Court **GRANTS** the States' Motion for Preliminary Injunction. (Dkt. No. 18). Therefore, it is hereby **ORDERED** that:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from enforcing and implementing the policies described in:

   a. Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4);

   b. The section entitled "Civil Immigration Enforcement and Removal Priorities" in the February 18 Memorandum. (Dkt. No. 1-2 at 4–6); and

   c. The section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the February 18 Memorandum.[62] (Dkt. No. 1-2 at 6–8).

2. This Preliminary Injunction is granted on a nationwide basis and prohibits enforcement and implementation in every place the Government has jurisdiction to enforce and implement the January 20 and February 18 Memoranda.

3. This Preliminary Injunction shall remain in effect pending a final resolution of the merits of this case or until a further Order from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

To ensure compliance with this Preliminary Injunction, the Court further **ORDERS** the following:

1. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of these aliens in light of the fact that the Memoranda have been enjoined.

2. By September 3, 2021, the Government must file with the Court the legal standard it is abiding by with respect to the detention of aliens covered by or subject to 8 U.S.C. § 1231(a)(2) given the Court's injunction of the Memoranda at issue in this lawsuit. The information should state with specificity what guidance, protocols, or standards control the detention of aliens in light of the fact that the Memoranda have been enjoined.

3. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens known to the Government, who are covered by or subject to 8 U.S.C. § 1226(c)(1)(A)–(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release. For each of these aliens, provide under seal the alien's last known residence or address and the offense for which the alien had been incarcerated.

   Additionally, for each alien not detained, the Government shall make and retain a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

***65** 4. Starting in September 2021, the Government must file with the Court on the 5th day of each month a report stating the number of aliens in their removal period as defined in 8 U.S.C. § 1231(a)(1). Of those, provide the number who were not detained pursuant to 8 U.S.C. § 1231(a)(2).

AMERICAN OVERSIGHT

> For each of these aliens not detained, provide under seal the alien's last known residence or address.
>
> Additionally, for each alien not detained, the Government shall make a contemporaneous record of the reason why the alien was not detained and the individual who made that specific determination.

This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the January 20 Memorandum's sections entitled "A. Comprehensive Review of Enforcement Policies and Priorities" and "D. No Private Right Statement."[63] This Memorandum Opinion and Order also does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's sections entitled "Purpose," "Background," "Questions," and "No Private Right Statement."

No security bond is required under Federal Rule of Civil Procedure 65(c).

It is SO ORDERED.

Signed on August 19, 2021.

All Citations

Slip Copy, 2021 WL 3683913

Footnotes

1 The term "Government" used throughout this Memorandum Opinion and Order refers to the United States, the agencies, and the individuals sued in their official capacity.

2 Under Section 1226(c), "the Attorney General *shall* take into custody" certain aliens who have either committed specified offenses or who are otherwise deemed deportable "when the alien is released" from custody. 8 U.S.C. § 1226(c) (emphasis added). Likewise, Section 1231(a)(2) provides, "the Attorney General *shall* detain the alien" "during [the alien's] removal period." 8 U.S.C. § 1231(a)(2) (emphasis added).

3 The States also seek an injunction compelling the Government to comply with the detention mandates in Sections 1226(c) and 1231(a)(2). (Dkt. No. 18).

4 In this Memorandum Opinion and Order, the Court does not address the States' likelihood of success on claims that the Memoranda are unlawful because they violate: (1) the Agreements between Texas and Louisiana and the Department of Homeland Security ("DHS"); and (2) the Constitution's requirement that the President "take Care that the Laws be faithfully executed." (Dkt. No. 1 at ¶¶ 122–31). In withholding a ruling on these claims, the Court is mindful that to succeed on their Motion, the States need only demonstrate a substantial likelihood of success on "at least one" claim, which they have. *See* *Texas v. United States*, 86 F. Supp. 3d 591, 672 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, ____ U.S. ____, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*mem.*). Moreover, given the significance of the substantial interests at stake in this case, the Court finds it to be in the interest of justice to rule after all Parties have an opportunity to make a complete presentation on the merits of these claims. *See id.* at 677. Similarly, the Court defers ruling on the States' request for an injunction to compel agency action unlawfully withheld pursuant to Section 706(1) of the Administrative Procedure Act. *See* footnote 61; *see also* (Dkt. No. 1 at 28); (Dkt. No. 18 at 26).

5 In outlining the extensive background and history involved in this case, the factual statements made herein (except where the Court is discussing a factual dispute) should be considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions, except where the Court discusses the various competing legal theories and positions, should be taken as conclusions of law regardless of any label or lack thereof.

AMERICAN OVERSIGHT

6 *See generally* John F. Kennedy, *A Nation of Immigrants* (1958); Andrea Barton, *Sitting on Ellis Island: The Fate of Disparate Immigration Policies in the Wake of the Guantanamo Bay Cases*, 23 Notre Dame J.L. Ethics & Pub. Pol'y 233, 237 (2009).

7 The text of the statute says "sentence;" however, the Court notes it should probably be "sentenced."

8 Federal regulations permit the temporary detention of certain incarcerated aliens at DHS's request for a period not to exceed 48 hours "in order to permit assumption of custody" of the detainee by DHS. 8 C.F.R. § 287.7(d). Note at least one state court determined that beyond the 48-hour mark, state authorities must release the incarcerated aliens "[i]f the federal government *fails to apply* federal law and take custody of [the criminal aliens] within the time limit set by federal regulations." *Ochoa v. Bass*, 2008 OK CR 11, ¶ 19, 181 P.3d 727, 733 (emphasis added).

9 The importance of detainers aside, note that "[t]here are certainly other mechanisms available to assist in implementing the federal apprehension of criminal aliens." *Id.* at 175. For instance, written agreements between the Executive Branch and states and local governments pursuant to 8 U.S.C. § 1357(g) may permit state and local law enforcement "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)." 8 U.S.C. § 1357(g). In another example, the Executive Branch may also enter an "inter-governmental service agreement" with local and state jails to authorize such detention centers to house prisoners on behalf of DHS. Lasch, *supra*, at 175.

10 The January 20 Memorandum excludes from the 100-day pause any alien with a final removal order who:

> 1) According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
> 2) Was not physically present in the United States before November 1, 2020; or
> 3) Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver and has been given a meaningful opportunity to access counsel prior to signing the waiver; or
> 4) For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

(Dkt. No. 1-1 at 4–5) (footnote omitted).

11 The January 20 Memorandum provides that "the Acting Director of ICE shall issue operational guidance on the implementation of these priorities." (Dkt. No. 1-1 at 4).

12 5 U.S.C. § 706(2)(A), (C).

13 5 U.S.C. § 706(2)(A).

14 5 U.S.C. § 553.

15 As this Court noted in *Texas I*, DHS, "U.S. Customs and Border Protection ..., U.S. Immigration and Customs Enforcement ..., and U.S. Citizenship and Immigration Services ... entered into a Memorandum of Understanding Between Texas and DHS concerning certain aspects of the nation's immigration laws." ___ F. Supp. 3d at ____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). "The Agreement was finalized on January 8, 2021—just 12 twelve days before the transition from the Trump Administration to the Biden Administration." *Texas I*, ___ F. Supp. 3d at____, 2021 WL 2096669, at *1; *see also* (Dkt. No. 1-3). DHS and the Louisiana Department of Justice entered into a nearly identical agreement, which was also finalized on January 8, 2021. (Dkt. No. 1-4).

16 This statement comes directly from the Chief of Staff of the Texas Department of Criminal Justice. (Dkt. No. 46 at 2). It is unclear whether the "ICE officials" quoted by the Chief of Staff made this statement in a capacity excluding the statement from the rule against hearsay. *See* Fed. R. Evid. 801(d)(2). But even if hearsay, this Court may rely on the statement at the preliminary injunction phase. *See* *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including

AMERICAN OVERSIGHT

hearsay evidence."). The Government has made no showing that this testimony is otherwise unreliable, and the Court finds none itself. Rather, the sworn affidavit from the Chief of Staff under penalty of perjury possesses sufficient indicia of reliability as to the statement of the ICE officials. The Court therefore accepts as fact, at the preliminary injunction phase, the testimony of the Chief of Staff regarding the statement of current ICE officials.

17 As the Court discusses *infra*, the federal government reimbursed Texas for a miniscule fraction of its costs for detaining criminal aliens as part of a statutorily mandated program that seeks to help states with the burden of incarcerating criminal aliens. *See* 8 U.S.C. § 1231(a)(1)(A).

18 Because the States have put forth sufficient evidence to demonstrate a concrete and imminent injury regarding Texas's detention costs and *parens patriae, see infra* II.A.1., the Court need not address the States' alleged financial injuries arising from unanticipated education and healthcare-related expenses.

19 The fact that an expansion of *parens patriae* to citizens-at-large in *Louisiana v. Texas* was determined in a case involving the Supreme Court's original jurisdiction does not restrict the scope of quasi-sovereign interests in non-original jurisdiction cases. If anything, the opposite is true. *See* *Snapp*, 458 U.S. at 603 n.12, 102 S.Ct. at 3267 n.12; *id.* at 611–12, 102 S.Ct. at 3270–71 (Brennan, J., concurring) (explaining on constitutional grounds that the Court might be more "restrictive" as to the types of interests a state can assert in a *parens patriae* action when the Court's original jurisdiction is invoked as compared to typical federal suits).

20 Notably, the statutory basis for SCAAP resides near one of the detention statutes at issue in this case, 8 U.S.C. § 1231(i).

21 In sum, having concluded that the States have standing, the Court must exercise jurisdiction. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) (noting that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"); *see also* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014) (resolving doctrinal tension that had developed with a federal court's "virtually unflagging" obligation to "hear and decide cases within its jurisdiction" (internal quotation omitted)).

22 Section 1252(a)(5) provides in relevant part: "Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." 8 U.S.C. § 1252(a)(5).

Section 1252(b)(9) states in part: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).

23 The Court in *Texas I* held that Section 1231(h) was unambiguous. ___ F. Supp. 3d at ____, 2021 WL 2096669, at *26 & n.4. Hence, the Court did not find *Chevron* deference applied to the Government's preferred interpretation of Section 1231(h). *Id.* The Court adopts that reasoning by reference here. The Court additionally notes that the Government, like in *Texas I*, fails to invoke any claim to *Chevron* deference with respect to Section 1231(h) in its Response to this Motion.

24 Indeed, even the Executive Branch in a website has stated that incarcerated individuals may apply for Medicaid coverage in their respective states and thereafter be eligible for benefits after release from custody. *See* HealthCare.gov, *Health coverage for incarcerated people*, https://www.healthcare.gov/incarcerated-people/.

AMERICAN OVERSIGHT

25 The Court is also concerned that the Memoranda affect the States' legal obligation to provide a public-school education to certain noncitizens following their release from juvenile detention. For example, Texas is required by both federal and state law to provide noncitizen children with a public-school education. *See generally* *Plyler*, 457 U.S. 202, 102 S.Ct. 2382 (holding that a Texas statute that withheld state funds for educating children who were not "legally admitted" was unconstitutional); *see also* *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005) ("In ... *Plyler*, the [Supreme] Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens."); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) ("[T]he State's public education expenditures for the children of undocumented aliens are required by the equal protection clause[.]" (citing *Plyler*, 457 U.S. 202, 102 S.Ct. 2382)). This obligation would necessarily include juveniles released from the custody of the Texas Juvenile Justice Department ("TJJD") who are not detained by ICE because of the Memoranda. *See* (Dkt. No. 19-9 at ¶ 7) ("As Chapter 25, Texas Education Code, requires a child to attend school and as *Plyler* ... prohibits denying undocumented children of illegal immigrants the right to attend public school, to the extent ICE does not take custody of non-citizen juveniles set to be released from TJJD custody, it is my understanding that those non-citizen juveniles who have not already received their General Educational Development or high school diploma attend Texas public schools after being released."). The Court is interested in further briefing on this issue at the next stage of this litigation.

26 A district court in Florida concluded the February 18 Memorandum is unreviewable under the APA because it did not constitute final agency action. *Florida. v.* *United States*, No. 8:21-CV-541-CEH-SPF, 2021 WL 1985058, at *9 (M.D. Fla. May 18, 2021). The Court respectfully disagrees with this conclusion for the reasons set forth herein.

27 As another Texas court said of a similar change in litigation position, "[b]ut that was then, and this is now." *Texas v. United States*, 340 F. Supp. 3d 579, 611 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded*, 945 F.3d 355 (5th Cir. 2019), *rev'd and remanded sub nom.* *California v. Texas*, 141 S.Ct. 2104 (2021).

28 Likewise, the Eleventh Circuit concluded, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (collecting cases with similar findings) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)). Indeed, "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold," so this Court cannot "blandly shrug them off because they were not a holding." *See* *United States v. Montero-Camargo*, 208 F.3d 1122, n.17 (9th Cir. 2000) (en banc) (citations omitted). Other circuits agree. *See* *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (considering that dicta "must be given considerable weight and cannot be ignored in the resolution of [a] close question"); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's 'considered dicta.' " (quoting *McCoy*, 950 F.2d at 19)); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[A]s we and our sister circuits have frequently noted, ... carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (internal quotation marks omitted) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003))); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (noting that lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" (citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)));

AMERICAN OVERSIGHT

Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that lower courts "should respect considered Supreme Court dicta"); *McDonough v. Anoka County*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts ... are not 'free to limit Supreme Court opinions precisely to the facts of each case.' Instead, federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings[.]' " (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993))); *Bangor Hydro–Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-particularly when expressed so unequivocally.").

29 The Court also notes that its decision in *Texas I* did not rely entirely on the protection of "public or private interests" rationale explained in *Richbourg Motor Co.* and *Escoe* to support its finding of a "stronger indication" that the "shall" in 8 U.S.C. § 1231(a)(1)(A) connoted a requirement. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *34–35. Instead, the Court performed a full statutory interpretation of the word "shall" in Section 1231(a)(1)(A) and relied on numerous precedents in the Fifth Circuit and sister circuits demonstrating the mandatory nature of that word. *Id.* at *33–38 (noting the Court had examined "the text, context, statutory history, and precedent demonstrating that 'shall' means *must* in section 1231(a)(1)(A)" (emphasis in original)). In contrast to that comprehensive analysis, the Government's current lone attack on the Court's prior synthesis of the rules from *Hecht, Castle Rock, Richbourg Motor Co.*, and *Escoe* is lacking. Nevertheless, despite the in-depth analysis the Court undertook in *Texas I*, a district court in Arizona arrived at a different conclusion, holding that "shall" does not mean "must" in 8 U.S.C. § 1231(a)(1)(A). *Arizona*, 2021 WL 2787930, at *9–10. That court's rationale was that the legislative intent required for Section 1231(a)(1)(A) to be mandatory—per *Castle Rock*—was not present. *Id.* The court based its holding on (a) the statutory scheme which apparently contemplated removals of aliens outside the 90-day period, (b) the Government's broad discretion to remove aliens at any stage of the removal process, and (c) some legislative history showing that the 90-day period contemplated in the section was intended to be "merely" a "target" date "rather than a statutory mandate." *Id.* Therefore, according to the *Arizona* court, "shall" did not mean "must" in Section 1231(a)(1)(A). *Id.* Like the Government in this case, the district court neither cited to nor discussed *Richbourg Motor Co.* and *Escoe*. This Court respectfully disagrees with the court in *Arizona* and the Government, having thoroughly probed the statutory text, the purpose of the statutes, and legislative history of Sections 1231(a)(1)(A) in *Texas I*, and Sections 1226(c) and 1231(a)(2) in this Memorandum Opinion and Order.

30 In *Texas I*, the Government argued that Section 1231(a)(1)(A)'s use of the word "shall" could not have meant "must" because at least one other "shall" in Section 1231 is not mandatory (at least according to the Government). *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35. That other "shall" is apparently in Section 1231(a)(2) which reads, as stated earlier: "During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under [certain circumstances]." *Id.* The Government contended that reading "shall" as mandatory in the first sentence of Section 1231(a)(2) would make the second sentence superfluous. *Id.*; *see also* (6:21-cv-3, Dkt. No. 82 at 21); (6:21-cv-3, Dkt. No. 83 at 34). The Court found the argument unpersuasive, finding that there was a distinction between the two clauses. *Id.* As the Court held, the first clause of Section 1231(a)(2) mandates the act of detaining. *Id.* (citing *Rodney*, 340 F. App'x at 764). The second clause, on the other hand, prohibits the release of certain individuals. *Id.* Thus, the Attorney General may in some circumstances "release" those whom he has "detain[ed]." *See* 8 U.S.C. § 1231(a)(2). Section 1231 itself prescribes the conditions through which an alien—who is presumably presently

AMERICAN OVERSIGHT

detained—may pursue a "stay" and a "release." *Id.* § 1231(c)(2)(A), (C). In fact, it could easily be said that the prohibition on releasing certain aliens demonstrates that Congress assumed *all* aliens would be detained —because they "shall" be. Thus, the Court concluded in *Texas I* that the Government's "textual" argument failed. In this case, the Government briefly restates its argument from *Texas I* in an attempt to persuade the Court to change its disposition. *Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *35; *see also* (Dkt. No. 42 at 39). The Court remains unpersuaded and adopts its prior conclusions from *Texas I* as discussed in this footnote.

31 For criminal aliens in state custody, the 90-day period does not start until they are released from state confinement. *See* 8 U.S.C. § 1231(a)(1)(B)(iii).

32 This proposition does not include circumstances in which the President is asked to enforce a law that is unconstitutional or, more specifically, a law that usurps Executive authority. *See* Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 621–22 (1994). After all, the Constitution commands that, "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, *and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.' " U.S. Const. art. II, § 1, cl. 8 (emphasis added). The Government, however, does not assert that Sections 1226(c) or 1231(a)(2) are unconstitutional. *See* (Dkt. No. 42).

33 Specifically, the First Test Act, enacted in 1673, "was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation and receive the Anglican sacrament. Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily." Delahunty & Yoo, *supra*, at 805–06. The Second Test Act, enacted in 1678, "made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy." *Id.* at 806.

34 This ire towards James II's use of the dispensing power is best captured in the English Bill of Rights, which says:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;
>
> By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament[.]

The Bill of Rights, 1 W. & M., c. 1 (1689).

35 Specifically, the English Bill of Rights of 1689 provides: "[T]he pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal" and that "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal." The Bill of Rights, 1 W. & M., c. 2 (1689).

36 These grievances are as follows:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good; He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Declaration of Independence ¶¶ 3–4.

37 Not all states ratified constitutions at the time of the founding. Indeed, "two states, Connecticut and Rhode Island, retained their Colonial Charters issued by King Charles II and did not try to write new state constitutions or declarations of rights" at this time. Calabresi, Agudo, & Dore, *supra*, at 1543; *see also* *Narragansett Indian Tribe of R.I. v. State*, 667 A.2d 280, 280 (R.I. 1995) ("Rhode Island's first constitution was adopted in

AMERICAN OVERSIGHT

1842 ...."); Moore v. Ganim, 660 A.2d 742, 772 (Conn. 1995) (Peters, C.J., concurring) ("Of the thirteen original states, Connecticut was the second to last to adopt a written state constitution, failing to do so until 1818.").

38 In fact, "[a]t the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority." *See* Price, *supra*, at 693. The First Congress did, however, have an opportunity to bar the President from possessing such power in the Bill of Rights but failed to do so, "despite proposals from several state ratifying conventions that the Constitution be amended to include such a provision." *Id.* at 694. But "any negative inference from Congress's failure to act on these proposals seems weak." *Id.* Instead, "[i]t seems more likely that James Madison and other members of the First Congress failed to include an antisuspension provision in the Bill of Rights precisely because they thought the Constitution already made it clear enough that the President lacked such powers." *Id.*

39 "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

40 "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3.

41 "*Care*: Regard; charge; heed in order to protection and preservation." Samuel Johnson, *A Dictionary of the English Language* (1755). https://johnsonsdictionaryonline.com/1755/care_ns.
"*Care*: Charge or oversight, implying concern for safety and prosperity." Noah Webster, *American Dictionary of the English Language* (1828). http://webstersdictionary1828.com/Dictionary/care.

42 "*Faithfully*: Without failure of performance; honestly; exactly." Johnson, *supra*. https://johnsonsdictionaryonline.com/1755/faithfully_adv.
"*Faithfully*: With strict adherence to allegiance and duty." Webster, *supra*. http://webstersdictionary1828.com/Dictionary/faithfully.

43 "*Execute*: To put in act; to do what is planned or determined." Johnson, *supra*. https://johnsonsdictionaryonline.com/1755/execute_va.
"*Execute*: To carry into effect; as, to execute law or justice." Webster, *supra*. http://webstersdictionary1828.com/Dictionary/execute.

44 As stated above, the Court, at this time, declines to weigh in on the merits of the States' separate claim that the Memoranda violate the Take Care Clause. *See* footnote 4. However, the Court is interested in further briefing on this claim at the next stage of this litigation. In addition to any issues the Parties would like to bring to the Court's attention, the Parties should focus part of their briefing on whether the States can bring a Take Care Clause claim independent of or in conjunction with their APA claims.

45 https://founders.archives.gov/documents/Washington/05-11-02-0040.

46 https:// https://founders.archives.gov/documents/Adams/99-02-02-0682.

47 https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/348?aff_id=1000.

48 In so doing, the Government essentially foregoes any zone-of-interest challenge on the States' other APA claims, that is, those based on Section 1226(c) and those which are arguably not based on any of the statutes in question (*i.e.*, the arbitrary and capricious and notice and comment claims).

49 In a status conference with the Parties on July 2, 2021, the Court asked whether the Government intended to file the administrative record for review. The Government declined stating that it was unnecessary at this stage of the litigation. (July 2, 2021, Status Conference, 10:00–10:15 A.M.). For their part, the States did not oppose the Government's position, and, instead, told the Court that it could dispose of the pending Motion for Preliminary Injunction without the full administrative record in hand. *Id.* In effect, the Parties agreed that the full administrative record is not necessary for the Court to rule on the arbitrary and capricious claim at this time.

AMERICAN OVERSIGHT

"A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2556 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). As such, the Court will limit its inquiry to the findings, conclusions, and explanations provided in the February 18 Memorandum for its review. In addition, because the Court is ruling on a motion for preliminary injunction, the Court merely needs to determine "if there is a substantial likelihood that" the States "will prevail on the merits" of their arbitrary and capricious claim. *Prichard*, 812 F.2d at 993. It follows, therefore, that the disposition of the arbitrary and capricious claim, at this stage, is not final. Indeed, for at least one other district court, the lack of an administrative record was not a barrier for that court to rule on an arbitrary and capricious claim at this stage. *See* *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *23 & n.8, 28–29 (N.D. Tex. June 27, 2016).

50 To the extent the January 20 Memorandum's 100-day pause on removals and that Memorandum's corresponding administrative record are implicated in this action, the Court adopts its reasoning in *Texas I* and finds that the Government failed to engage in reasoned decision-making. ____ F. Supp. 3d at ____, 2021 WL 2096669, at *38–42. Thus, the Court adopts and incorporates by reference its prior decision that the January 20 Memorandum's 100-day pause is arbitrary and capricious.

51 The Court acknowledges it could be argued that, considering the transmissibility of COVID-19, the Executive Branch has chosen to detain fewer aliens to minimize the spread of the virus in detention facilities where it could not ensure proper safety precautions. But it could also be argued (and the CDC Report the Court describes above strongly suggests) that allowing certain aliens—those who would be detained but for the Memoranda—to be released within communities during the pandemic would exacerbate COVID-19's community spread. Regardless, the Memoranda fail to logically link the Executive Branch's bare COVID-19 justifications to the new guidance such that the Court can conclude the Memoranda were borne of reasoned decision making.

52 Not only that, the States' proposed limited policies are "obvious," "significant," and "viable" to this Court. *See Jones*, 716 F.3d at 215. It is incredibly obvious that a "reprioritization policy" that still effectuates and follows the law on detention and removals is more limited than the new guidelines. And surely, following laws should be significantly viable for the Executive Branch given it is *required* by the Constitution to enforce such laws. U.S. Const. art. II, §§ 1, 3.

53 " '[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4).

54 Specifically, the APA requires that "[g]eneral notice of proposed rule making *shall* be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." *Id.* § 553(b) (emphasis added). And that notice *shall* contain "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The APA also requires an agency to "give interested persons an opportunity to participate in the rule making," *id.* § 553(c), and that the "publication or service of a substantive rule shall be made not less than 30 days." *Id.* § 553(d).

55 The Fifth Circuit and the D.C. Circuit have emphasized that "unless a pronouncement acts prospectively, it is a binding norm. Thus ... a statement of policy may not have a present effect[.]" *Shalala*, 56 F.3d at 595; *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). Here, the February 18 Memorandum states that "[t]his interim guidance is effective *immediately*." (Dkt. No. 19-2 at 2) (emphasis added).
The Fifth Circuit cautions, however, that the "binding effect, *not the timing*, ... is the essence of criterion one." *Shalala*, 56 F.3d at 595 (emphasis added). Thus, the "[m]ere pronouncements of what the agency

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intends, whether for the present or for the future, which do not have a binding effect, are properly classified as interpretative rules." *Cmty. Nutrition Inst.*, 818 F.2d at 946 n.4. This caveat is of no consequence here because the Court finds that the Memoranda have a binding effect due to their effect on the rights and obligations described.

56 In describing the criteria for determining whether a rule is a general statement of policy or a substantive rule requiring notice and comment, the Fifth Circuit has relied on the D.C. Circuit. *See* *Shalala*, 56 F.3d at 595 nn.15–16 (citing *Cmty. Nutrition Inst.*, 818 F.2d at 943, and *Am. Bus Ass'n*, 627 F.2d at 529).

57 Specifically, the February 18 Memorandum states: "The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above." (Dkt. No. 19-2 at 7). In such circumstances, "[a]n approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above." (*Id.*).

58 And "when the location of a proposed or completed enforcement action is a courthouse, ... or a sensitive location, ... that should be explicitly highlighted in the request." (*Id.* at 7 n.7) (citations omitted).

59 The Government implicitly invokes prosecutorial discretion with respect to any harm an injunction may cause its Article II authority. *See* (Dkt. No. 42 at 55). This argument does not warrant much discussion. Indeed, the Court has already extensively discussed the extent of the Executive's discretion in enforcing a law when a clear congressional mandate is in place. *See supra* II.B.3.

60 Relatedly, the Government argues that an injunction would harm it by dismantling the two-step process ICE currently undergoes to determine whether to detain an alien in state custody. *See* (Dkt. No. 42 at 56). Sections 1226(c) and 1231(a)(2) already mandate which aliens must be detained and the time at or for which the Government must detain the alien.

61 The States also request that the Court issue a positive injunction to compel agency action unlawfully withheld. (Dkt. No. 18 at 25–26); (Dkt. No. 51 at 33). The Government is opposed. (Dkt. No. 42 at 57–61). Under the APA, a "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Court reserves ruling on this issue until later in the litigation.

62 This Memorandum Opinion and Order does not prohibit the Government from carrying out or adhering to the February 18 Memorandum's subsections entitled "Notice of At-Large Enforcement Actions" and "Weekly Reporting of All Enforcement and Removal Actions."

63 This Court previously enjoined Section C of the January 20 Memorandum. *See Texas I*, ____ F. Supp. 3d at ____, 2021 WL 2096669, at *52.

End of Document

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Delivery Report

From: postmaster@ago.mo.gov [postmaster@ago.mo.gov]
Sent: 8/23/2021 7:32:09 PM
To: 'Justin.smith@ago.mo.gov' [justin.smith@ago.mo.gov]
Subject: Undeliverable: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
Attachments: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana

Your message

To: 'elacour@ago.state.al.us'; 'krobertson@ago.state.al.us'; 'Laura.fox@alaska.gov'; 'cori.mills@alaska.gov'; 'vincent.wagner@arkansasag.gov'; 'Nicholas.Bronni@arkansasag.gov'; 'henry.whitaker@myfloridalegal.com'; 'daniel.bell@myfloridalegal.com'; 'apinson@law.ga.gov'; 'tjohnson@law.ga.gov'; 'Brian.Kane@ag.idaho.gov'; 'kimi.white@ag.idaho.gov'; 'tom.fisher@atg.in.gov'; 'kian.hudson@atg.in.gov'; 'jeff.chanay@ag.ks.gov'; 'brant.laue@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Barry.Dunn@ky.gov'; 'chad.meredith@ky.gov'; 'MurrillE@ag.louisiana.gov'; 'Scott.Stewart@ago.ms.gov'; 'Justin.Matheny@ago.ms.gov'; Smith, Justin; Sauer, John; 'david.dewhirst@mt.gov'; 'dave.bydalek@nebraska.gov'; 'jim.campbell@nebraska.gov'; 'Sean.P.Gill@doj.nh.gov'; 'masagsve@nd.gov'; 'tseibel@nd.gov'; 'Benjamin Flowers (Benjamin.Flowers@OhioAGO.gov)'; 'May.Mailman@OhioAGO.gov'; 'mithun.mansinghani@oag.ok.gov'; 'esmith@scag.gov'; 'mgates@scag.gov'; 'Paul.Swedlund@state.sd.us'; 'jonathan.skrmetti@ag.tn.gov'; 'Andree.Blumstein@ag.tn.gov'; 'Sarah.Campbell@ag.tn.gov'; 'grant.dorfman@oag.texas.gov'; 'judd.stone@oag.texas.gov'; 'melissaholyoak@agutah.gov'; 'Lindsay.S.See@wvago.gov'; 'ryan.schelhaas@wyo.gov'
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Subject: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
Sent: 8/23/2021 7:29:38 PM

Delivery has failed to these recipients or groups:

'Justin.smith@ago.mo.gov' (justin.smith@ago.mo.gov)
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
For more information about this error, see DSN code 5.7.1 in Exchange Online - Office 365.

Diagnostic information for administrators:

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justin.smith@ago.mo.gov
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, "'dave.bydalek@nebraska.gov'"
, "'jim.campbell@nebraska.gov'"
, "'Sean.P.Gill@doj.nh.gov'"
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(Benjamin.Flowers@OhioAGO.gov)'" ,
"'May.Mailman@OhioAGO.gov'" ,
"'mithun.mansinghani@oag.ok.gov'" ,
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, "Napolitano, Anthony" ,
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Subject: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
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Delivery Report

From: postmaster@ago.mo.gov [postmaster@ago.mo.gov]
Sent: 8/30/2021 9:50:23 AM
To: Justin.Smith@ago.mo.gov
Subject: Undeliverable: RE: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
Attachments: RE: Cert-stage Amicus Br. in Seattle's Union Gospel Mission

Your message

To: cori.mills@alaska.gov; jessie.alloway@alaska.gov; ninia.dizon@alaska.gov; Beau.Roysden@azag.gov; Drew.Ensign@azag.gov; nicholas.bronni@arkansasag.gov; vincent.wagner@arkansasag.gov; dylan.jacobs@arkansasag.gov; Henry.Whitaker@myfloridalegal.com; James.Percival@myfloridalegal.com; Jeffrey.DeSousa@myfloridalegal.com; Daniel.Bell@myfloridalegal.com; APinson@law.ga.gov; brian.kane@ag.idaho.gov; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; Kian.Hudson@atg.in.gov; jeff.chanay@ag.ks.gov; Brant.Laue@ag.ks.gov; Chad.Meredith@ky.gov; Matt.Kuhn@ky.gov; murrille@ag.louisiana.gov; StJohnJ@ag.louisiana.gov; Whitney.Lipscomb@ago.ms.gov; Scott.Stewart@ago.ms.gov; Justin.Matheny@ago.ms.gov; Sauer, John; Smith, Justin; Christian.Corrigan@mt.gov; Brent.Mead2@mt.gov; David.Dewhirst@mt.gov; Jim.Campbell@nebraska.gov; Daniel.E.Will@doj.nh.gov; Anthony.J.Galdieri@doj.nh.gov; wstenehjem@nd.gov; masagsve@nd.gov; tseibel@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; May.Davis@ohioago.gov; mithun.mansinghani@oag.ok.gov; zach.west@oag.ok.gov; ESmith@scag.gov; HKirkland@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Paul.Swedlund@state.sd.us; Sarah.Campbell@ag.tn.gov; Andree.Blumstein@ag.tn.gov; sarah.campbell@ag.tn.gov; Judd.Stone@oag.texas.gov; Grant.Dorfman@oag.texas.gov; Benjamin.Wilson@oag.texas.gov; melissaholyoak@agutah.gov; rcantrell@agutah.gov; Lindsay.S.See@wvago.gov; Thomas.T.Lampman@wvago.gov; Jessica.A.Lee@wvago.gov; james.kaste@wyo.gov; ryan.schelhaas@wyo.gov
CC: Wilson, Thomas
Subject: RE: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
Sent: 8/30/2021 9:50:55 AM

Delivery has failed to these recipients or groups:

Justin.Smith@ago.mo.gov (Justin.Smith@ago.mo.gov)
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
For more information about this error, see DSN code 5.7.1 in Exchange Online - Office 365.

Diagnostic information for administrators:

Generating server: AGOPMAIL01.ago.state.mo.us

Justin.Smith@ago.mo.gov
Remote Server returned '550 5.7.1 TRANSPORT.RULES.RejectMessage; the message was rejected by organization policy'

Original message headers:

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Received: from AGOPMAIL01.ago.state.mo.us (10.116.8.8) by
 AGOPMAIL01.ago.state.mo.us (10.116.8.8) with Microsoft SMTP Server
 (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_128_GCM_SHA256) id
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Received: from oa.mo.gov (10.245.70.220) by AGOPMAIL01.ago.state.mo.us
 (10.116.8.8) with Microsoft SMTP Server (version=TLS1_2,
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 Transport; Mon, 30 Aug 2021 09:50:22 -0500
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        by momail3.mo.gov (8.16.1.2/8.16.1.2) with SMTP id 17UEoIRA020360;
        Mon, 30 Aug 2021 09:51:03 -0500
Authentication-Results: mo.gov;
        spf=pass smtp.mailfrom=Edmund.LaCour@AlabamaAG.gov;
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Received: from gcc02-bl0-obe.outbound.protection.outlook.com (mail-
bl2gcc02on2099.outbound.protection.outlook.com [40.107.89.99])
        by momail3.mo.gov with ESMTP id 3axy66gnbv-1
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        Mon, 30 Aug 2021 09:51:00 -0500
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 smtp.mailfrom=alabamaag.gov; dmarc=pass action=none
 header.from=alabamaag.gov; dkim=pass header.d=alabamaag.gov; arc=none
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=ALABAMAAG.GOV;
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From: "LaCour, Edmund"
To: "cori.mills@alaska.gov" ,
        "jessie.alloway@alaska.gov" ,
        "ninia.dizon@alaska.gov" , "Beau.Roysden@azag.gov"
        , "Drew.Ensign@azag.gov" ,
        "nicholas.bronni@arkansasag.gov" ,
        "vincent.wagner@arkansasag.gov" ,
        "dylan.jacobs@arkansasag.gov" ,
        "Henry.Whitaker@myfloridalegal.com" ,
        "James.Percival@myfloridalegal.com" ,
```


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"Jeffrey.DeSousa@myfloridalegal.com" ,
"Daniel.Bell@myfloridalegal.com" ,
"APinson@law.ga.gov" , "brian.kane@ag.idaho.gov"
, "tom.fisher@atg.in.gov" ,
"julia.payne@atg.in.gov" , "Kian.Hudson@atg.in.gov"
, "jeff.chanay@ag.ks.gov" ,
"Brant.Laue@ag.ks.gov" , "Chad.Meredith@ky.gov"
, "Matt.Kuhn@ky.gov" ,
"murrille@ag.louisiana.gov" ,
"StJohnJ@ag.louisiana.gov" ,
"Whitney.Lipscomb@ago.ms.gov" ,
"Scott.Stewart@ago.ms.gov" ,
"Justin.Matheny@ago.ms.gov" ,
"john.sauer@ago.mo.gov" , "Justin.Smith@ago.mo.gov"
, "Christian.Corrigan@mt.gov"
, "Brent.Mead2@mt.gov" ,
"David.Dewhirst@mt.gov" , "Jim.Campbell@nebraska.gov"
, "Daniel.E.Will@doj.nh.gov"
, "Anthony.J.Galdieri@doj.nh.gov"
, "wstenehjem@nd.gov" ,
"masagsve@nd.gov" , "tseibel@nd.gov" ,
"Benjamin.flowers@ohioattorneygeneral.gov"
, "May.Davis@ohioago.gov"
, "mithun.mansinghani@oag.ok.gov"
, "zach.west@oag.ok.gov"
, "ESmith@scag.gov" ,
"HKirkland@scag.gov" , "BCook@scag.gov" ,
"steven.blair@state.sd.us" ,
"Sherri.Wald@state.sd.us" ,
"Paul.Swedlund@state.sd.us" ,
"Sarah.Campbell@ag.tn.gov" ,
"Andree.Blumstein@ag.tn.gov" ,
"sarah.campbell@ag.tn.gov" ,
"Judd.Stone@oag.texas.gov" ,
"Grant.Dorfman@oag.texas.gov" ,
"Benjamin.Wilson@oag.texas.gov" ,
"melissaholyoak@agutah.gov" ,
"rcantrell@agutah.gov" , "Lindsay.S.See@wvago.gov"
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, "james.kaste@wyo.gov" ,
"ryan.schelhaas@wyo.gov"
CC: "Wilson, Thomas"
Subject: RE: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
Thread-Topic: Cert-stage Amicus Br. in Seattle's Union Gospel Mission
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Date: Mon, 30 Aug 2021 14:50:55 +0000
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 (UTC)
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 malwarescore=0 spamscore=0 bulkscore=0 adultscore=0 suspectscore=0
 lowpriorityscore=0 mlxscore=0 clxscore=252 phishscore=0 priorityscore=0
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 definitions=main-2108300104
Return-Path: Edmund.LaCour@AlabamaAG.gov

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Delivery Report

From: postmaster@ago.mo.gov [postmaster@ago.mo.gov]
Sent: 8/30/2021 10:14:52 AM
To: 'Justin.smith@ago.mo.gov' [justin.smith@ago.mo.gov]
Subject: Undeliverable: Re: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
Attachments: Re: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana

Your message

To: Roysden, Beau; 'elacour@ago.state.al.us'; 'krobertson@ago.state.al.us'; 'Laura.fox@alaska.gov'; 'cori.mills@alaska.gov'; 'vincent.wagner@arkansasag.gov'; 'Nicholas.Bronni@arkansasag.gov'; 'henry.whitaker@myfloridalegal.com'; 'daniel.bell@myfloridalegal.com'; 'apinson@law.ga.gov'; 'tjohnson@law.ga.gov'; 'Drew Waldbeser'; 'Ross Bergethon'; 'Brian.Kane@ag.idaho.gov'; 'kimi.white@ag.idaho.gov'; 'tom.fisher@atg.in.gov'; 'kian.hudson@atg.in.gov'; 'jeff.chanay@ag.ks.gov'; 'brant.laue@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Barry.Dunn@ky.gov'; 'Chad.Meredith@ky.gov'; 'Scott.Stewart@ago.ms.gov'; 'Justin.Matheny@ago.ms.gov'; Smith, Justin; Sauer, John; 'david.dewhirst@mt.gov'; 'dave.bydalek@nebraska.gov'; 'jim.campbell@nebraska.gov'; 'Sean.P.Gill@doj.nh.gov'; 'masagsve@nd.gov'; 'tseibel@nd.gov'; 'Benjamin Flowers (Benjamin.Flowers@OhioAGO.gov)'; 'May.Mailman@OhioAGO.gov'; 'mithun.mansinghani@oag.ok.gov'; 'esmith@scag.gov'; 'mgates@scag.gov'; 'Paul.Swedlund@state.sd.us'; 'jonathan.skrmetti@ag.tn.gov'; 'Andree.Blumstein@ag.tn.gov'; 'Sarah.Campbell@ag.tn.gov'; 'melissaholyoak@agutah.gov'; 'Lindsay.S.See@wvago.gov'; 'ryan.schelhaas@wyo.gov'
CC: 'MurrillE@ag.louisiana.gov'; 'grant.dorfman@oag.texas.gov'; 'judd.stone@oag.texas.gov'; 'Thompson, Will'; Rogers, James; Napolitano, Anthony; Sawyer, Kate; Crank, Sarah; Anklam, Rachel
Subject: Re: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
Sent: 8/30/2021 10:11:51 AM

Delivery has failed to these recipients or groups:

'Justin.smith@ago.mo.gov' (justin.smith@ago.mo.gov)
Thank you for your message. Please provide any information for my attention to Megan Werdehausen at (573) 751-8807 or Megan.Werdehausen@ago.mo.gov. Thank you, Justin

Your message wasn't delivered because the email admin for the organization 'ago.mo.gov' created an email rule restriction. Please contact the email admin for that organization and ask them to remove or update the rule restriction.
For more information about this error, see DSN code 5.7.1 in Exchange Online - Office 365.

Diagnostic information for administrators:

Generating server: AGOPMAIL01.ago.state.mo.us

justin.smith@ago.mo.gov
Remote Server returned '550 5.7.1 TRANSPORT.RULES.RejectMessage; the message was rejected by organization policy'

Original message headers:

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 (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_128_GCM_SHA256) id
 15.1.2176.14; Mon, 30 Aug 2021 10:14:51 -0500
```

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Received: from oa.mo.gov (10.245.72.12) by AGOPMAIL01.ago.state.mo.us
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 Transport; Mon, 30 Aug 2021 10:14:51 -0500
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        by monail1.mo.gov (8.16.1.2/8.16.1.2) with SMTP id 17UFAQQT000826;
        Mon, 30 Aug 2021 10:15:31 -0500
Authentication-Results: mo.gov;
        spf=pass smtp.mailfrom=drew.ensign@azag.gov;
        dkim=pass header.s=selector2-azago-onmicrosoft-com header.d=azago.onmicrosoft.com
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        by monail1.mo.gov with ESMTP id 3aryljrvc2-1
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 Microsoft SMTP Server (version=TLS1_2,
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 2021 15:12:28 +0000
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 Transport; Mon, 30 Aug 2021 15:12:28 +0000
X-MS-Exchange-Authentication-Results: spf=pass (sender IP is 159.87.87.4)
 smtp.mailfrom=azag.gov; ag.louisiana.gov; dkim=none (message not signed)
 header.d=none;ag.louisiana.gov; dmarc=bestguesspass action=none
 header.from=azag.gov;
Received-SPF: Pass (protection.outlook.com: domain of azag.gov designates
```


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159.87.87.4 as permitted sender) receiver=protection.outlook.com;
client-ip=159.87.87.4; helo=EDGESRV01.azag.gov;
Received: from EDGESRV01.azag.gov (159.87.87.4) by
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15.01.2242.012; Mon, 30 Aug 2021 08:11:51 -0700
From: "Ensign, Drew"
To: "Royden, Beau" , "'elacour@ago.state.al.us'"
, "'krobertson@ago.state.al.us'"
, "'Laura.fox@alaska.gov'"
, "'cori.mills@alaska.gov'" ,
"'vincent.wagner@arkansasag.gov'" ,
"'Nicholas.Bronni@arkansasag.gov'" ,
"'henry.whitaker@myfloridalegal.com'" ,
"'daniel.bell@myfloridalegal.com'" ,
"'apinson@law.ga.gov'" , "'tjohnson@law.ga.gov'"
, 'Drew Waldbeser' , "'Ross
Bergethon'" , "'Brian.Kane@ag.idaho.gov'"
, "'kimi.white@ag.idaho.gov'"
, "'tom.fisher@atg.in.gov'" ,
"'kian.hudson@atg.in.gov'" ,
"'jeff.chanay@ag.ks.gov'" , "'brant.laue@ag.ks.gov'"
, "'Chad.Meredith@ky.gov'" ,
"'Barry.Dunn@ky.gov'" , "'Chad.Meredith@ky.gov'"
, "'Scott.Stewart@ago.ms.gov'"
, "'Justin.Matheny@ago.ms.gov'"
, "'Justin.smith@ago.mo.gov'"
, "'John.Sauer@ago.mo.gov'" ,
"'david.dewhirst@mt.gov'" ,
"'dave.bydalek@nebraska.gov'" ,
"'jim.campbell@nebraska.gov'" ,
"'Sean.P.Gill@doj.nh.gov'" , "'nasagsve@nd.gov'"
, "'tseibel@nd.gov'" , "'Benjamin Flowers
(Benjamin.Flowers@OhioAGO.gov)'" ,
"'May.Mailman@OhioAGO.gov'" ,
"'mithun.mansinghani@oag.ok.gov'" ,
"'esmith@scag.gov'" , "'ngates@scag.gov'" ,
"'Paul.Swedlund@state.sd.us'" ,
"'jonathan.skrmetti@ag.tn.gov'" ,
"'Andree.Blumstein@ag.tn.gov'" ,
"'Sarah.Campbell@ag.tn.gov'" ,
"'melissaholyoak@agutah.gov'" ,
"'Lindsay.S.See@wvago.gov'" ,
"'ryan.schelhaas@wyo.gov'"
CC: "'MurrillE@ag.louisiana.gov'" ,
"'grant.dorfman@oag.texas.gov'" ,
"'judd.stone@oag.texas.gov'" , "'Thompson, Will'"
, "Rogers, James" ,
"Napolitano, Anthony" , "Sawyer, Kate"
, "Crank, Sarah" , "Anklam,
Rachel"
Subject: Re: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana

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Thread-Topic: Upcoming Sign-on - Amicus Brief Supporting Texas and Louisiana
Thread-Index: AdeahqvHm6G3mYQSSm2c7wkFXCKY2wDK1rXh
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 (UTC)
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 definitions=main-2108300107
Return-Path: drew.ensign@azag.gov

AMERICAN OVERSIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

NORTHLAND PARENT ASSOCIATION,
a Missouri nonprofit corporation

Plaintiff,

v.

Excelsior Springs School District #40
300 West Broadway Street
Excelsior Springs, MO 64024

Board of Education of Excelsior Spring School District # 40
300 West Broadway Street
Excelsior Springs, MO 64024

Kearney R-I School District
150 West State Route 92
Kearney, MO 64060

Board of Education of Kearney R-I School District
150 West State Route 92
Kearney, MO 64060

Liberty 53 School District
8 Victory Lane
Liberty, MO 64068

Board of Education of Liberty 53 School District
8 Victory Lane
Liberty, MO 64068

North Kansas City School District #74
2000 NE 46th Street
Kansas City, MO 64116

Board of Education of North Kansas City School District #74
2000 NE 46th Street
Kansas City, MO 64116

Case No. _____

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MCAGE-22-0644-A-005529

Smithville R-II School District
655 S Commercial Avenue
Smithville, MO 64089

Board of Education of Smithville R-II School District
655 S Commercial Avenue
Smithville, MO 64089

Park Hill School District
7703 NW Barry Road
Kansas City, MO 64153

Board of Education of Park Hill School District
7703 NW Barry Road
Kansas City, MO 64153

Platte County School District R-III
998 Platte Falls Road
Platte City, MO 64079

Board of Education of Platte County School District R-III
998 Platte Falls Road
Platte City, MO 64079

Quinton Lucas, Mayor of Kansas City, Missouri, in his Official Capacity
414 E 12th Street
Kansas City, MO 64106

City Council of Kansas City, Missouri
414 E 12th Street
Kansas City, MO 64106

Bryant DeLong, Mayor of North Kansas City, Missouri, in his Official Capacity
2010 Howell Street
North Kansas City, MO 64116

City Council of North Kansas City, Missouri
2010 Howell Street
North Kansas City, MO 64116

Defendants.

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COMPLAINT

NORTHLAND PARENT ASSOCIATION, by and through counsel, for its claims for relief against Defendants, alleges and states as follows:

PARTIES

1. Plaintiff, the **Northland Parent Association ("NPA")**, is a Missouri nonprofit corporation with its principal place of nonprofit business in Clay County, Missouri.

2. The NPA is made up of hundreds of parents, guardians, families, and taxpayers in Clay County, Missouri, and Platte County, Missouri, who inform themselves, educate the public, and advocate for the health and social, emotional, and academic wellbeing of students in the Northland area of the metropolitan area of Kansas City.

3. Defendant **Excelsior Springs School District #40 ("ESSD")** is a public school district located in Clay County, Missouri, and a political subdivision of the State of Missouri. ESSD is responsible for providing a free public education to the residents of the district. ESSD is governed by a seven-director school board.

4. Defendant **Board of Education of ESSD ("ESSD School Board")** is a representative body elected by the registered voters of the ESSD. The purpose and role of the ESSD School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." ESSD, Policy BBA: School Board Powers & Duties (adopted 10/12/1998). The ESSD School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.* The ESSD School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for the ESSD. *Id.*

AMERICAN OVERSIGHT

MCAG-22-0644-A-005531

5. The members of the ESSD School Board are Tray Harkins, Darren McKown, Rick Strack, Travis Hux, Kenny Manley, Steve Houck, Kalyn Goode, and Troy Snelling. They are sued collectively as a Board in their official capacity.

6. The NPA has one or more members whose children are currently enrolled in the early childhood program in ESSD.

7. The NPA has one or more members whose children are currently enrolled in an elementary school in ESSD.

8. The NPA has one or more members whose children are currently enrolled in middle school in ESSD.

9. The NPA has one or more members whose children are currently enrolled in high school in ESSD.

10. Defendant **Kearney R-1 School District** ("**KSD**") is a public school district located in Clay County, Missouri, and a political subdivision of the State of Missouri. KSD is responsible for providing a free public education to the residents of the district. KSD is governed by a seven-director school board.

11. Defendant **Board of Education of KSD ("KSD School Board")** is a representative body elected by the registered voters of the KSD district. The purpose and role of the KSD School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." KSD, Policy BBA: School Board Powers & Duties (adopted 11/15/2001). The KSD School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.*

AMERICAN OVERSIGHT

MCAGE-22-0644-A-005532

The KSD School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for the KSD. *Id.*

12. The members of the KSD School Board are Mark Kelly, Bree Switzer, Darlene Bailey, Brian Hamm, Dan Holloway, John Kern, and Susan Woehrman. They are sued collectively as a Board in their official capacity.

13. The NPA has one or more members whose children are currently enrolled in the early childhood program in KSD.

14. The NPA has one or more members whose children are currently enrolled in an elementary school in KSD.

15. The NPA has one or more members whose children are currently enrolled in a middle school in KSD.

16. The NPA has one or more members whose children are currently enrolled in a high school in KSD.

17. Defendant **Liberty 53 School District** (commonly and hereinafter referred to as **Liberty Public Schools ("LPS")**) is a public school district located in Clay County, Missouri, and a political subdivision of the State of Missouri. LPS is responsible for providing a free public education to the residents within the district. LPS is governed by a seven-director school board.

18. Defendant **Board of Education of LPS ("LPS School Board")** is a representative body elected by the registered voters of the LPS district. The purpose and role of the LPS School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." LPS, Policy BBA: School Board Powers & Duties (revised 01/22/2013). The LPS School Board "is accountable to the electorate, and shall be

AMERICAN OVERSIGHT

MCAGE-22-0644-A-005533

responsive to the educational needs and the imposed financial constraints of the district." *Id.* The LPS School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for LPS. *Id.*

19. The members of the LPS School Board are Nicholaus Bartlow, Angie Reed, AJ Byrd, Scott Connor, Kim-Marie Graham, Drew Marriott, and Andrew Roffmann. They are sued collectively as a board in their official capacity.

20. The NPA has one or more members whose children are currently enrolled in the early childhood program in LPS.

21. The NPA has one or more members whose children are currently enrolled in an elementary school in LPS.

22. The NPA has one or more members whose children are currently enrolled in a middle school in LPS.

23. The NPA has one or more members whose children are currently enrolled in a high school in LPS.

24. Defendant **North Kansas City School District #74** (commonly and hereinafter referred to as **"NKC Schools")** is a public school district located in Clay County and Platte County, Missouri, and is a political subdivision of the State of Missouri. NKC Schools is responsible for providing a free public education to the residents within the district. NKC Schools is governed by a seven-director school board.

25. Defendant **Board of Education of NKC Schools ("NKC School Board")** is a representative body elected by the registered voters of the NKC Schools district. The purpose and role of the NKC School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and

AMERICAN OVERSIGHT

MCAGE-22-0644-A-005534

procedures . . . , and the policies, rules and procedures of the school district." NKC Schools, Policy BBA: School Board Powers & Duties (adopted 02/11/2003). The NKC School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.* The NKC School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for NKC Schools. *Id.*

26. The members of the NKC School Board are Jan Kauk, Terry Stone, Jane Rinehart, Judy Wartick, Paul Harrell, Karee Gleason-Miller, and Terry Ward. They are sued collectively as a board in their official capacity.

27. The NPA has one or more members whose children are currently enrolled in the early childhood program in NKC Schools.

28. The NPA has one or more members whose children are currently enrolled in an elementary school in NKC Schools.

29. The NPA has one or more members whose children are currently enrolled in a middle school in NKC Schools.

30. The NPA has one or more members whose children are currently enrolled in a high school in NKC Schools.

31. Defendant **Park Hill School District ("PHSD")** is a public school district located in Platte County, Missouri, and a political subdivision of the State of Missouri. PHSD is responsible for providing a free public education to the residents of the district. PHSD is governed by a seven-director school board.

32. Defendant **Board of Education of PHSD ("PHSD School Board")** is a representative body elected by the registered voters of PHSD. The purpose and role of the PHSD

AMERICAN OVERSIGHT

MCAGE-22-0644-A-005535

School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." PHSD, Policy BBA: School Board Powers & Duties (adopted 2/14/2013). The PHSD School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.* The PHSD School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for the PHSD. *Id.*

33. The members of the PHSD School Board are Janice Bolin, Bart Klein, Kimberlee Ried, Scott Monsees, Brandy Woodley, Todd Fane, and Susan Newburger. They are sued collectively as a Board in their official capacity.

34. The NPA has one or more members whose children are currently enrolled in the early childhood program in PHSD.

35. The NPA has one or more members whose children are currently enrolled in an elementary school in PHSD.

36. The NPA has one or more members whose children are currently enrolled in middle school in PHSD.

37. The NPA has one or more members whose children are currently enrolled in high school in PHSD.

38. Defendant **Platte County School District R-III ("PCSD")** is a public school district located in Platte County and Clay County, Missouri, and it is a political subdivision of the State of Missouri. PCSD is responsible for providing a free public education to the residents of the district. PCSD is governed by a seven-director school board.

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 8 of 74
MCAG-22-0644-A-005536

39. Defendant **Board of Education of PCSD ("PCSD School Board")** is a representative body elected by the registered voters of the PCSD. The purpose and role of the PCSD School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." PCSD, Policy BBA: School Board Powers & Duties (adopted 12/16/1999). The PCSD School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.* The PCSD School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for the PCSD. *Id.*

40. The members of the PCSD School Board are Buffy Smith, Gary Brown, Sharon Sherwood, Doug Doll, Alisha Elliott, Bobby Vann, and Karen Bryant. They are sued in their official capacity.

41. The NPA has one or more members whose children are currently enrolled in the early childhood program in PCSD.

42. The NPA has one or more members whose children are currently enrolled in an elementary school in PCSD.

43. The NPA has one or more members whose children are currently enrolled in middle school in PCSD.

44. The NPA has one or more members whose children are currently enrolled in high school in PCSD.

45. Defendant **Smithville R-II School District ("SSD")** is a public school district located in Missouri in the counties of Clay, Clinton, and Platte, and is a political subdivision of the

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 9 of 74
MCAGE-22-0644-A-005537

State of Missouri. SSD is responsible for providing a free public education to the residents within the district. SSD is governed by a seven-director school board.

46. Defendant **Board of Education of SSD ("SSD School Board")** is a representative body elected by the registered voters of in the SSD. The purpose and role of the SSD School Board is to "exercise general supervision over the schools of the district, and to ensure that the schools are maintained as provided by the state statutes, [state] rules and procedures . . . , and the policies, rules and procedures of the school district." SSD, Policy BBA: School Board Powers & Duties (adopted 04/21/2010). The SSD School Board "is accountable to the electorate, and shall be responsive to the educational needs and the imposed financial constraints of the district." *Id.* The SSD School Board, acting as a whole, "controls all aspects of the operations of the district within the limits of the law" and is "the final authority" for SSD. *Id.*

47. The members of the SSD School Board are Denney Fales, Sarah Lamer, Jeff Bloemker, Ian Saxton, Len Matthies, Scott Haggerty, and Susan Whitacre. They are sued collectively as a board in their official capacity.

48. The NPA has one or more members whose children are currently enrolled in the early childhood program in SSD.

49. The NPA has one or more members whose children are currently enrolled in an elementary school in SSD.

50. The NPA has one or more members whose children are currently enrolled in a middle school in SSD.

51. The NPA has one or more members whose children are currently enrolled in a high school in SSD.

AMERICAN OVERSIGHT

MoAG-22-0644-A-005538

52. The above listed School District and School Board Defendants are hereinafter collectively referred to as "**School Defendants**."

53. Defendant **Quinton Lucas** is the Mayor of Kansas City. He is sued in his official capacity.

54. Defendant **City Council of Kansas City, Missouri,** is Kansas City's legislative and policy-making body comprised of thirteen councilmembers: Quinton Lucas, Heather Hall, Kevin O'Neill, Dan Fowler, Teresa Loar, Melissa Robinson, Brandon Ellington, Katheryn Shields, Eric Bunch, Lee Barnes, Jr., Ryana Parks-Shaw, Kevin McManus, and Andrea Bough. They are sued collectively as a government body in their official capacity.

55. Defendant **Bryant DeLong** is the Mayor of North Kansas City, Missouri. He is sued in his official capacity.

56. Defendant **City Council of North Kansas City, Missouri,** is North Kansas City's legislative and policy-making body comprised of eight councilmembers: Anthony Saper, Wesley Graves, Lisa Tull, Jesse Smith, Zachary Clevenger, Adam Roberts, Amie Clarke, and Ana Pellumbi. They are sued collectively as a government body in their official capacity.

57. The above listed city officials and departments hereinafter collectively referred to as "**City Defendants**."

JURSIDICTION AND VENUE

58. This Court has original subject matter jurisdiction over the federal Constitutional violations alleged in this Complaint pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343. Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over Plaintiff's state law claims. This Court has jurisdiction to issue injunctive and declaratory relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005539

59. Venue is proper in this Court under 28 U.S.C. § 1391. All Defendants reside in the Western District of Missouri, and a substantial part of the events or omissions giving rise to the claims occurred in the Western District of Missouri.

FACTUAL BACKGROUND

60. Plaintiff hereby incorporates paragraphs 1-60 of this Complaint if fully set forth herein.

61. Upon information and belief, on or around August 27, 2021, Missouri Governor Mike Parson terminated Executive Order 20-02 ending the State of Emergency that has been in effect since March 13, 2020, stating that the situation no longer demands an expansive emergency declaration as there is now a solution to ending the pandemic with the vaccine. Governor Parson then ordered with a more targeted State of Emergency declaration that acknowledges the continued needs of Missouri's health care system. Press Release, Mike Parson, Governor, Missouri, Governor Parson Ends Existing State of Emergency by Terminating Executive Order 20-02 (Aug. 27, 2021), *available at* https://governor.mo.gov/press-releases/archive/governor-parson-ends-existing-state-emergency-terminating-executive-order-20 (last visited Aug. 28, 2021).

I. COVID-19, Risks to Children, & Masks

62. COVID-19 is a respiratory illness caused by a coronavirus that, among other symptoms, can cause cough, shortness of breath, fever or chills, muscle and body aches, vomiting or diarrhea, and the temporary loss of taste or smell.

a. Low risk of death to children from COVID-19.

63. The death of any child is a tragedy.

64. To date, no child younger than 10 years old in Missouri has died from COVID-19.[1]

[1] Unless otherwise noted, the Complaint cites statewide statistics reported on the Missouri Department of Health & Senior

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 12 of 71
Image 22-0644A-005540

65. Out of more than 10,200 reported deaths involving COVID-19 in Missouri, only five– 0.05% are from children between the ages of 10 and 17.

66. By contrast, in 2019, Missouri reported four fatalities of children under age 15 from chronic lower respiratory disease; ten deaths of children under age 15 due to influenza and pneumonia; 11 deaths of children under age 15 from cancers; and 49 children under age 15 died in motor vehicle crashes. DHHS, Table 21A, Resident Deaths by Selected Causes by Age Groups: Missouri, 2019, available at https://health.mo.gov/data/vitalstatistics/mvs19/Table21a.pdf.

67. Missouri's experience is consistent with nationwide data. The CDC reports 385 deaths nationally in children under 18 years old from COVID-19 out of more than 54,000 deaths from all causes in that age bracket. CDC, Deaths involving coronavirus disease 2019 (COVID-19), pneumonia, and influenza reported to NCHS by time-period, jurisdiction of occurrence, sex and age-group, Aug. 18, 2021, available at https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (last visited Aug. 25, 2021); *see also*, Marty Makary, Opinion, *The Flimsy Evidence Behind the CDC's Push to Vaccinate Children,* WALL ST. J. (July 19, 2021), https://on.wsj.com/2VYqit1 (In the United States, less than 350 children "under 18 have died with a Covid diagnosis code in their record.").

68. By contrast, during that same time period, the CDC reports 1,381 deaths of children under 18 years old involving pneumonia, influenza, or COVID-19, meaning that approximately 1,075 deaths of children under 18 years old involved pneumonia or influenza, but not COVID-19. CDC, Deaths involving coronavirus disease 2019 (COVID- 19), pneumonia, and influenza reported to NCHS by time-period, jurisdiction of occurrence, sex and age-group, Aug. 18, 2021,

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Services COVID-19 dashboard, available at https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/data/ public-health/statewide.php.

AMERICAN OVERSIGHT

MORE-22-0644A-005541

available at https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (last visited Aug. 25, 2021).

69. The CDC's current best estimate scenario assesses the infection fatality rate to be 0% for 0-17 year olds and to be 0.05% for 18-49 year olds (and, given that COVID-19 risk is more serious as individuals age, 0.05% is likely far too high for 18- and 19-year-olds). CDC, COVID-19 Pandemic Planning Scenarios (last updated Mar. 19, 2021), https://bit.ly/3AyuiiU.

70. Data from the United Kingdom regarding fatality rates from the delta variant show the case fatality rate from delta is lower than other variants, and it is near 0.0% for those under fifty years old. *See* PUB. HEALTH ENG., SARS-COV-2 VARIANTS OF CONCERN AND VARIANTS UNDER INVESTIGATION IN ENGLAND: TECHNICAL BRIEFING 20, at 14 tbl.4 (Aug. 6, 2021); *see id.* at 18 tbl.5 (showing that only 48 of the 147,612 unvaccinated people under 50 who were infected with the Delta variant died (0.03%)).

b. Low risk of children's hospitalization due to COVID-19.

71. COVID-19 "infection in children is generally characterized by mild illness. Only a minority of children require hospitalization …" Zoe Hyde, Perspective, COVID-19, *Children and Schools: Overlooked and at Risk,* 213 MED. J. AUSTL. 444, 444 (2020); *see Children, School and COVID-19,* NAT'L INST. PUB. HEALTH & ENV'T (last updated July 14, 2021), https://www.rivm.nl/en/coronavirus-covid-19/children-and-covid-19 ("Worldwide, relatively few children have been reported with COVID-19. . . . Children become less seriously ill and almost never need to be hospitalized because of" COVID- 19.).

72. Children make up a small percentage of COVID-related hospitalizations and make up less than 1 for every 100,000 residents in Missouri. COVID Data Tracker, CDC, *New Admissions of Patients with Confirmed COVID-19 per 100,000 Population by Age Group,*

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 14 of 71
MORE-22-0644-A-005542

Missouri (last visited Aug. 24, 2021), https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions.

73. As of July 31, 2021, the CDC reported that the rate of hospitalization with COVID for children between 5 and 17 was 0.5 per 100,000, or about 250 patients. Marty Makary & H. Cody Meissner, Opinion, *The Case Against Masks for Children,* WALL ST. J. (Aug. 8, 2021), https://on.wsj.com/3ANwOlt. Those numbers overestimate the risk because all children admitted to the hospital are tested whether they complained of COVID or some other affliction.

74. The CDC estimates that compared to adults 40 to 49 years of age, children 5 to 17 years of age have 160 times lower risk of death from COVID-19 and 27 times lower risk of hospitalization from COVID-19." Dena Bravata, *Back to School: The Effect of School Visits During COVID-19 on COVID-19 Transmission 9* (Nat'l Bureau of Econ. Research, Working Paper No. 28645, Apr. 2021).

75. Sweden, which kept schools open last year, reported a total of 15 children with Covid-19 were admitted to an ICU (0.77 per 100,000 children in this age group)" between March and June 2020. Jonas F. Ludvigsson, Letter to the Editor, *Open Schools, Covid-19, and Child and Teacher Morbidity in Sweden,* 384 NEW. ENG. J. MED. 669, 669 (2021).

76. All these studies and data show that children are a small proportion of COVID-19 infections and are at substantially less risk for severe health outcomes than adults.

c. Low risk of children spreading COVID-19.

77. Research and data from the last 18 months overwhelmingly show that the risk of children spreading the coronavirus is minimal.

78. An article published in the New England Journal of Medicine studied and confirmed the direction of the virus's spread from contact to contact. By studying results from

AMERICAN OVERSIGHT

MCAG-22-0644-A-005543

Iceland's systematic screening process, the author determined that if children do get the virus, they are less likely to transmit the disease to adults and found that there was not a single instance of a child infecting parents. Daniel F. Gudbjartsson, Ph.D, Agnar Helgason, Ph.D., et al., *Spread of SARS-CoV-2 in the Icelandic Population,* N. Eng. J. Med. (June 11, 2020), https://www.nejm.org/doi/full/10.1056/NEJMoa2006100.

79. A French study from April 2020, when there were no vaccines, showed that three schoolchildren who had positive test results became positive from a source other than the school. Arnaud Fontanet, MD, DrPH, Rebecca Grant, et al., SARS-CoV-2 Infection in Primary Schools in Northern France: A Retrospective Cohort Study in an Area of High Transmission, Institut Pasteur, (last visited August 25, 2020), https://www.pasteur.fr/fr/file/35404/download.

80. Out of Ireland, researchers followed three children (between ages 10 and 15) and three adults who tested positive in March 2020. After being confined to their homes due to a lockdown, the children had 722 contacts with other people, but the researchers found no instance of a child infecting another child. The adults had fewer contacts (102) and passed it on to other adults. Laura Heavey, Geraldine Casey, et al., *No Evidence of Secondary Transmission of COVID-19 from Children Attending School in Ireland, 2020,* Eurosurveillance, (May 28, 2020), https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2020.25.21.2000903#html_fulltext.

81. A Netherland study confirmed that (1) children play a minor role in the spread of the novel coronavirus, (2) the virus is mainly spread between adults and from adult family members to children, and (3) the spread of COVID-19 among children or from children to adults is less common. *Children and COVID-19,* National Institute for Public Health and the

AMERICAN OVERSIGHT

Mo AG 22-0644 A-005544

Environment, (July 2, 2020), https://www.rivm.nl/en/novel-coronavirus- covid-19/children-and-covid-19.

82. Similarly, a German study from March 2020 to early May 2020 followed 128 pediatric patients admitted to hospitals. For that limited sample size, the researchers found that the primary source of infection with SARS-CoV-2 appears not to be other children. Armann, J. P., et al., *Hospital Admission in Children and Adolescents With COVID-19. Deutsches Arzteblatt international,* 117(21), 373–374 (2020).

83. In a large study from the United Kingdom studying school environments, the author confirmed that there is very little evidence that the virus is transmitted in schools. Sian Griffiths, *Pupils pose little risk of spreading COVID,* THE SUNDAY TIMES (Aug. 9, 2020), https://bit.ly/3y9WqYb.

84. Research studying the effect of school closures on disease spread finds little or no effect of school closure on disease spread. When Sweden kept its schools open, a study found that there was no additional risk to the elderly (a high-risk population) cohabitating with schoolchildren even if children became infected. Brandén, Maria, et al., *Residential Context and COVID-19 Mortality among the Elderly in Stockholm: A population-based, observational study. Stockholm Research Reports in Demography,* THE LANCET (Oct. 27, 2020) https://www.thelancet.com/journals/lanhl/article/PIIS2666-7568(20)30016-7/fulltext; *Covid-19 in schoolchildren: A comparison between Finland and Sweden,* Public Health Agency of Sweden (2020), https://www.folkhalsomyndigheten.se/contentassets/c1b78bffbfde4a7899eb0d8ffdb57b09/covid-19-school-aged-children.pdf.

85. Additionally, teachers in Missouri have been eligible to receive a COVID-19 vaccination since early March 2021.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005545

86. Further, Emory Vaccine Center Director Rafi Ahmed, PhD reported that antibody responses from naturally infected COVID-19 patients were durable and offered a sustained defense against reinfection. The study additionally suggested that patients who survived COVID-19 are likely to also possess protective immunity even against some of the SARS-CoV-2 variants. Ahmed, Rafi et. al., *Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells*. CELL REPORTS MEDICINE (July 14, 2021) https://www.cell.com/cell-reports-medicine/fulltext/S2666-3791(21)00203-2.

87. Several studies show that children do not generally spread the coronavirus, even in school settings. The studies also demonstrate that children have very positive outcomes with a lower risk of death and severe health outcomes.

II. Masks fail to provide adequate protection and offer a false sense of security.

88. Mask use by the general population shows, at best, a marginal impact on the spread of COVID-19. And most studies show no distinguishable difference between places with mask mandates and those without them.

89. A much-touted research paper claimed that mask mandates had reversed COVID-19 incidence in Kansas counties that had implemented them. *See* Miriam E. Van Dyke, *Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate—Kansas, June 1-August 23, 2020,* 69 MORBIDITY & MORTALITY WEEKLY REP. 1777, 1778 (2020). However, that paper was based on early data that was later found to be inaccurate. When the updated data was studied, it did not show any reversal in COVID-19 incidence. Kevin Dayaratna & Norbert J. Michel, *A Statistical Analysis of Mandates and Mask Usage in Kansas,* THE HERITAGE FOUND.: SPECIAL REPORT, Apr. 15, 2021, at 6. Additionally, the paper suffered

AMERICAN OVERSIGHT

MCAG-22-0644-A-005546

from numerous methodological deficiencies that prevented it from being useful. *See id.* at 13–14 & charts 2 & 3.

90. "[M]ask mandates and use were poor predictors of COVID-19 spread in US states." Damian D. Guerra & Daniel J. Guerra, *Mask Mandate and Use Efficacy in State- Level COVID-19 Containment* 12 (MedRxiv, Preprint, May 25, 2021).

91. Though the European Centre for Disease Prevention and Control advocates for universal public mask use, it has conceded that the evidence of the benefit in wearing a surgical mask was "of low to moderate certainty" and failed to show statistically significant benefits. EUROPEAN CTR. FOR DISEASE PREVENTION & CONTROL, USING FACE MASKS IN THE COMMUNITY: FIRST UPDATE 5 (2021). As for non-medical (i.e., cloth) facemasks: "We did not identify any interventional or observational study directly comparing the effectiveness of non-medical face masks with that of medical face masks and no masks." *Id.* at 7. Another study advocating for mask usage noted that "[t]he quality of the evidence [regarding the effectiveness of masks] is problematic." Julii Brainard et al., *Community Use of Face Masks and Similar Barriers to Prevent Respiratory Illness Such as COVID- 19: A Rapid Scoping Review,* EUROSURVEILLANCE, at 9 (Dec. 10, 2020).

92. Another study reported that "the scientific evidence [of whether masks prevent viral respiratory infections] should be considered equivocal." Olga Perski et al., *Face Masks to Prevent Community Transmission of Viral Respiratory Infections: A Rapid Review Using Bayesian Analysis,* QEIOS, at 14 (May 1, 2020).

93. According to recent report, a study published by the CDC found that mitigation measures in schools, and in particular "requiring student masking were each found to not have a

AMERICAN OVERSIGHT

statistically significant benefit." David Zweig, *Following the Science: The Science of Masking Kids at School Remains Uncertain,* NY Mag (Aug. 20, 2021).

94. The observational data and anecdotal evidence similarly show that public mask use has little effect on community spread or stopping infection surges.

95. That is unsurprising because masks—especially cloth masks—are not able to stop "the smaller inhalable particles" that are largely response for transmission" of COVID-19. Lisa M. Brosseau & Margaret Sietsema, *Commentary: Masks-for-All for COVID-19 Not Based on Sound Data,* CTR. INFECTIOUS DISEASE RES. & POL. Apr. 1, 2020), https://bit.ly/3saPjgK.

96. Indeed, masks have long been considered one measure that offers their wearers a false sense of security.

97. Adults, let alone children, may not properly wear masks. As recently observed, "[f]olks who don't know how to wear [masks] properly tend to touch their faces a lot and actually can increase the spread of coronavirus." Jeffrey H. Anderson, *Do Masks Work?,* CITY J. (Aug. 11, 2021), https://www.city-journal.org/do-masks-work-a-review-of-the-evidence (quoting tweet from former Surgeon General Jerome Adams). One study found that "[r]ates of infection were consistently higher among those in the cloth mask group than in the medical mask and control groups. … The poor performance may have been because the masks were not washed frequently enough or because they became moist and contaminated." Abrar A. Chughtai et al., *Effectiveness of Cloth Masks for Protection Against Severe Acute Respiratory Syndrome Coronavirus 2,* EMERGING INFECTIOUS DISEASES: ONLINE REPORT, at e2 (Oct. 2020).

III. Masks can harm children.

98. Requiring children to mask is not a mere convenience; there are real costs to such measures.

AMERICAN OVERSIGHT

Image-22-0644A-005548

99. In the United Kingdom, "[f]ace coverings are no longer advised for pupils, staff and visitors either in classrooms or in communal areas." U.K., Dep't of Educ., Guidance: Schools in COVID-19 Operational Guidance (last updated Aug. 27, 2021), available at https://www.gov.uk/government/publications/actions-for-schools-during-the-coronavirus-outbreak/schools-covid-19-operational-guidance#face-coverings (last visited Aug. 27, 2021).

100. A study on mask use in 25,930 schoolchildren found that 68% "complained about impairments caused by wearing the masks," including "irritability (60%), headache (53%), difficulty concentrating (50%), less happiness (49%), reluctance to go to school/kindergarten (44%), malaise (42%), impaired learning (38%) and drowsiness/fatigue (37%)." Silke Schwarz et al., *Coronakinderstudien co-Ki: Erste Ergebnisse Eines Deutschlandweiten Registers zur Mund-Nasen-Bedeckung (Maske) bei Kindern,* 169 MONATSSCHRIFT KINDERHEILKUNDE 353, 355 (2021).

101. Importantly, mask use by young children is detrimental to their communication skills at a critical stage of their development. The World Health Organization notes that masking young children raises social and communication concerns. Specifically, researchers are concerned that masks may "hinder[] verbal and non-verbal communication." Jonas F. Ludvigsson, Opinion, *Little Evidence for Facemask Use in Children Against COVID-19*, 110 ACTA PEADIATRICA 745 745 (2021).

102. One study found, for example, that "children correctly identified the emotional expression on uncovered faces about 66% of the time ... [but] [l]ooking at faces in surgical-type masks, ... were only able to correctly identify sadness about 28% of the time, anger 27% of the time, and fear 18% of the time." Robert Lee Hotz, Covid Face Masks Are Disrupting a Key Tool of Human Communications, New Research Shows, WALL ST. J.: SCI. J. (Jan. 18, 2021),

AMERICAN OVERSIGHT

MCAG-22-0644-A-005549

https://on.wsj.com/3iO2fWG; see Clause-Christian Carbon, *Wearing Face Masks Strongly Confuses Counterparts in Reading Emotions*, FRONTIERS PSYCH., Sept. 2020, at 6. "Covering a child's face mutes these nonverbal forms of communication and can result in robotic and emotionless interactions, anxiety and depression. Seeing people speak is a building block of phonetic development. It is especially important for children with disabilities such as hearing impairment." Marty Makary & H. Cody Meissner, Opinion, *The Case Against Masks for Children*, WALL ST. J. (Aug. 8, 2021), https://on.wsj.com/3ANwOlt.

IV. Defendants have imposed mask mandates and quarantine policies.

a. Excelsior Springs School District

103. Upon information and belief, on or around August 23, 2021, the ESSD School Board and ESSD adopted and implemented COVID-19 protocols for the Fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all persons must wear face coverings in all indoor settings.

104. Upon information and belief, before the ESSD School Board and ESSD finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, ESSD School Board and ESSD received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

105. Upon information and belief, the mask mandate implemented by the ESSD School Board and ESSD is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and

AMERICAN OVERSIGHT

MCAG-22-0644-A-005550

significantly prevent COVID-19 transmission in the community or (2) that only recommending masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

106. Upon information and belief, the mask mandate implemented by the ESSD School Board and ESSD has been inconsistently applied and enforced.

107. Upon information and belief, the quarantine policy implemented by the ESSD School Board and ESSD is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

108. Upon information and belief, ESSD requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

109. Upon information and belief, ESSD does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

110. Upon information and belief, the quarantine policy implemented by the ESSD School Board and ESSD has been inconsistently applied and enforced.

b. Kearney School District

111. Upon information and belief, on or around August 14, 2021, the KSD School Board and KSD adopted and implemented COVID-19 protocols for the Fall of 2021 that included a quarantine policy and imposed a mask mandate, under which universal, indoor masking is required

AMERICAN OVERSIGHT

MCAS-22-0644-A-005551

for all students, staff members, and visitors regardless of vaccination status.

112. Upon information and belief, before the KSD School Board and KSD finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, KSD School Board and KSD received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

113. Upon information and belief, the mask mandate implemented by the KSD School Board and KSD is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

114. Upon information and belief, the mask mandate implemented by the KSD School Board and KSD has been inconsistently applied and enforced.

115. Upon information and belief, the quarantine policy implemented by the KSD School Board and KSD is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

116. Upon information and belief, KSD requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that

AMERICAN OVERSIGHT

MOAG-22-0644-A-005552

unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

117. Upon information and belief, KSD does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

118. Upon information and belief, the quarantine policy implemented by the KSD School Board and KSD has been inconsistently applied and enforced.

c. Liberty Public Schools

119. Upon information and belief, on or around August 2021, the LPS School Board and LPS adopted and implemented COVID-19 protocols for the fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all students, staff members, and visitors must wear masks while inside district facilities.

120. Upon information and belief, before the LPS School Board and LPS finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, LPS School Board and LPS received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

121. Upon information and belief, the mask mandate implemented by the LPS School Board and LPS is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending

AMERICAN OVERSIGHT

MOAG-22-0644-A-005553

masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

122. Upon information and belief, the mask mandate implemented by the LPS School Board and LPS has been inconsistently applied and enforced.

123. Upon information and belief, the quarantine policy implemented by the LPS School Board and LPS is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

124. Upon information and belief, LPS requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

125. Upon information and belief, LPS does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

126. Upon information and belief, the quarantine policy implemented by the LPS School Board and LPS has been inconsistently applied and enforced.

d. NKC Schools

127. Upon information and belief, on or around July 29, 2021, the NKC School Board and NKC Schools adopted and implemented COVID-19 protocols for the fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all students, staff members, and visitors must wear masks while inside all NKC schools.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005554

128. Upon information and belief, before the NKC School Board and NKC Schools finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, NKC School Board and NKC Schools received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

129. Upon information and belief, the mask mandate implemented by the NKC School Board and NKS Schools is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

130. Upon information and belief, the mask mandate implemented by the NKC School Board and NKC Schools has been inconsistently applied and enforced.

131. Upon information and belief, the quarantine policy implemented by the NKC School Board and NKC Schools is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

132. Upon information and belief, NKC Schools requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person,

AMERICAN OVERSIGHT

MCAG-22-0644-A-005555

even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

133. Upon information and belief, NKC Schools does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

134. Upon information and belief, the quarantine policy implemented by the NKC School Board and NKC Schools has been inconsistently applied and enforced.

e. Park Hill

135. Upon information and belief, on or around August 16, 2021, the PHSD School Board and PHSD Schools adopted and implemented COVID-19 protocols for the fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all individuals aged 3 and older inside all district facilities are required to wear masks.

136. Upon information and belief, before the PHSD School Board and PHSD finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, PHSD School Board and PHSD received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

137. Upon information and belief, the mask mandate implemented by the PHSD School Board and PHSD is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending

AMERICAN OVERSIGHT

MOAG-22-0644-A-005556

masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

138. Upon information and belief, the mask mandate implemented by the PHSD School Board and PHSD has been inconsistently applied and enforced.

139. Upon information and belief, the quarantine policy implemented by the PHSD School Board and PHSD is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

140. Upon information and belief, PHSD requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

141. Upon information and belief, PHSD does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

142. Upon information and belief, the quarantine policy implemented by the PHSD School Board and PHSD has been inconsistently applied and enforced.

f. Platte County R-III

143. Upon information and belief, on or about August 12, 2021, the PCSD School Board and PCSD adopted and implemented COVID-19 protocols for the fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all students, staff, and visitors aged

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 29 of 74
MOAG-22-0644-A-005557

3 and older while indoors at PCSD buildings are required to wear face coverings when physical distancing cannot be maintained.

144. Upon information and belief, before the PCSD School Board and PCSD finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, the PCSD School Board and PCSD received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

145. Upon information and belief, the mask mandate implemented by the PCSD School Board and PCSD is unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

146. Upon information and belief, the mask mandate implemented by the PCSD School Board and PCSD has been inconsistently applied and enforced.

147. Upon information and belief, the quarantine policy implemented by the PCSD School Board and PCSD is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005558

148. Upon information and belief, PCSD requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

149. Upon information and belief, PCSD does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

150. Upon information and belief, the quarantine policy implemented by the PCSD School Board and PCSD has been inconsistently applied and enforced.

g. Smithville School District

151. Upon information and belief, on or around August 23, 2021, the SSD School Board and SSD adopted and implemented COVID-19 protocols for the fall of 2021 that included a quarantine policy and imposed a mask mandate, under which all students, staff and visitors inside any SSD facility are required to wear masks.

152. Upon information and belief, before the SSD School Board and SSD finalized their mask and quarantine plans for the Fall of 2021, many parents, guardians, family members, and other resident taxpayers, including NPA members, attended school board meetings and communicated their concerns with and opposition to such policies. In addition, upon information and belief, the SSD School Board and SSD received written and other forms of communication from parents, guardians, family members, and other resident taxpayers, including NPA members, in opposition to the policies.

153. Upon information and belief, the mask mandate implemented by the SSD School Board and SSD is unsupported by substantial evidence (1) that mandating masks to be worn by all

AMERICAN OVERSIGHT

MCAG-22-0644-A-005559

persons subject to the mask mandate would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

154. Upon information and belief, the mask mandate implemented by the SSD School Board and SSD has been inconsistently applied and enforced.

155. Upon information and belief, the quarantine policy implemented by the SSD School Board and SSD is unsupported by substantial evidence (1) that quarantine policy would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that the quarantine policy would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

156. Upon information and belief, SSD requires a COVID-19-unvaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, even if that unvaccinated student is symptom-free and has previously been infected with the virus and has COVID-19 antibodies.

157. Upon information and belief, SSD does not require a COVID-19-vaccinated student to quarantine if the student has been in close contact with a COVID-19-positive person, so long as the vaccinated student is symptom-free.

158. Upon information and belief, the quarantine policy implemented by the SSD School Board and SSD has been inconsistently applied and enforced.

h. City of Kansas City, Missouri

159. Upon information and belief, on or about August 2, 2021, the Mayor and City Council of the City of Kansas City (collectively "City of Kansas City") imposed a mask mandate,

AMERICAN OVERSIGHT

MCAE-22-0644-A-005560

under which all individuals over the age of 5 are required to wear masks or facial coverings in all indoor spaces of public accommodation where six feet of social distancing cannot be maintained.

160. Upon information and belief, before the City of Kansas City finalized and approved the mask mandate, many residents attended City Council meetings and communicated their concerns with and opposition to the mandate. In addition, upon information and belief, the City of Kansas City received written and other forms of communication from residents in opposition to the policies.

161. Upon information and belief, the mask mandate implemented by the City of Kansas City is unsupported by substantial evidence (1) that mandating masks to be worn by students at school would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks for students at school (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

162. Upon information and belief, the mask mandate implemented by the City of Kansas City has been inconsistently applied and enforced.

i. City of North Kansas City, Missouri

163. Upon information and belief, on or about August 1, 2021, the Mayor of North Kansas City and City Council of North Kansas City (collectively "City of North Kansas City") imposed a mask mandate, under which all individuals over the age of 5, regardless of vaccination status, are required to wear a mask indoors in areas of public accommodation.

164. Upon information and belief, before the City of North Kansas City finalized and approved the mask mandate, many residents attended City Council meetings and communicated their concerns with and opposition to the mandate. In addition, upon information and belief, the

AMERICAN OVERSIGHT

MOAG-22-0644-A-005561

City of North Kansas City received written and other forms of communication from residents in opposition to the policies.

165. Upon information and belief, the mask mandate implemented by the City of North Kansas City is unsupported by substantial evidence (1) that mandating masks to be worn by students at school would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that only recommending masks for students at school (but letting students and families choose) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

166. Upon information and belief, the mask mandate implemented by the City of North Kansas City has been inconsistently applied and enforced.

167. The above-listed Defendants' mask mandates as applied to school children hereinafter are collectively referred to as "**Mask Mandates**"

168. The above-listed School Defendants' quarantine policies hereinafter are collectively referred to as "**Quarantine Policies**."

V. Exemptions under School Defendants' Mask Mandates.

a. Excelsior Springs School District

169. Upon information and belief, although the ESSD School Board and ESSD announced a mask mandate on or around August 23, 2021, no guidelines for exemptions were given to students' families other than a reference in an *Updated Reopen Plan* that a "Doctor note not to wear a mask" would be considered for a medical exemption. No provisions were to accommodate exemptions based on religious beliefs or conscientious objections.

170. Upon information and belief, ESSD administrators have discretion to allow some exemptions, including medical exemptions.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005562

171. Upon information and belief, the information provided by ESSD to students and families regarding medical exemptions has been unclear, inconsistent, and changing.

172. Upon information and belief, the ESSD policy on mask exemptions based on medical reasons has been applied discretionally and inconsistently, and ESSD has denied many medical exemptions.

173. Upon information and belief, ESSD is not allowing any exemptions based on religious beliefs or conscientious objections.

174. Children of one or more NPA members in the ESSD have been denied a medical exemption to the mask mandate.

175. Children of one or more NPA members in the ESSD have been denied a religious or conscience exemption to the mask mandate.

b. Kearney School District

176. Upon information and belief, the mask mandate adopted by the KSD School Board and implemented by KSD includes no express provisions for exemptions to the mandate based on medical, religious, or conscientious reasons.

177. Upon information and belief, the KSD School Board did not adopt a mask-exemption policy.

178. Upon information and belief, KSD administrators have discretion to allow some exemptions, including medical exemptions.

179. Upon information and belief, the information provided by KSD to students and families regarding medical exemptions has been unclear, inconsistent, and changing.

AMERICAN OVERSIGHT

Image-22-0644-A-005563

180. Upon information and belief, KSD's policy on mask exemptions based on medical reasons has been applied discretionally and inconsistently, and KSD has denied many medical exemptions.

181. Upon information and belief, KSD is not allowing any exemptions based on religious beliefs or conscientious objections.

182. Upon information and belief, children of one or more NPA members in the KSD have been denied a medical exemption to the mask mandate.

183. Upon information and belief, children of one or more NPA members in the KSD have been denied a religious or conscience exemption to the mask mandate.

c. Liberty Public Schools

184. Upon information and belief, the LPS School Board did not adopt a policy that would allow for exemptions to the district's mask mandate based on medical, religious, or conscience reasons.

185. Upon information and belief, on or around August 20, 2021, LPS announced a plan that gave LPS the discretion to allow exemptions to the mask mandate based on "medical condition or disability." Information provided to students and families stated that an exemption may be granted to a student if "the individual's physician provides a written notice/order that verifies that the student or staff member cannot wear a mask, or cannot safely wear a mask for reasons related to a clearly identified and referenced medical condition or disability."

186. Upon information and belief, LPS administrators have discretion to allow some exemptions, including medical exemptions.

187. Upon information and belief, the information provided by LPS to students and families regarding medical exemptions has been unclear, inconsistent, and changing.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005564

188. Upon information and belief, LPS's policy on mask exemptions based on medical reasons has been applied inconsistently, and LPS has denied many medical exemptions.

189. Upon information and belief, LPS is not allowing any exemptions based on religious beliefs or conscientious objections.

190. Upon information and belief, children of one or more NPA members in LPS have been denied a medical exemption to the mask mandate.

191. Upon information and belief, children of one or more NPA members in LPS have been denied a religious or conscience exemption to the mask mandate.

d. NKC Schools

192. Upon information and belief, the NKC School Board did not adopt a policy that would allow for exemptions to the district's mask mandate based on medical, religious, or conscience reasons.

193. Upon information and belief, in or around August 2021, NKC Schools announced a discretionary "Face Mask Exemption" plan, under which the district "might" allow face shield instead of masks if a student provided a note from a physician that included specific indication of one of seven medical conditions that NKC Schools deemed sufficient for consideration on whether to allow the student to wear a face shield instead of a mask.

194. Upon information and belief, NKC Schools administrators have discretion to allow some exemptions, including medical exemptions.

195. Upon information and belief, the information provided by NKC Schools to students and families regarding medical exemptions has been unclear, inconsistent, and changing.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005565

196. Upon information and belief, NKC Schools' plan for mask exemptions based on medical reasons has been applied inconsistently, and NKC Schools has denied many medical exemptions.

197. Upon information and belief, NKC Schools is not allowing any exemptions based on religious beliefs or conscientious objections.

198. Upon information and belief, children of one or more NPA members in NKC Schools have been denied a medical exemption to the mask mandate.

199. Upon information and belief, children of one or more NPA members in NKC Schools have been denied a religious or conscience exemption to the mask mandate.

e. Park Hill School District

200. Upon information and belief, the PHSD School Board did not adopt a policy that would allow for exemptions to the district's mask mandate based on medical, religious, or conscience reasons.

201. Upon information and belief, PHSD administrators have discretion to allow some exemptions, including medical exemptions.

202. Upon information and belief, PHSD is not allowing any exemptions based on religious beliefs or conscientious objections.

f. Platte County R-III

203. Upon information and belief, the PCSD School Board did not adopt a policy that would allow for exemptions to the district's mask mandate based on medical, religious, or conscience reasons.

204. Upon information and belief, PCSD administrators have discretion to allow some exemptions, including medical exemptions.

AMERICAN OVERSIGHT

MCAG-22-0644A-005566

205. Upon information and belief, PCSD is not allowing any exemptions based on religious beliefs or conscientious objections.

g. Smithville School District

206. Upon information and belief, the SSD School Board did not adopt a policy that would allow for exemptions to the district's mask mandate based on medical, religious, or conscience reasons.

207. Upon information and belief, on or around August 23, 2021, SSD announced a discretionary plan for allowing a mask exemption based on medical condition or disability, under which a medical mask exemption may be granted to a student provided the individual's treating physician provides a written notice or order that verifies that the student cannot wear a mask related to a "clearly identified and diagnosed medical condition or disability and the reason a mask cannot be worn safely."

208. Upon information and belief, SSD administrators have discretion to allow some exemptions, including medical exemptions.

209. Upon information and belief, the information provided by SSD to students and families regarding medical exemptions has been unclear, inconsistent, and changing.

210. Upon information and belief, SSD's plan for mask exemptions based on medical reasons has been applied inconsistently, and SSD has denied many medical exemptions.

211. Upon information and belief, SSD is not allowing any exemptions based on religious beliefs or conscientious objections.

212. Upon information and belief, children of one or more NPA members in SSD have been denied a medical exemption to the mask mandate.

AMERICAN OVERSIGHT

Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 39 of 74
MCAG-22-0644-A-005567

213. Upon information and belief, children of one or more NPA members in SSD have been denied a religious or conscience exemption to the mask mandate.

VI. In implementing Mask Mandates for children at schools, Defendants failed to consider important aspects and factors regarding the masking of children and neglected the comments and information provided by members of the electorate in opposition to the Mask Mandates.

214. Upon information and belief, in imposing mask mandates on school children, Defendants did not consider the harms of masking children.

215. Upon information and belief, Defendants failed to consider the comments and information provided by parents, guardians, and other members of the electorate who were concerned about the harms of masking children and expressed opposition to policies mandating that children wear masks at school.

216. On information and belief, Defendants failed to consider the science and evidence showing that children generally do not affect community spread and that children do not readily transmit the coronavirus, or the science and evidence showing lower risks of infection, transmission, and severe health outcomes in children from COVID-19.

217. On information and belief, Defendants failed to consider the science and evidence showing that mask use by the general population has little to no effect on community spread, and that mask mandates also have limited effectiveness, at best, in preventing community spread.

218. On information and belief, Defendants failed to consider the changed circumstances of vaccinated persons (including of teachers, school staff, and eligible children) and the number of vaccinated persons increasing each day.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005568

219. On information and belief, Defendants failed to consider the effect that natural immunity and antibodies imparted to persons previously infected with COVID-19 (including teachers, school staff, and children) would have on community spread.

220. No restriction or policy imposed by Defendants can be "unconstitutional, unlawful, unreasonable, arbitrary, or capricious, or involve[] an abuse of discretion." § 536.150.1 RSMo. Government action is arbitrary, capricious, and unreasonable when it is based on *post hoc* rationalization, when it fails to consider an important part of the problem it is addressing, and when it fails to consider less restrictive alternatives before infringing on citizens' liberty. *See*, *e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1909 (2020); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). "[A]n agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously." *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In addition, agencies must consider whether there are less restrictive policies that would achieve their goals. *See Regents of the Univ. of Calif.*, 140 S. Ct. at 1912 (quoting *State Farm Mut. Auto.*, 463 U.S. at 51).

221. Upon information and belief, the Mask Mandates are unsupported by substantial evidence (1) that mandating masks to be worn by all persons subject to the mandates would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that recommending masks (but letting students and families choose) would

AMERICAN OVERSIGHT

MOAG-22-0644-A-005569

substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

222. The mask mandates are unconstitutional, unlawful, unreasonable, arbitrary, and capricious, and involve an abuse of discretion.

COUNT I
(all Defendants)
Defendants' Mask Mandates are unreasonable, arbitrary and capricious as applied to school children, § 536.150.1, RSMO.

223. Plaintiff hereby incorporates paragraphs 1 - 222 of this Complaint as if fully set forth herein.

224. The NPA challenges the validity of the Mask Mandates, and seeks a declaration that they are "unreasonable, arbitrary, or capricious." § 536.150.1, RSMo. The Mask Mandates are not subject to administrative review. *Id.*

225. School Districts are "agencies" within the definition § 536.010(2), RSMo. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 818 (Mo. Ct. App. 2011), *as modified* (Jan. 31, 2012). School Districts may not exercise their power in an "unreasonable, arbitrary, capricious or unlawful manner." *Magenheim v. Bd. of Educ. of Sch. Dist. of Riverview Gardens*, 347 S.W.2d 409, 417 (Mo. App. 1961).

226. The Mask Mandates require all children attending schools in the districts of Defendant Schools to wear a mask with few exceptions while they are at school. The Mask Mandates are therefore agency decisions that determine "legal rights, duties, or privileges." § 536.150.1, RSMo.

227. Missouri schoolchildren are not validly subject to the Mask Mandates because they are "unreasonable, arbitrary, or capricious," § 536.150.1, RSMo, for several reasons.

AMERICAN OVERSIGHT

MCAG-22-0644A-005570

228. First, the masking requirement for schoolchildren is unreasonable, arbitrary, and capricious. Schoolchildren are generally not at risk of serious illness even if they get COVID-19, thus reducing the need for harsher non-pharmaceutical intervention. *See*, *e.g.*, Marty Makary, Opinion, *The Flimsy Evidence Behind the CDC's Push to Vaccinate Children*, WALL ST. J. (July 19, 2021) ("Our report found a mortality rate of zero among children without a pre-existing medical condition such as leukemia."). On information and belief, Defendants failed to consider that fact in deciding to promulgate the Mask Mandates.

229. Second, on information and belief, Defendants failed to consider several important factors relating to masking for schoolchildren:

a. To start, the Mask Mandate fails to account for the fact that children are less likely to contract COVID-19 and that, if they do contract it, display less severe symptoms. *See, e.g.,* Nicholas G. Davies *Age-Dependent Effects in the Transmission and Control of COVID-19 Epidemics,* 26 NATURE MED. 1205, 1205 (2020) (concluding that susceptibility of infection in those under twenty is half that for those over twenty and that those under twenty do not manifest clinical symptoms as often). That suggests that children are also less likely to transmit the virus, *see id.* At 1208-09, which appears to be the consensus position.[2] There is thus a much less pressing need for masking among young children. That includes within schools. One study found "an infection rate of 0.13% and 0.24% among staff" after analyzing in-school infection data from over 47 states. Patrick Boyle, *Kids, School, and COVID-19: What We Know– and What We Don't,* AAMC (Nov. 5, 2020).

[2] See, e.g., Eun Young Cho et al., Letter to the Editor, *Interpreting Transmissibility of COVID-19 in Children*, 26 EMERGING INFECTIOUS DISEASES 3106, 3107 (2020) (interpreting data); Patrick Boyle, *Kids, School, and COVID-19: What We Know—and What We Don't*, AAMC (Nov. 5, 2020), https://bit.ly/3kQDvyG ("Several studies have found that children transmit the virus, but perhaps not as often as adults, especially in younger age groups. It's not clear why."); Eli Somekh et al., *The Role of Children in the Dynamics of Intra Family Coronavirus 2019 Spread in Densely Populated Areas*, 39 PEDIATRICS INFECTIOUS DISEASE J. 202, 203–04 (2020) (noting studies indicating that children are less likely to get COVID-19, and finding similar results).

AMERICAN OVERSIGHT

MCAG-22-0644-A-005571

Rather, schools are more likely to be affected by COVID-19 rates in the community than be sites of super-spreader events. *See id.*[3]

b. But while the risks schoolchildren face from COVID-19, as well as the risk that they transmit the virus, are relatively low, there is a significant cost to forcing them to mask. For one, masks hinder "verbal and non-verbal communication." Jonas F. Ludvigsson, Editorial, *Little Evidence for Facemask Use in Children Against COVID-19*, 110 ACTA PAEDITRICA 742, 742 (2021); *see* Connor Harris, *Do We Need Mask Mandates?*, CITY J. (Mar. 22, 2021), https://www.city-journal.org/do-we-need-mask-mandates ("Some child development researchers also worry that widespread mask- wearing may hamper children's linguistic and emotional development."); *see also* John T. Brooks, et al., *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Feb. 10, 2021, at 7 (finding that "children were less accurate with faces that wore a mask compared to faces that were not covered"). And the same risks associated with mask use in adults are present with respect to children—namely, that the masks may create a false sense of security and that failing to properly wear face masks over their nose and mouths and that touching the masks will eliminate, if not exceed, any benefit achieved by having students wear masks. *See id.*

c. There are also common-sense concerns with having schoolchildren wear a face mask all day while at school, such as general discomfort. *See* Harris, *supra* ("In a self-selected survey of German schoolchildren, more than half of the participants reported headaches.").

[3] *See also*, *e.g.*, CDC, *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated* (updated July 9, 2021), https://bit.ly/3rxQeaR; *Questions and Answers on COVID-19: Children Aged 1–18 Years and the Role of Schools Settings*, European Centre for Disease Prevention & Control (updated Jan. 25, 2021), https://bit.ly/3j3yHDJ. *But see* Zoe Hyde, Perspectives, *COVID- 19, Children and Schools: Overlooked and at Risk*, 213 MED. J. AUSTL. 444, 446 (2020) (arguing that schools play a bigger role in transmission than assumed, but conceding that "[w]hether young and older children transmit the virus similarly is unknown and requires urgent clarification").

AMERICAN OVERSIGHT

MCAG-22-0644-A-005572

Similarly, mask requirements also take up instructional time as teachers police mask compliance, take mask breaks outdoors, send students to get masks, and punish students for failing to comply.

d. Finally, children with special needs may find it especially difficult to wear masks but may not be able to take advantage of any of the exceptions in the Mask Mandate. The mandate thus jeopardizes their ability to be in public places under the Mask Mandate. *See The Challenge of Face Masks*, ORG. FOR AUTISM RES. (Nov. 12, 2020), https://bit.ly/3eVYRa3. While the Mask Mandate's exempts those who are not able to wear a mask in Section 2.B.2, that exemption is vague, and arguably very narrow. It is therefore unclear whether it would exempt all special needs children—for example, all of those on the autism spectrum. *See id.*

e. Defendants failed to consider the effect natural immunity and antibodies from the population (including children) that previously contracted COVID- 19 have on community spread.

f. Defendants failed to consider over a year's worth of data showing that mask use, including a mask mandate, has little to no effect in preventing community spread of COVID-19.

g. On information and belief, Defendants failed to consider whether the Mask Mandate—because it treats vaccinated individuals like unvaccinated ones— discourages people from receiving the vaccine by implying that vaccines have limited efficacy. *Cf.* Rachel Holloway et al., *Updated Preparedness and Response Framework for Influenza Pandemics*, MORBIDITY & MORTALITY WEEKLY REPORT, Sept. 26, 2014, at 6 (saying vaccine availability is a consideration when determining what actions to take during a pandemic).

h. Defendants failed to consider non-COVID-19 harms to masking children, including emotional, psychological, and social harms.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005573

i. Defendants only considered the risk of a single COVID-19 infection and not the health outcomes from such an infection.

230. Upon information and belief, Defendants failed to consider the comments and information provided by parents, guardians, and other members of the electorate who were concerned about the harms of masking children and expressed opposition to policies mandating that children wear masks at school.

231. Upon information and belief, Defendants failed to consider substantial evidence (1) that mandating masks to be worn by all persons subject to the Mask Mandates would substantially reduce COVID-19 numbers and significantly prevent COVID-19 transmission in the community or (2) that recommending masks (and letting students and families choose whether to wear them) would substantially increase COVID-19 numbers and significantly further COVID-19 spread in the community.

232. On information and belief, Defendants failed to consider such factors in applying the Mask Mandates to schoolchildren. They therefore failed to engage in reasoned decision-making, and, as a result, subjected schoolchildren to an unnecessary, burdensome, and harmful mask mandate.

233. For those reasons, the Mask Mandates are unreasonable, arbitrary, and capricious and the schoolchildren should not be subject to them.

COUNT II
(all Defendants)
Defendants' Mask Mandates are unlawful as applied to school children.
§ 536.150.1, RSMo.

234. Plaintiff hereby incorporates paragraphs 1 - 233 of this Complaint as if fully set forth herein.

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 46 of 74
Mo-AG-22-0644-A-005574

235. In the alternative, the Plaintiff challenges the validity of the Mask Mandates, and seek a declaration that they are "unlawful" and therefore the schoolchildren cannot be lawfully subjected to them. § 536.150.1, RSMo. The Mask Mandates are not subject to administrative review. *Id.*

236. By law, "[i]t shall be the general duty and responsibility of the department of health and senior services to safeguard the health of the people in the state and all its subdivisions." § 192.020.1, RSMo.

237. DHSS permits local health authorities to create and enforce only orders "adequate . . . to prevent the spread of [a] disease and other measures considered by the . . . local health authority as appropriate disease control measures based upon the disease . . . ." 19 C.S.R. § 20-20.040.2(G).

238. DHSS has not delegated that authority to school districts.

239. Neither Platte County nor Clay County have issued an order mandating masks.

240. Missouri law does not authorize School Defendants to impose a Mask Mandate.

241. School Defendants do not have authority to impose Mask Mandates for public health reasons.

242. Neither the Missouri Constitution nor the General Assembly has granted School Defendants a general police power to enact law for the public welfare.

243. In fact, Missouri statutes that require DHSS to set health policy in schools indicate that only DHSS may provide appropriate measures to safeguard the public health. *See* § 167.181, RSMo (DHSS develops informational brochure on HPV).

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 47 of 74
MoAG-22-0644-A-005575

244. The Mask Mandates are not authorized under 19 CSR 20-20.040 because they are neither "adequate" to prevent the spread of disease nor "appropriate" as a disease control measure among K-12 schoolchildren, for all the reasons stated herein.

245. For these reasons, the Mask Mandates are an unlawful order, and the schoolchildren should not be subject to them.

COUNT III
(all Defendants)
Declaration that the Mask Mandates are subject to § 67.265 RSMo and expire without further authorization.

246. Plaintiff hereby incorporates paragraphs 1 - 245 of this Complaint as if fully set forth herein.

247. Plaintiff seeks a declaration that the Mask Mandates are subject to the requirements of § 67.265.2, RSMo.

248. Defendants are political subdivisions within § 67.265.1, RSMo.

249. There was a broad emergency order declared pursuant to chapter 44, RSMo., which was terminated on August 27, 2021.

250. The Mask Mandates are "orders" as defined by § 67.265.1, RSMo.

251. The Mask Mandates are also orders that "directly or indirectly closes, partially closes, or places restrictions on the opening or access to any one or more business organizations, churches, schools, or other places of public or private gathering or assembly, including any order, ordinance, rule, or regulation of general applicability or that prohibits or otherwise limits attendance at any public or private gathering …." § 67.265.1(1), RSMo.

252. The Mask Mandates place restrictions on access to "business organizations, churches, schools, or other places of public or private gathering or assembly," § 67.265.1(1),

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 48 of 74
MoAG-22-0644-A-005576

RSMo, because they limit access to schools to only masked individuals or to individuals who fall under an exception to the mask requirement.

253. On information and belief, students who refuse to comply with the Mask Mandates will be excluded from school property, will face discipline, and may be sent home.

254. On information and belief, students who refuse to comply with the Mask Mandates will not be allowed in school and may be required to use virtual instruction.

255. As a result, the Mask Mandates are subject to § 67.265, RSMo, and expire after thirty days absent authorization by a majority vote of the governing bodies, *i.e.*, the Boards of Education for the School Defendants or the city councils for the City Defendants.

256. The Mask Mandates are also subject to § 67.265.2, RSMo, and may be terminated at any time by a simple majority vote of the governing bodies.

COUNT IV
(all School Defendants)
School Defendants' Mask Mandates violate the Equal Protection Clause of the U.S. Constitution

257. Plaintiff hereby incorporates paragraphs 1 - 256 of this Complaint as if fully set forth herein.

258. Under the Fourteenth Amendment to the U.S. Constitution, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

259. A state providing a public education must ensure that education is available to all on equal terms. *Brown v. Board of Educ.,* 347 U.S. 483, 493 (1954).

260. School Defendants acted under color of law in adopting, implementing, and enforcing the Mask Mandates.

261. As applied to schoolchildren, the Mask Mandates imposed by School Defendants treat similarly situated persons differently without adequate justification.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005577

262. School Defendants' mask mandates disproportionately impact early-childhood students, as face coverings impair young children's ability to learn language and socialize.

263. Upon information and belief, School Defendants did not consider or neglected to adequately account for the disproportionate impact the Mask Mandates would have on early-childhood students.

264. Upon information and belief, School Defendants' Mask Mandates apply to younger children than even the cities' mandates (which apply only to children ages 5 and up).

265. Through their Mask Mandates, School Defendants unfairly and arbitrarily treat children who participate in public early-child education programs in the school districts differently than children who do not.

266. The Mask Mandates disproportionately impact English-language learner students, as face coverings inhibit their ability to communicate with their teachers and peers.

267. Upon information and belief, School Defendants did not consider or neglected to adequately account for the disproportionate impact the Mask Mandates would have on English-language learner students.

268. The Mask Mandates disproportionately impact students who are hard of hearing or who have hearing or speech disabilities, because masks can hinder communication with such persons.

269. Upon information and belief, Defendants did not consider or neglected to adequately account for the disproportionate impact the Mask Mandates would have on students who are hard of hearing or have hearing or speech disabilities.

270. The Mask Mandates disproportionately impact students with special needs. On information and belief, students' special needs may vary greatly. Some special-needs students may

AMERICAN OVERSIGHT

MCAE-22-0644-A-005578

touch the masks frequently, creating more of a risk of contracting a virus. Other special-needs students will simply remove the masks or other face coverings or shields. Still others, because of a disability, may be unable to remove a mask in case of an emergency, such as choking. Children with special needs may find it especially difficult to wear masks but may not be able to take advantage of any of the exceptions in the school districts' Mask Mandates. The mandates thus jeopardize their ability to be in public schools (like all other students) under the Mask Mandates.

271. Upon information and belief, School Defendants did not consider or neglected to adequately account for the disproportionate impact the Mask Mandates would have on students with special needs.

272. Upon information and belief, the Mask Mandates have been inconsistently applied and enforced by School Defendants.

273. School Defendants' Mask Mandates as applied to students violate the Equal Protection Clause of the U.S. Constitution because they deny to many students the equal protection of the law. U.S. Const. amend. XIV § 1.

274. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the Mask Mandates are unconstitutional under the Equal Protection Clause of the U.S. Constitution; an injunction prohibiting School Defendants from enforcing the Mask Mandates; nominal damages for the harm caused by the School Defendants' Mask Mandates; and attorney fees and costs.

AMERICAN OVERSIGHT

Image: 22-0644-A-005579

COUNT V
(all School Defendants)
School Defendants' Mask Mandates violate the Equal Protection Clause of the Missouri Constitution

275. Plaintiff hereby incorporates paragraphs 1 - 274 of this Complaint as if fully set forth herein.

276. Under the Missouri Constitution, "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. § 2.

277. For similar reasons as alleged above in the paragraphs under Count IV (which paragraphs are incorporated hereto), the Mask Mandates as applied to students violate the Missouri Constitution because the mandates treat students unequally and deny many students equal rights and opportunity under the law.

278. For the reasons stated above, Plaintiff is entitled to a declaration that the Mask Mandates are unconstitutional under the Equal Protection Clause of the Missouri Constitution; an injunction prohibiting School Defendants from enforcing the Mask Mandates; and nominal damages for the harm caused by the School Defendants' Mask Mandates; and attorney fees and costs.

COUNT VI
(all School Defendants)
School Defendants' Mask Mandates violate the students' right to education without due process of law in violation of the U.S. Constitution, Missouri Constitution, and state statutes.

279. Plaintiff hereby incorporates paragraphs 1 - 278 of this Complaint as if fully set forth herein.

280. In Missouri, students who are no older than 21 years of age have a protected property interest in free public education. Mo. Const. art. IX § 1(a).

AMERICAN OVERSIGHT

281. In Missouri, the right to free public education under Mo. Const. art. IX § 1(a) is a fundamental right. *Concerned Parents v. Caruthersville School Dist. 18*, 548 S.W.2d 554, 560 (Mo. 1977).

282. Any governmental taking of a property interest implicates the right to procedural due process and requires notice and the opportunity to be heard. U.S. Const. amends. V & XIV § 1; Mo. Const. art. I § 10.

283. Under Missouri law, admission to public schools is to be without charge, and instruction to students is to cost them nothing. *Concerned Parents*, 548 S.W.2d at 559.

284. School Defendants acted under color of law in adopting, implementing, and enforcing the Mask Mandates.

285. Upon information and belief, School Defendants' policies imposing mask mandates do not provide for the free distribution of required masks to students.

286. State law requires school boards and districts to undergo certain procedures before they can legally discipline, remove, suspend, or expel as student from public school, including notice to parents or legal guardians and a hearing. *See, e.g.*, §167.161 RSMo.

287. Upon information and belief, each of the School Defendants have their own suspension policies that are supposed to comply with state law.

288. State law sets forth the parameters that school boards and districts must follow with respect to disciplining, restraining, confining, and secluding students.

289. Upon information and belief, each of the School Defendants have their own policies regarding disciplining, restraining, confining, and secluding students.

AMERICAN OVERSIGHT

MoAG-22-0644-A-005581

290. Upon information and belief, if students do not wear a prescribed mask and have not been given an exemption under School Defendants' mask mandates, the students are not allowed to attend school, or in some cases, they are disciplined or isolated.

291. Upon information and belief, School Defendants have failed to follow state law in that they have not given adequate notice or a hearing to the parents of students who are not allowed to attend school because of not complying with the Mask Mandates.

292. Upon information and belief, School Defendants' personnel have forced students to put masks on their faces or have physically placed masks on students without their parents' approval.

293. Upon information and belief, School Defendants have failed to follow state law regarding medical care, restraints, confinement, and seclusion by forcing students to put masks on their faces, physically placing masks on students without their parents' approval, or disciplining, confining, or isolating students who are not wearing the required masks.

294. By refusing to allow students without masks to attend school, School Defendants have deprived the students of their right to a free public education in Missouri.

295. School Defendants have violated the due process clauses of both the U.S. and the Missouri constitution because they have denied maskless students access to public school without adequate notice or hearing, in violation of the students' and their parents and legal guardians' constitutional and statutory rights.

296. The Mask Mandates lack a compelling interest; are arbitrary, capricious, and vague; are not narrowly tailored to the objectives of the programs or mandates; and deprive students and their parents and legal guardians of fundamental rights secured by the Missouri and U.S. Constitution.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005582

297. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the Mask Mandates are unconstitutional under the right-to-education clause of the Missouri Constitution and the Due Process Clauses of both the Missouri and U.S. Constitution; an injunction prohibiting School Defendants from enforcing the Mask Mandates; nominal damages for the harm caused by the School Defendants' Mask Mandates; and attorney fees and costs.

COUNT VII
(all School Defendants)
School Defendants' Quarantine Policies are unreasonable, arbitrary, and capricious, § 536.150.1 RSMo.

298. Plaintiff hereby incorporates paragraphs 1 - 297 of this Complaint as if fully set forth herein.

299. The NPA challenges the validity of the Quarantine Policies, and seeks a declaration that they are "unreasonable, arbitrary, or capricious." § 536.150.1, RSMo. The Quarantine Policies are not subject to administrative review. *Id.*

300. School Defendants are "agencies" within the definition § 536.010(2), RSMo. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 818 (Mo. Ct. App. 2011), *as modified* (Jan. 31, 2012). School Defendants may not exercise their power in an "unreasonable, arbitrary, capricious or unlawful manner." *Magenheim v. Bd. of Educ. of Sch. Dist. of Riverview Gardens*, 347 S.W.2d 409, 417 (Mo. App. 1961).

301. The Quarantine Policies require unvaccinated students to quarantine after COVID-19 exposure in varying circumstances. The Quarantine Policies are therefore an agency decision that determines "legal rights, duties, or privileges." § 536.150.1, RSMo.

302. Missouri schoolchildren are not validly subject to the Quarantine Policies because they are "unreasonable, arbitrary, and capricious" and constitute an abuse of discretion. § 536.150.1, RSMo.

AMERICAN OVERSIGHT

MoAG-22-0644A-005583

303. As stated in Count I, the School Defendants fail to account for the fact that children are less likely to contract or transmit the COVID-19 virus.

304. On information and belief, School Defendants' Quarantine Policies distinguish only between vaccinated and unvaccinated individuals and fail to account for the natural immunity against the COVID-19 virus that those who have already been infected possess.

305. On information and belief, School Defendants failed to consider those factors in applying the Mask Mandates to schoolchildren. They therefore failed to engage in reasoned decision-making, and, as a result, subjected schoolchildren to unnecessary, burdensome, and harmful Quarantine Policies.

306. On information and belief, the quarantine policies have been inconsistently applied and enforced by School Defendants.

307. For those reasons, the Quarantine Policies are unreasonable, arbitrary, and capricious and the schoolchildren should not be subject to them.

COUNT VIII
(all School Defendants)
School Defendants' Quarantine Policies are unlawful.

308. Plaintiff hereby incorporates paragraphs 1 - 307 of this Complaint as if fully set forth herein.

309. Plaintiff challenges the validity of the Quarantine Policies and seeks a declaration that they are "unlawful" and therefore the schoolchildren cannot be lawfully subjected to them. § 536.150.1, RSMo. The Quarantine Policies are not subject to administrative review. *Id.*

310. By law, "[i]t shall be the general duty and responsibility of the Department of Health and Senior Services to safeguard the health of the people in the state and all its subdivisions." § 192.020.1, RSMo.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005584

311. DHSS permits local health authorities to create and enforce only orders "adequate … to prevent the spread of [a] disease and other measures considered by the … local health authority as appropriate disease control measures based upon the disease …." 19 C.S.R. § 20-20.040.2(G).

312. DHSS has not delegated that authority to school districts.

313. Neither the Missouri Constitution nor the General Assembly has granted School Defendants a general police power to enact law for the public welfare.

314. In fact, Missouri statutes that require DHSS to set forth health policy in schools indicate that only DHSS may provide appropriate measures to safeguard the public health. See § 167.181 RSMo (DHSS develops informational brochure on HPV).

315. The Quarantine Policies are not authorized under 19 CSR 20-20.040 due to School Defendants' failure to account for the fact that children are less likely to contract or transmit COVID-19, and the failure to consider any natural immunity acquired when imposing a quarantine.

316. Therefore, the Quarantine Policies are neither "adequate" to prevent the spread of disease nor "appropriate" as a disease control measure among K-12 schoolchildren.

317. Missouri law does not authorize School Defendants to impose Quarantine Policies.

318. School Defendants do not have authority to impose Quarantine Policies for public health reasons.

319. For these reasons, the Quarantine Policies are unlawful orders, and schoolchildren should not be subject to them.

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 57 of 74
MoAG-22-0644-A-005585

COUNT IX
(all School Defendants)
School Defendants' Quarantine Policies violate the Equal Protection Clause of the U.S. Constitution.

320. Plaintiff hereby incorporates paragraphs 1 - 319 of this Complaint as if fully set forth herein.

321. Under the Fourteenth Amendment to the U.S. Constitution, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

322. A state providing public education, must ensure that education is available to all on equal terms. *Brown v Board of Educ.*, 347 U.S. 483, 493 (1954).

323. Under color of law, School Defendants adopted, implemented, and are enforcing the Quarantine Policies.

324. Upon information and belief, as applied to school children, the Quarantine Policies implemented by School Defendants treat similarly situated persons differently without adequate justification.

325. Upon information and belief, School Defendants' Quarantine Policies create two separate but unequal classes of students: (1) students who've received a COVID-19 vaccine and are considered fully vaccinated and (2) students who have not received a COVID-19 vaccine, regardless of whether an unvaccinated student has previously been infected with the virus or whether the unvaccinated student cannot get the vaccine because of health or religious reasons.

326. Upon information and belief, School Defendants' Quarantine Policies treat unvaccinated students as second-class citizens and deprive them without adequate justification of their full right to education.

327. Upon information and belief, School Defendants' Quarantine Policies unreasonably, unfairly, and arbitrarily require unvaccinated students who've had a close contact

AMERICAN OVERSIGHT

IMAGES-22-0644-A-005586

with a COVID-19-positive person to stay home from school (and school activities, like sports) and quarantine, even if the unvaccinated student is experiencing no symptoms and even if he or she has previously been infected with COVID-19 (and thus has COVID-19 antibodies). Meanwhile, a vaccinated student who has had a close contact with a COVID-19-positive person does not have to stay home and quarantine and gets to continue going to school (and participating in school activities, like sports), so long as the vaccinated student is experiencing no symptoms.

328. Upon information and belief, School Defendants' Quarantine Policies unreasonably, unfairly, and arbitrarily treat students who've had close contacts with a COVID-19-positive persons differently depending on whether masks were being worn at the time of the close contact.

329. Upon information and belief, some School Defendants' Quarantine Policies unreasonably, unfairly, and arbitrarily treat students who've had a close contact with a COVID-19-positive person differently depending on whether the close contact occurred off school property (in which case the student must quarantine) or whether the close contact occurred at school (in which case quarantine is not necessary if the student experiences no symptoms).

330. Upon information and belief, School Defendants have inconsistently applied and enforced the Quarantine Policies.

331. School Defendants' Quarantine Policies violate the Equal Protection Clause of the U.S. Constitution because they deny to many students the equal protection of the law. U.S. Const. amend. XIV § 1.

332. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the Quarantine Policies are unconstitutional under the Equal Protection Clause of the U.S. Constitution; an injunction prohibiting School Defendants from enforcing the Quarantine

AMERICAN OVERSIGHT

MCAE-22-0644-A-005587

Policies; nominal damages for the harm caused by the School Defendants' Quarantine Policies; and attorney fees and costs.

COUNT X
(all School Defendants)
School Defendants' Quarantine Policies violate the Equal Protection Clause of the Missouri Constitution.

333. Plaintiff hereby incorporates paragraphs 1 - 332 of this Complaint as if fully set forth herein.

334. Under the Missouri Constitution, "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. § 2.

335. For similar reasons as alleged above in paragraphs of Count IX (which paragraphs are incorporated hereto), the School Defendants' Quarantine Policies violate the Missouri Constitution because they arbitrarily treat students differently and deny many students equal rights and opportunity under the law.

336. For the reasons stated above, Plaintiff is entitled to a declaration that the Quarantine Policies are unconstitutional under the Equal Protection Clause of the Missouri Constitution; an injunction prohibiting School Defendants from enforcing the Quarantine Policies; nominal damages for the harm caused by the policies; and attorney fees and costs.

COUNT XI
(all School Defendants)
School Defendants' Quarantine Policies violate the students' right to education without due process of law in violation of both the U.S. Constitution and the Missouri Constitution.

337. Plaintiff hereby incorporates paragraphs 1 - 336 of this Complaint as if fully set forth herein.

338. In Missouri, students who are no older than 21 years of age have a protected property interest in free public education. Mo. Const. art. IX § 1(a).

AMERICAN OVERSIGHT

339. In Missouri, the right to free public education under Mo. Const. art. IX § 1(a) is a fundamental right. *Concerned Parents v. Caruthersville School Dist. 18*, 548 S.W.2d 554, 560 (Mo. 1977).

340. Any governmental taking of a property interest implicates the right to procedural due process and requires notice and the opportunity to be heard. U.S. Const. amends. V & XIV § 1; Mo. Const. art. I § 10.

341. Acting under color of law, School Defendants adopted, implemented, and are enforcing the Quarantine Policies.

342. Upon information and belief, School Defendants' Quarantine Policies deprive quarantined students who experience no symptoms of their right to education because they unreasonably, unfairly, and arbitrarily prohibit unvaccinated students who've had a close contact with a COVID-19-posivite person from attending school or participating in school activities.

343. Upon information and belief, School Defendants do not provide adequate notice or a hearing to a student, or to his or her parents or legal guardians, before mandating that the student quarantine and stay home from school and school activities.

344. By prohibiting quarantined students who experience no symptoms from attending school and participating in school activities, School Defendants have deprived students of their constitutional right to a free public education in Missouri.

345. School Defendants have violated the due process clauses of both the U.S. Constitution and the Missouri Constitution because they have denied quarantined students access to public school without adequate notice or hearing, in violation of the students' and their parents' constitutional and statutory rights.

AMERICAN OVERSIGHT

MoAG-22-0644-A-005589

346. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the Quarantine Policies are unconstitutional under the right-to-education clause of the Missouri Constitution and the Due Process Clauses of both the Missouri and U.S. Constitution; an injunction prohibiting School Defendants from enforcing the Quarantine Policies; nominal damages for the harm caused by the School Defendants' Quarantine Policies; and attorney fees.

COUNT XI
(all School Defendants)
School Defendants' mask-exemption policies are unlawful and invalid because School Defendants did not follow proper procedure in implementing the policies.

347. Plaintiff hereby incorporates paragraphs 1 - 346 of this Complaint as if fully set forth herein.

348. School boards are agencies under the Missouri Administrative Procedure Act, § 536.010 et al. *See State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 327 (Mo. 1995).

349. Upon information and belief, the Boards of Education of School Defendants did not approve by vote the respective mask-exemption.

350. Upon information and belief, Defendant Schools notified families about their plans for exemptions to their respective mask mandates just days before school started.

351. Upon information and belief, Defendant Schools violated Missouri's Sunshine Law/Open Meetings Law, sections 610.010 to 610.035 RSMo, because proper notice was not given to the public and the mask-exemption policies were instituted without proper board votes.

352. Upon information and belief, implementation of a mask-exemption policy without approval by the board of education violates each of the School Defendants' district policies.

353. Having been implemented without proper board approval, School Defendants' policies regarding exemptions to the mask mandates are unlawful and invalid.

AMERICAN OVERSIGHT

Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 62 of 74
MoAG-22-0644A-005590

354. For the reasons stated above, Plaintiff is entitled under section 610.027 RSMo to a declaration that the mask-exemption policies are invalid; an injunction preventing School Defendants from enforcing the mask-exemption policies; statutory damages; and attorney fees and costs.

COUNT XII
(Defendants ESSD, KSD, LPS, NKC Schools, & SSD)
Mask-exemption policies in certain school districts are ultra vires, because School Defendants have no authority to demand students and their families to disclose private medical information.

355. Plaintiff hereby incorporates paragraphs 1 - 354 as if fully set forth herein.

356. Upon information and belief, to get a medical exemption from the Mask Mandates, Defendants ESSD, KSD, LPS, NKC Schools, and SSD are requiring parents and legal guardians to provide physician statements with the student's clearly identified and diagnosed medical conditions or disabilities and reasons that the student cannot safely wear a mask.

357. These School Defendants have no authority to require such personal and specific information to be disclosed by a student or family in order for the student to obtain a medical exemption from the Mask Mandates.

358. Although no Missouri statute could be found that specifies exemptions to mask mandates, an analogy to § 167.181 RSMo is appropriate. Under that statute, Missouri school children are required to receive certain immunizations, yet religious and medical exemptions are permitted. "In cases where any such objection is for reasons of medical contraindications, a statement from a duly licensed physician must also be provided to the school administrator." The regulations for this statute provide further explanation as to the sufficiency of the medical-exemption request. A student seeking a medical exemption from a required immunization must submit a "signed certification by a licensed doctor of medicine (MD), doctor of osteopathy (DO), or his or her designee indicating that either [1] the immunization would seriously endanger the

AMERICAN OVERSIGHT

Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 63 of 74
MoAG-22-0644-A-005591

student's health or life or [2] the student has documentation of disease or laboratory evidence of immunity to the disease." 19 CSR 20-28.010.

359. Upon information and belief, these School Defendants are requiring parents and legal guardians to provide more personal information for a medical exemption to the Mask Mandates than School Defendants legally could require for a medical exemption to the immunization requirements.

360. No law authorizes School Defendants to interrogate students regarding specifics of their medical condition that requires an exemption to the Mask Mandate. Such interrogation invades the right of privacy and intrudes into the physician-patient relationship.

361. Defendants' policies regarding exemptions to the Mask Mandates therefore are unlawful as ultra vires.

COUNT XIII
(Defendants ESSD, KSD, LPS, NKC Schools, & SSD)
Mask-exemption policies in certain school districts are unreasonable and unconstitutional because they violate students' rights to privacy and personal autonomy.

362. Plaintiff incorporates paragraphs 1 - 361 as is fully set forth herein.

363. School Defendants acted under color of law in implementing and enforcing the mask-exemption policies.

364. Upon information and belief, to get a medical exemption from the Mask Mandates, Defendants ESSD, KSD, LPS, NKC Schools, and SSD are requiring parents and legal guardians to provide physician statements with the student's clearly identified and diagnosed medical conditions or disabilities and reasons that the student cannot safely wear a mask.

365. By requiring such personal and medical information, these School Defendants have deprived students of their right to privacy, personal autonomy, and bodily integrity secured by the U.S. Constitution. U.S. Const. amend 14 § 1.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005592

366. The right to privacy protects the students' personal autonomy and bodily integrity from intrusion by the government, and it protects the disclosure of personal and private information, such as a person's medical history.

367. The mask-exemption requirements in the school districts of ESSD, KSD, LPS, NKC Schools, and SSD therefore violate students' right to privacy.

368. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the mask-exemption policies are unconstitutional under the U.S. Constitution; an injunction prohibiting School Defendants from enforcing their mask-exemption policies; and nominal damages for the harm caused by the School Defendants' mask-exemption policies; and attorney fees and costs.

COUNT XIV
(Defendants ESSD, KSD, LPS, NKC Schools, & SSD)
The mask-exemption policies in ESSD, KSD, LPS, NKC Schools, and SSD are unreasonable, vague, ambiguous, and constitute an abuse of discretion.

369. Plaintiff incorporates paragraphs 1 - 368 as if fully set forth herein.

370. Upon information and belief, Defendants ESSD, KSD, LPS, NKC Schools, and SSD have failed to provide parents and legal guardians with clear guidelines as to what information or statement from a physician would be acceptable for the defendants to grant medical exemptions from the Mask Mandates.

371. Upon information and belief, even when parents and guardian believed they'd submitted physician statements with the requisite information, including with specific diagnoses and reasons why students could not safely wear a mask, School Defendants denied the requests for medical exemptions.

372. Even if the mask-exemption requirements in these school districts were constitutional (which they are not) denials of exemption requests when students have provided the

AMERICAN OVERSIGHT

MCAG-22-0644-A-005593

requested information violate the defendants' own mask-exemption policies and are abuses of discretion.

373. For the reasons stated above, the mask-exemption policies in ESSD, KSD, LPS, NKC Schools, and SSD are unreasonable, vague, ambiguous, and constitute an abuse of discretion.

COUNT XV
(all School Defendants)
School Defendants' mask-exemption policies violate the Equal Protection Clause of the U.S. Constitution because they create two separate and unequal classes of students.

374. Plaintiff incorporates paragraphs 1 - 373 as if fully set forth herein.

375. A state providing public education, must ensure that education is available to all on equal terms. *Brown v Board of Educ.*, 347 U.S. 483, 493 (1954).

376. The legal system recognizes educations' impact upon the social, intellectual, and psychological well-being of the child, *Plyler v Doe*, 457 U.S. 202, 222 (1982), and the benefits the child derives from the socialization process in the regular classroom. *Hairston v Drosick*, 423 F Supp 180, 183 (S.D.W.Va. 1976).

377. School Defendants acted under color of law in implementing and enforcing the policies regarding exemptions to the Mask Mandates.

378. Upon information and belief, under School Defendants' mask-exemption policies, if exemptions are given to students, the unmasked students are unfairly segregated from their peers and deprived of the socialization process in the classroom.

379. Upon information and belief, under School Defendants' mask-exemption policies, a student with an approved exemption to the Mask Mandates is essentially isolated from the rest of the classmates because the unmasked student may have plexiglass around his or her desk and must sit a certain distance away from other students in the classroom, cannot work in groups with other students unless the unmasked student maintains a certain distance, cannot go into the

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 66 of 74
MCAG-22-0644-A-005594

restroom with other students, and must walk a certain distance away from others in the hallways. In short, School Defendants treat mask-exempted students like lepers.

380. Upon information and belief, the mask-exempted students have a completely different school experience than that of the masked students, resulting in two separate and unequal classes of students created by School Defendants.

381. School Defendants' mask-exemption policies violate the Equal Protection Clause of the U.S. Constitution because they create two separate and unequal classes of students.

382. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the mask-exemption policies are unconstitutional under the Equal Protection Clause of the U.S. Constitution; an injunction prohibiting School Defendants from enforcing their mask-exemption policies; nominal damages for the harm caused by the School Defendants' mask-exemption policies; and attorney fees and costs.

COUNT XVI (all School Defendants)
School Defendants' mask-exemption policies violate the Equal Protection Clause of the Missouri Constitution because they create two separate and unequal classes of students.

383. Plaintiff hereby incorporates paragraphs 1- 382 of this Complaint as if fully set forth herein.

384. Under the Missouri Constitution, "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. § 2.

385. For similar reasons as alleged above in the paragraphs for Count Sixteen (which paragraphs are incorporated hereto), School Defendants' mask-exemption policies violate the Missouri Constitution because they treat mask-exempted students unequally and deny them equal rights and opportunity under the law.

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 67 of 71
MoAG-22-0644-A-005595

386. For the reasons stated above, Plaintiff is entitled to a declaration that the mask-exemption policies are unconstitutional under the Equal Protection Clause of the Missouri Constitution; an injunction prohibiting School Defendants from enforcing their mask mandate and exemption policies; nominal damages for the harm caused by the policies; and attorney fees and costs.

COUNT XVII
(Defendants ESSD, KSD, LPS, NKC Schools, & SSD)
The mask-exemption policies in ESSD, KSD, LPS, NKC Schools, and SSD unlawfully discriminate against students with disabilities under federal law.

387. Plaintiff incorporates paragraphs 1 - 386 as if fully set forth herein.

388. Both the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973, are federal laws that require school districts to provide eligible disabled students with a Free Appropriate Public Education, or FAPE.

389. Under IDEA, Individual Education Programs (IEPs) offer special education services tailored to a child's unique needs to ensure participation in the general curriculum.

390. Section 504 of the Rehabilitation Act of 1973 aims to remove barriers to students with disabilities in public schools and to protect kids from discrimination in school settings.

391. Students with disabilities who cannot wear a mask or cannot safely wear a mask because of their disability in accordance with CDC guidelines should not be required to wear one.

392. Defendants ESSD, KSD, LPS, NKC Schools, and SSD acted under color of law in implementing and enforcing the mask-exemption policies.

393. Upon information and belief, Defendants ESSD, KSD, LPS, NKC Schools, and SSD deny mask exemptions to students with disabilities, who have IEPs under IDEA or qualify for services under Section 504.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005596

394. Upon information and belief, by denying mask exemptions to students with disabilities, Defendants ESSD, KSD, LPS, NKC Schools, and SSD unlawfully discriminate against such students, exacerbate their disabilities, and interfere the children's ability to learn in the general classroom.

395. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. 1983, IDEA, and Section 504, to a declaration that Defendants ESSD, KSD, LPS, NKC Schools, and SSD unlawfully discriminate against students with disabilities under IDEA and Section 504; an injunction preventing these defendants from continuing to do so; nominal damages for the harm caused by these defendants, and attorney fees.

COUNT XVIII
(Defendants ESSD, KSD, LPS, NKC Schools, and SSD)
The mask-exemption policies of ESSD, KSD, LPS, NKC Schools, and SSD cause school personnel to engage in the unauthorized practice of medicine in violation of § 334.010 RSMo.

396. Plaintiff hereby incorporates paragraphs 1-395 of this Complaint as if fully set forth herein.

397. Under § 334.010 RSMo, it is unlawful for any person not now a registered physician within the meaning of the law to practice medicine.

398. Upon information and belief, under the mask-exemption policies in Defendants ESSD, KSD, LPS, NKC Schools, and SSD, school personnel (including superintendents, other administrators, and school nurses) make the determination whether the wearing of a mask would endanger the health of a student or whether a mask can safely be worn by a student.

399. Upon information and belief, under the mask-exemption policies in ESSD, KSD, LPS, NKC Schools, and SSD, school superintendents, other administrators, and nurses decide

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 69 of 74
MCAG-22-0644-A-005597

whether they agree or disagree with the student's physician's medical judgment that the student needs to be exempted from the Mask Mandates because of medical reasons.

400. Upon information and belief, school personnel (including superintendents, other administrators, and school nurses) are not registered physicians within the meaning of the law and are not qualified to engage in the practice of medicine by determining whether students' have medical reasons why mask wearing could endanger their health.

401. Because the mask-exemption policies in ESSD, KSD, LPS, NKC Schools, and SSD give school personnel (including superintendents, other administrators, and school nurses) the authority to make medical-exemption determinations and to discount, second-guess, and override the determinations and recommendations of registered physicians, such policies are unlawful and invalid because they cause school personnel to unlawfully engage in the practice of medicine.

COUNT XIX
(all School Defendants)
School Defendants' Mask Mandates violate the First Amendment to the U.S. Constitution because they allow no exemptions for religious beliefs or conscientious objections.

402. Plaintiff hereby incorporates paragraphs 1 - 401 of this Complaint as if fully set forth herein.

403. Under the First Amendment to the U.S. Constitution, which is applicable to the States through the Fourteenth Amendment, government shall not prohibit the free exercise of religion. U.S. Const. amend I.

404. Under E*mployment Div.* v. *Smith*, 494 U. S. 872 (1990), laws that incidentally burden religion ordinarily are not subject to strict scrutiny so long as the laws are neutral and generally applicable. *Fulton v. City of Philadelphia*, 593 U.S. ___, slip op. at 5 (2021).

AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 70 of 74
MCAG-22-0644-A-005598

405. However, when laws or government policies that are not neutral or generally applicable burden a person's religious exercise, then strict scrutiny applies, and the government must demonstrate a compelling interest that is narrowly tailored further that interest. *Id.*

406. Upon information and belief, School Defendants' Mask Mandates are not generally applicable because they give school administrators discretion on whether to permit exemptions to mask wearing. Furthermore, School Defendants allow exemptions for a number of reasons. For example, upon information and belief, medical exemptions are allowed, student athletes don't have to wear masks when playing sports, and students don't have to wear masks when participating in physical education, band, or choir.

407. Upon information and belief, however, School Defendants do not allow exemptions to the Mask Mandates for religious reasons or conscientious objections.

408. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs. *Id.*

409. School Defendants lack a compelling interest for denying exemptions to students who object to the Mask Mandates based on sincerely held religious beliefs or conscientious objections, and the Mask Mandates are not narrowly tailored to achieve such compelling interest.

410. School Districts' Mask Mandates violate the First Amendment because they infringe on rights to free exercise of religion and rights of conscience.

411. For the reasons stated above, Plaintiff is entitled under 42 U.S.C. § 1983 to a declaration that the mask-exemption policies are unconstitutional under the First Amendment of the U.S. Constitution; an injunction prohibiting School Defendants from enforcing their mask-exemption policies without religious and conscience exemptions; nominal damages for the harm caused by the School Defendants' mask-exemption policies; and attorney fees and costs.

AMERICAN OVERSIGHT

MCAG-22-0644-A-005599

COUNT XX
(all School Defendants)
School Defendants' Mask Mandates violate the Missouri Religious Freedom Restoration Act because they allow no exemptions for religious beliefs.

412. Plaintiff hereby incorporates paragraphs 1 - 411 of this Complaint as if fully set forth herein.

413. Under the Missouri Religious Freedom Restoration Act, § 1.302 RSMo:

> a governmental authority may not restrict a person's free exercise of religion, unless: (1) The restriction is in the form of a rule of general applicability, and does not discriminate against religion, or among religions; and (2) The governmental authority demonstrates that application of the restriction to the person is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances.

414. Upon information and belief, School Defendants' Mask Mandates are not generally applicable, and they discriminate against religion because the Mask Mandates do not provide exemptions for religious beliefs.

415. Upon information and belief, School Defendants' Mask Mandates give school administrators broad discretion on whether to permit exemptions to mask wearing. Furthermore, School Defendants allow exemptions for a number of reasons. For example, upon information and belief, medical exemptions are allowed, student athletes don't have to wear masks when playing sports, and students don't have to wear masks when participating in physical education, band, or choir.

416. Upon information and belief, however, School Defendants do not allow exemptions to the Mask Mandates for religious reasons.

417. School Defendants cannot demonstrate (1) a compelling governmental interest for forcing a student to wear a mask when the student has (or whose parents or legal guardians have) a religious reason for seeking an exemption and (2) that the Mask Mandates are not unduly restrictive.

AMERICAN OVERSIGHT

Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 72 of 74
MORE-22-0644-A-005600

418. School Defendants' Mask Mandates violate Missouri's Religious Freedom Restoration Act because they infringe on the free exercise of religion by denying exemptions to students who seek exemptions for religious reasons.

419. For the reasons stated above, Plaintiff is entitled to a declaration that the mask-exemption policies are unconstitutional under Missouri's Religious Freedom Restoration Act; an injunction prohibiting School Defendants from enforcing their mask-exemption policies; nominal damages for the harm caused by the School Defendants' mask-exemption policies; and attorney fees and costs.

WHEREFORE, Plaintiff prays this Court to:

- Declare all Defendants' Mask Mandates and the School Defendants' mask-exemption policies and Quarantine Policies to be unlawful, unreasonable, arbitrary, capricious, abuses of discretion, and unconstitutional under the U.S. Constitution and the Missouri Constitution, as alleged above;
- Enter an injunctive order in Plaintiff's favor and against all Defendants preventing all Defendants from enforcing their Mask Mandates as applied to school children;
- Enter an injunctive order in Plaintiff's favor and against School Defendants preventing them from enforcing their Quarantine Policies and Mask-Exemption Policies;
- Enter a judgment on all counts in Plaintiff's favor for nominal damages, together with prejudgment and post-judgment interest;
- Grant attorney fees to Plaintiff under 42 U.S.C. §§ 1983, 1988, IDEA, Section 504, 29 U.S.C. § 794(b), and § 610.027 RSMo, as well as costs herein incurred; and
- For such other and further relief as the Court deems just and proper under the circumstances.

AMERICAN OVERSIGHT

MOAG-22-0644-A-005601

Respectfully submitted,

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AMERICAN OVERSIGHT
Case 4:21-cv-00623-HFS Document 1 Filed 08/29/21 Page 74 of 74
MCAG-22-0644-A-005602

No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

The STATE OF TEXAS and the STATE OF LOUISIANA,
Plaintiff-Appellees,

v.

The UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division
Civil Action No. 6:21-cv-00016

CORRECTED MOTION OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND PROPOSED BRIEF

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Dated: August 30, 2021

AMERICAN OVERSIGHT

MOTION

Proposed *amici curiae* the States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Utah, and West Virginia ("Amici" or "Amici States") respectfully move for leave to file the attached proposed brief in opposition to Federal Defendants' motion for a stay pending appeal.

As outlined in the attached proposed brief, the States continue to suffer ongoing irreparable harm caused by Defendants' unlawful actions. The district court's injunction ensures that the *status quo ante* will prevail pending adjudication of this dispute, and thus will ameliorate the harms that the Amici States are suffering.

The legal issues in this case, and the real-world impact of their resolution, are of enormous importance to the Amici States. Indeed, the States of Arizona, Florida, and Montana are litigating similar claims against the Defendants in the the Ninth and Eleventh Circuits. *See, e.g.*, *Arizona v. DHS*, No. 21-16118 (9th Cir. filed June 30, 2021); *Florida v. United States*, No. 21-11715 (11th Cir. docketed May 19, 2021).

Counsel for Plaintiffs and Defendants have consented to the filing of this brief.

AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI 1

ARGUMENT 1

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force 1

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts 4

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality 4

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments 6

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime 7

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must" 10

A. Plain Text 10

B. Canons of Construction 11

1. Canon Against Surplusage 12

2. *Expressio Unius* 13

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful 14

1. 1996 Amendments To Statutory Text. 14

2. Legislative History And Intent 17

CONCLUSION 19

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005605

TABLE OF AUTHORITIES

Cases

Arizona v. DHS, No. CV-21-00186-PHX-SRB,,
2021 WL 2787930 (D. Ariz. June 30, 2021) 7, 9

Alabama Ass'n of Realtors v. HHS,
141 S. Ct. 2320 (2021).....4

Alabama Ass'n of Realtors v. HHS,
2021 WL 3783142 (U.S. Aug. 26, 2021).....5, 6

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004).....10

Christensen v. Harris Cty.,
529 U.S. 576 (2000).....14

Coyt v. Holder,
593 F.3d 902 (9th Cir. 2010) 15, 18

Fed. Exp. Corp. v. Holowecki,
552 U.S. 389 (2008).....11

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995).....10

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..... 13-14

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555 U.S. 113 (2009).....10

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558 U.S. 233 (2010).....18

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523 U.S. 26 (1998).....11

AMERICAN OVERSIGHT

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853 F.3d 492 (9th Cir. 2017) 14

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2021 WL 3683913 n.30 (S.D. Tex. Aug. 19, 2021) 12

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534 U.S. 19 (2001).....12

Statutes

2 U.S.C. §1531 6

2 U.S.C. §1534.....6

8 U.S.C. §1227 (1996) 17

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

INTERESTS OF AMICI

The Amici States and their citizens continue to suffer significant costs from illegal immigration—including billions of dollars in new expenses relating to law enforcement, education, and healthcare as a direct result of Defendants' failures to enforce immigration law. Those harms are exacerbated by the Biden Administration's increasingly brazen disrespect for the legal requirements in general, and those relating to immigration in particular.

As sovereigns within our federal system of dual sovereigns, the States also have an interest in ensuring that the federal government respects the rule of law. Defendants' challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force

The Interim Guidance's severe restrictions on removals is leading to an increase in attempted border crossings because it eliminates one of the major disincentives to being caught. This has, in turn, increased the Amici States' enforcement expenses related to the flow and traffic of individuals.

DHS itself has recently admitted in a sworn declaration that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their

AMERICAN OVERSIGHT

normal operating capacity." Exhibit 1, Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's control of the border. July 2021 had the highest number of encounters in *decades*. *Id.* at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") The most recent data for July's show the trend since 2018 (copied below). Notably, the number of encounters in July 2021 was more than *five times* the July 2020 and July 2018 numbers, and roughly *2.5 times* July 2019.

The Amici States are thus facing an unprecedented crisis, and every day that the Interim Guidance remains in force further compounds the consequences of it.

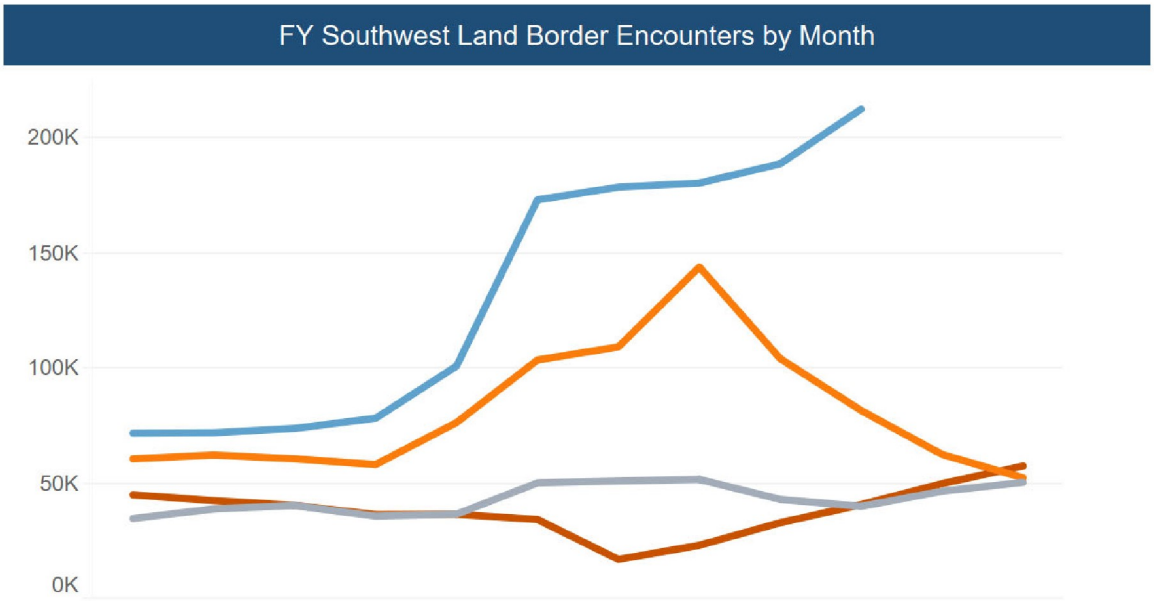
AMERICAN OVERSIGHT

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

AMERICAN OVERSIGHT

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts

The Biden Administration's brazen defiance of legal requirements underscores the need for this Court to act quickly and forcefully to break the Administration's escalating pattern of contempt for the rule of law. That disrespect is apparent both in this case, and is also particularly apparent from its recent unlawful extension of the eviction moratorium and refusal to abide by legal obligations to consider impacts on States and local governments.

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality

On June 29, the Supreme Court issued an opinion in which five justices expressed their clear view that the Centers for Disease Control lacked statutory authority to impose a nationwide eviction moratorium, absent new legislation from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). President Biden admitted as much, explaining that "[t]he bulk of the constitutional scholarship says that [an additional moratorium is] not likely to pass constitutional muster."[1] Similarly, White House Press Secretary Jen Psaki admitted that "CDC Director Rochelle Walensky and her team have been unable to find legal authority

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[1] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

AMERICAN OVERSIGHT

for a new, targeted eviction moratorium."[2] The next day, Ms. Psaki again said that "the Supreme Court ... made clear ... that any further action [on an eviction moratorium] would need legislative steps forward."[3]

But despite acknowledging the near-certain illegality of extending the eviction moratorium, the Biden Administration did so anyway. And not only that, but admitted that the slowness of courts in responding to such unlawful behavior meant that such action was likely to be substantially effective despite its unlawfulness. President Biden thus confessed that "by the time it gets litigated, it will probably give some additional time ... to people who are, in fact, behind in the rent."

This brazen defiance of Supreme Court precedent and the rule of law underscores the need for courts to take expeditious and decisive action in response to such actions: another of which is squarely presented here. The Supreme Court has now done so, reinstating an injunction against the moratorium extension. *See Alabama Ass'n of Realtors v. HHS*, __ U.S. __, 2021 WL 3783142 (Aug. 26, 2021). In doing so, the Supreme Court explained that the Plaintiffs were—as

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[2] Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.

[3] Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/.

AMERICAN OVERSIGHT

President Biden correctly predicted—"virtually certain to succeed on the merits." *Id.* at *1. Indeed, it was "difficult to imagine them losing." *Id.* at *3.

The district court properly acted to enjoin similarly brazen legal violations here. This Court should decline to stay this sorely and sadly necessary corrective action.

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments

Further underscoring Defendants' violations of legal requirements here is their failure to comply with their legal obligations in relation to state, local, tribal, and small governments in crafting the Memorandum and Interim Guidance. The Unfunded Mandates Reform Act (UMRA) requires that "[e]ach agency shall ... assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector." 2 U.S.C. §1531. But it appears that Defendants never assessed the impact on the Amicus States and their constituent local governments of the Memorandum and the Interim Guidance. Certainly, no such analysis appears on the face of Defendants' decision documents.

UMRA also requires that "[e]ach agency shall ... develop an effective process to permit elected officers of State, local, and tribal governments ... to provide *meaningful and timely input* in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. §1534(a) (emphasis added). But Defendants never allowed elected leaders in the Amicus

AMERICAN OVERSIGHT

States to provide *any* such input.

More generally, Defendants never offered an opportunity for commenting generally, which might at least have offered the States to weigh in on these issues. Nor does it appear that Defendants intend to do so in the future: they have announced that they will replace the Interim Guidance "the end of September." Stay Mot. at 1. But that timetable would not permit notice-and-comment rulemaking, so it appears that Defendants intend to violate notice-and-comment rulemaking requirements *yet again*, despite the district court repeatedly holding below that such actions violated the APA. (Nor did Defendants appeal the district court's holding that the 100-Day Moratorium violated notice-and-comment requirements.)

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime

Amici States are also suffering harms under the Interim Guidance similar to those suffered by Plaintiff States here. Arizona's experience provides an illustration of this, including harms recognized by the District of Arizona. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930, at *6–8 (D. Ariz. June 30, 2021). These harms are ongoing and compounding by the day as the backlog of unremoved individuals grows.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the

AMERICAN OVERSIGHT

challenged actions. Significantly, the Interim Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. Instead of being removed, these individuals are instead being released on the street and into communities.

DHS's actions have directly led to States incurring supervised-release costs that it otherwise would not occur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since the institution of new removal priorities. *See* Decl. of Jennifer Abbotts, Exhibit 2, AZMT007439-7441. Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR") business records and emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at internal Ex. E, AZMT007455-AZMT007458.[4] These individuals were placed on community supervision (similar to federal supervised release), which costs the State $4,163.60 annually per individual. *See id.* AZMT007439; Decl. of Shaka Okougbo, Exhibit 3, AZMT008128. The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE

[4] For example, an April 14, 2021, email titled "316717 Detainer lift" from ICE employee Christopher Murphy informs ADCRR that the detainer for inmate 316717 has been lifted, explaining "Subject does not meet the current enforcement priorities." Decl. of Jennifer Abbotts, Ex. 2, at internal Ex. C, AZMT007450.

AMERICAN OVERSIGHT

detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, Decl. of Brian Lockerby, Exhibit 4, AZMT007419-AZMT007422. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Given those recidivism rates, the release of convicts into the community pursuant to the Interim Guidance makes it virtually certain that the Plaintiff States will incur additional law enforcement and incarceration costs and direct crime-based losses.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals overall from before and after February 2021 is the new enforcement priorities. Deposition of Albert Carter at 81:10-84:5; 87:1-89:11, Exhibit 5.[5] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at

[5] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. Deposition of Albert Carter, Ex. 5, at 15:20-24; 18:15-19:19.

AMERICAN OVERSIGHT

84:6-14.

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must"

A core issue in this case is whether "shall" in 8 U.S.C. §§1231(a)(2) and 1226(c) imposes mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in this context means "must," and that the Interim Guidance is accordingly unlawful.

A. Plain Text

The plain text of Sections 1231(a)(2) and 1226(c) establishes that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary

AMERICAN OVERSIGHT

definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, premise, requirement, or obligation." *Shall*, *American Heritage Dictionary* (5th ed.).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

The plain text of Sections 1231(a)(2) and 1226(c) therefore creates an unequivocal obligation to detain the aliens with final orders of removal and to detain the specified types of criminal aliens. Defendants thus lack *any* discretion not to detain them—let alone so unbounded discretion as to be completely unreviewable by courts.

B. Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(2) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

AMERICAN OVERSIGHT

1. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(2) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation.

Section 1231(a)(2) requires that "during the removal period," the government "shall detain the alien." Section 1231(c)(2)(C) provides a limited exception similar to Section 1226(c)(2), allowing for the release from detention of an alien arriving at a port of entry who has been ordered removed, "if the alien is needed to testify in the prosecution of a person." 8 U.S.C. §1231(c)(2).

In prior filings, DHS has claimed that Section 1231(a)(2) grants broad discretion because it also says that "[u]nder no circumstance, during the removal period shall the Attorney General release an alien" with certain types of criminal convictions or who is involved in terrorism. *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *35 n.30 (S.D. Tex. Aug. 19, 2021). As the

AMERICAN OVERSIGHT

district court explained, however, this language is best read in concert with the rest of section 1231 and requires a conclusion that detention is mandatory. *Id.* Thus, because Section 1231(c)(2)(C) contains the only enumerated exception to the command that aliens be detained during their removal period, the "[u]nder no circumstance" language in Section 1231(a)(2) is best read as a limitation on that grant of authority in Section 1231(c)(2)(C). Therefore, when Section 1231 is read as a whole, the "[u]nder no circumstance" language makes most sense when understood as a limitation of the government's authority to release testifying aliens, and not as a broad grant of discretion.

If DHS were correct that "shall detain" in Section 1231(a)(2) really means only "may detain," then there would be no need for 1231(c)(2) to allow for the release of aliens needed to testify, as DHS would already have the discretion to release such aliens. Similarly, if DHS were correct that "shall take into custody" in Section 1226(c)(1) really means "may take into custody," then there would be no reason to allow in Section 1231(c)(2)(C) for the release of aliens cooperating or testifying in an investigation. The exception for testifying aliens simply has no meaning if releases are committed to DHS's sole and unreviewable discretion.

2. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844

AMERICAN OVERSIGHT

(2018). Thus, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up)).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Interim Guidance (or its predecessor 100-day Moratorium) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for other justifications for release, let alone complete discretion to release.

Application of the e*xpressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). But DHS's conjured second exception does no such thing: instead it swallows the rest of the subsection and renders it a nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful.

1. 1996 Amendments To Statutory Text.

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

AMERICAN OVERSIGHT

("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of Sections 1226 and 1231 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting removals and detaining aliens subject to removal.

The plain language of Section 1226 is already perfectly clear, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides . . . that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. 104-828, at 210-211.

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

AMERICAN OVERSIGHT

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*." 8 U.S.C. §1252 (1996) (emphasis added).	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231(a)(2) (emphasis added).

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month

AMERICAN OVERSIGHT

removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252(c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (6 months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

AMERICAN OVERSIGHT

2. Legislative History And Intent

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals and to

AMERICAN OVERSIGHT

encourage illegal entries. That is neither what Congress intended nor can Congress's text bear that construction.

CONCLUSION

The border is in crisis. This Administration is increasingly and alarmingly lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from the Administration's control. This Court should deny Federal Defendants' motion for a stay pending appeal.

Respectfully submitted,

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-005628

CERTIFICATE OF COMPLIANCE

This brief contains 3,672 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count). Because it is an amicus brief relating to a motion, there is no specifically applicable word limitation. It is, however, within the general limitation of 6,500 words for merits-stage amicus briefing under Rule 29(a)(5).

s/ Drew C. Ensign
Drew C. Ensign

Dated: August 30, 2021

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of Amici Curiae States of States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, and West Virginia in Opposition to the Emergency Motion for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 30, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

AMERICAN OVERSIGHT

No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

The STATE OF TEXAS and the STATE OF LOUISIANA,
Plaintiff-Appellees,

v.

The UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division
Civil Action No. 6:21-cv-00016

CORRECTED MOTION OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND PROPOSED BRIEF

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AMERICAN OVERSIGHT

MOTION

Proposed *amici curiae* the States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Utah, and West Virginia ("Amici" or "Amici States") respectfully move for leave to file the attached proposed brief in opposition to Federal Defendants' motion for a stay pending appeal.

As outlined in the attached proposed brief, the States continue to suffer ongoing irreparable harm caused by Defendants' unlawful actions. The district court's injunction ensures that the *status quo ante* will prevail pending adjudication of this dispute, and thus will ameliorate the harms that the Amici States are suffering.

The legal issues in this case, and the real-world impact of their resolution, are of enormous importance to the Amici States. Indeed, the States of Arizona, Florida, and Montana are litigating similar claims against the Defendants in the the Ninth and Eleventh Circuits. *See, e.g.*, *Arizona v. DHS*, No. 21-16118 (9th Cir. filed June 30, 2021); *Florida v. United States*, No. 21-11715 (11th Cir. docketed May 19, 2021).

Counsel for Plaintiffs and Defendants have consented to the filing of this brief.

AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI 1

ARGUMENT 1

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force 1

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts 4

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality 4

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments 6

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime 7

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must" 10

A. Plain Text 10

B. Canons of Construction 11

1. Canon Against Surplusage 12

2. *Expressio Unius* 13

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful 14

1. 1996 Amendments To Statutory Text. 14

2. Legislative History And Intent 17

CONCLUSION 19

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. DHS, No. CV-21-00186-PHX-SRB,,
2021 WL 2787930 (D. Ariz. June 30, 2021) 7, 9

Alabama Ass'n of Realtors v. HHS,
141 S. Ct. 2320 (2021).....4

Alabama Ass'n of Realtors v. HHS,
2021 WL 3783142 (U.S. Aug. 26, 2021).....5, 6

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004).....10

Christensen v. Harris Cty.,
529 U.S. 576 (2000).....14

Coyt v. Holder,
593 F.3d 902 (9th Cir. 2010) 15, 18

Fed. Exp. Corp. v. Holowecki,
552 U.S. 389 (2008).....11

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995).....10

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..... 13-14

Jimenez v. Quarterman,
555 U.S. 113 (2009).....10

Kucana v. Holder,
558 U.S. 233 (2010).....18

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998).....11

AMERICAN OVERSIGHT

Syed v. M-I, LLC,
853 F.3d 492 (9th Cir. 2017) 14

Texas v. United States,
2021 WL 3683913 n.30 (S.D. Tex. Aug. 19, 2021) 12

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....12

Statutes

2 U.S.C. §1531 6

2 U.S.C. §1534.....6

8 U.S.C. §1227 (1996) 17

8 U.S.C. §1252 (1996) 15, 16

8 U.S.C. §1231 ..... 12, 17

Other Authorities

32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996) 18

H.R. Conf. Rep. 104-828 ..... 15, 16, 18

Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/. 5

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AMERICAN OVERSIGHT

Joseph Biden, Remarks at the White House (August 3,2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/. 4

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005636

INTERESTS OF AMICI

The Amici States and their citizens continue to suffer significant costs from illegal immigration—including billions of dollars in new expenses relating to law enforcement, education, and healthcare as a direct result of Defendants' failures to enforce immigration law. Those harms are exacerbated by the Biden Administration's increasingly brazen disrespect for the legal requirements in general, and those relating to immigration in particular.

As sovereigns within our federal system of dual sovereigns, the States also have an interest in ensuring that the federal government respects the rule of law. Defendants' challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force

The Interim Guidance's severe restrictions on removals is leading to an increase in attempted border crossings because it eliminates one of the major disincentives to being caught. This has, in turn, increased the Amici States' enforcement expenses related to the flow and traffic of individuals.

DHS itself has recently admitted in a sworn declaration that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their

AMERICAN OVERSIGHT

normal operating capacity." Exhibit 1, Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's control of the border. July 2021 had the highest number of encounters in *decades*. *Id.* at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") The most recent data for July's show the trend since 2018 (copied below). Notably, the number of encounters in July 2021 was more than *five times* the July 2020 and July 2018 numbers, and roughly *2.5 times* July 2019.

The Amici States are thus facing an unprecedented crisis, and every day that the Interim Guidance remains in force further compounds the consequences of it.

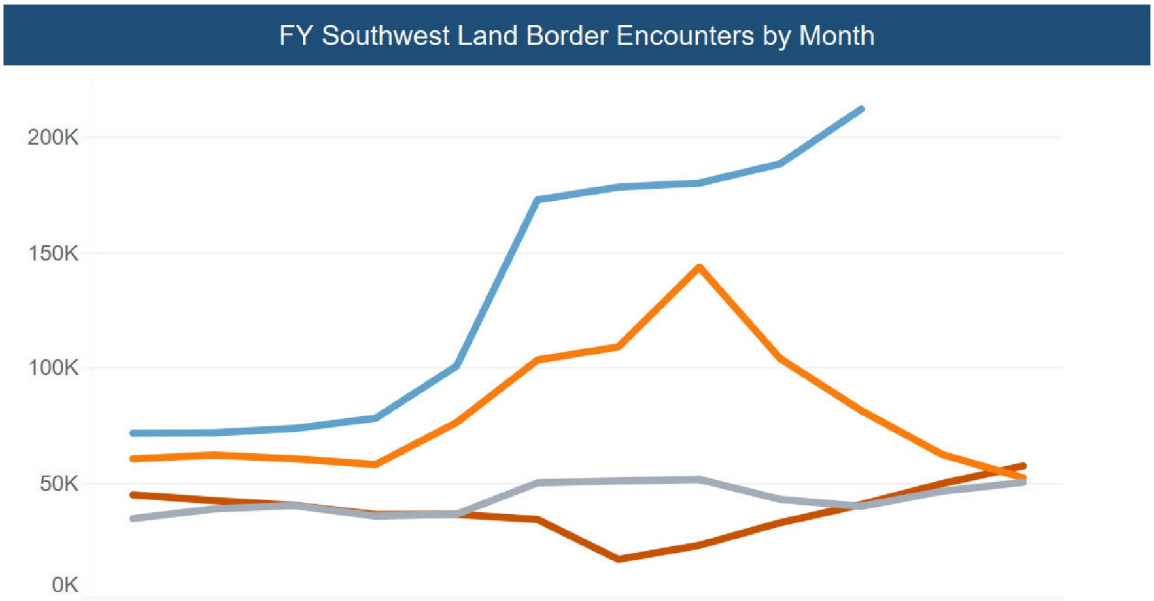
AMERICAN OVERSIGHT

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

AMERICAN OVERSIGHT

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts

The Biden Administration's brazen defiance of legal requirements underscores the need for this Court to act quickly and forcefully to break the Administration's escalating pattern of contempt for the rule of law. That disrespect is apparent both in this case, and is also particularly apparent from its recent unlawful extension of the eviction moratorium and refusal to abide by legal obligations to consider impacts on States and local governments.

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality

On June 29, the Supreme Court issued an opinion in which five justices expressed their clear view that the Centers for Disease Control lacked statutory authority to impose a nationwide eviction moratorium, absent new legislation from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). President Biden admitted as much, explaining that "[t]he bulk of the constitutional scholarship says that [an additional moratorium is] not likely to pass constitutional muster."[1] Similarly, White House Press Secretary Jen Psaki admitted that "CDC Director Rochelle Walensky and her team have been unable to find legal authority

---

[1] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

AMERICAN OVERSIGHT

for a new, targeted eviction moratorium."[2] The next day, Ms. Psaki again said that "the Supreme Court ... made clear ... that any further action [on an eviction moratorium] would need legislative steps forward."[3]

But despite acknowledging the near-certain illegality of extending the eviction moratorium, the Biden Administration did so anyway. And not only that, but admitted that the slowness of courts in responding to such unlawful behavior meant that such action was likely to be substantially effective despite its unlawfulness. President Biden thus confessed that "by the time it gets litigated, it will probably give some additional time ... to people who are, in fact, behind in the rent."

This brazen defiance of Supreme Court precedent and the rule of law underscores the need for courts to take expeditious and decisive action in response to such actions: another of which is squarely presented here. The Supreme Court has now done so, reinstating an injunction against the moratorium extension. *See Alabama Ass'n of Realtors v. HHS*, __ U.S. __, 2021 WL 3783142 (Aug. 26, 2021). In doing so, the Supreme Court explained that the Plaintiffs were—as

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[2] Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.

[3] Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/.

AMERICAN OVERSIGHT

President Biden correctly predicted—"virtually certain to succeed on the merits." *Id.* at *1. Indeed, it was "difficult to imagine them losing." *Id.* at *3.

The district court properly acted to enjoin similarly brazen legal violations here. This Court should decline to stay this sorely and sadly necessary corrective action.

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments

Further underscoring Defendants' violations of legal requirements here is their failure to comply with their legal obligations in relation to state, local, tribal, and small governments in crafting the Memorandum and Interim Guidance. The Unfunded Mandates Reform Act (UMRA) requires that "[e]ach agency shall ... assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector." 2 U.S.C. §1531. But it appears that Defendants never assessed the impact on the Amicus States and their constituent local governments of the Memorandum and the Interim Guidance. Certainly, no such analysis appears on the face of Defendants' decision documents.

UMRA also requires that "[e]ach agency shall ... develop an effective process to permit elected officers of State, local, and tribal governments ... to provide *meaningful and timely input* in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. §1534(a) (emphasis added). But Defendants never allowed elected leaders in the Amicus

AMERICAN OVERSIGHT

States to provide *any* such input.

More generally, Defendants never offered an opportunity for commenting generally, which might at least have offered the States to weigh in on these issues. Nor does it appear that Defendants intend to do so in the future: they have announced that they will replace the Interim Guidance "the end of September." Stay Mot. at 1. But that timetable would not permit notice-and-comment rulemaking, so it appears that Defendants intend to violate notice-and-comment rulemaking requirements *yet again*, despite the district court repeatedly holding below that such actions violated the APA. (Nor did Defendants appeal the district court's holding that the 100-Day Moratorium violated notice-and-comment requirements.)

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime

Amici States are also suffering harms under the Interim Guidance similar to those suffered by Plaintiff States here. Arizona's experience provides an illustration of this, including harms recognized by the District of Arizona. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930, at *6–8 (D. Ariz. June 30, 2021). These harms are ongoing and compounding by the day as the backlog of unremoved individuals grows.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the

AMERICAN OVERSIGHT

challenged actions. Significantly, the Interim Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. Instead of being removed, these individuals are instead being released on the street and into communities.

DHS's actions have directly led to States incurring supervised-release costs that it otherwise would not occur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since the institution of new removal priorities. *See* Decl. of Jennifer Abbotts, Exhibit 2, AZMT007439-7441. Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR") business records and emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at internal Ex. E, AZMT007455-AZMT007458.[4] These individuals were placed on community supervision (similar to federal supervised release), which costs the State $4,163.60 annually per individual. *See id.* AZMT007439; Decl. of Shaka Okougbo, Exhibit 3, AZMT008128. The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE

[4] For example, an April 14, 2021, email titled "316717 Detainer lift" from ICE employee Christopher Murphy informs ADCRR that the detainer for inmate 316717 has been lifted, explaining "Subject does not meet the current enforcement priorities." Decl. of Jennifer Abbotts, Ex. 2, at internal Ex. C, AZMT007450.

AMERICAN OVERSIGHT

detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, Decl. of Brian Lockerby, Exhibit 4, AZMT007419-AZMT007422. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Given those recidivism rates, the release of convicts into the community pursuant to the Interim Guidance makes it virtually certain that the Plaintiff States will incur additional law enforcement and incarceration costs and direct crime-based losses.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals overall from before and after February 2021 is the new enforcement priorities. Deposition of Albert Carter at 81:10-84:5; 87:1-89:11, Exhibit 5.[5] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at

[5] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. Deposition of Albert Carter, Ex. 5, at 15:20-24; 18:15-19:19.

AMERICAN OVERSIGHT

84:6-14.

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must"

A core issue in this case is whether "shall" in 8 U.S.C. §§1231(a)(2) and 1226(c) imposes mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in this context means "must," and that the Interim Guidance is accordingly unlawful.

A. Plain Text

The plain text of Sections 1231(a)(2) and 1226(c) establishes that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary

AMERICAN OVERSIGHT

definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, premise, requirement, or obligation." *Shall*, *American Heritage Dictionary* (5th ed.).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

The plain text of Sections 1231(a)(2) and 1226(c) therefore creates an unequivocal obligation to detain the aliens with final orders of removal and to detain the specified types of criminal aliens. Defendants thus lack *any* discretion not to detain them—let alone so unbounded discretion as to be completely unreviewable by courts.

B. Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(2) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

AMERICAN OVERSIGHT

1. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(2) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation.

Section 1231(a)(2) requires that "during the removal period," the government "shall detain the alien." Section 1231(c)(2)(C) provides a limited exception similar to Section 1226(c)(2), allowing for the release from detention of an alien arriving at a port of entry who has been ordered removed, "if the alien is needed to testify in the prosecution of a person." 8 U.S.C. §1231(c)(2).

In prior filings, DHS has claimed that Section 1231(a)(2) grants broad discretion because it also says that "[u]nder no circumstance, during the removal period shall the Attorney General release an alien" with certain types of criminal convictions or who is involved in terrorism. *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *35 n.30 (S.D. Tex. Aug. 19, 2021). As the

AMERICAN OVERSIGHT

district court explained, however, this language is best read in concert with the rest of section 1231 and requires a conclusion that detention is mandatory. *Id.* Thus, because Section 1231(c)(2)(C) contains the only enumerated exception to the command that aliens be detained during their removal period, the "[u]nder no circumstance" language in Section 1231(a)(2) is best read as a limitation on that grant of authority in Section 1231(c)(2)(C). Therefore, when Section 1231 is read as a whole, the "[u]nder no circumstance" language makes most sense when understood as a limitation of the government's authority to release testifying aliens, and not as a broad grant of discretion.

If DHS were correct that "shall detain" in Section 1231(a)(2) really means only "may detain," then there would be no need for 1231(c)(2) to allow for the release of aliens needed to testify, as DHS would already have the discretion to release such aliens. Similarly, if DHS were correct that "shall take into custody" in Section 1226(c)(1) really means "may take into custody," then there would be no reason to allow in Section 1231(c)(2)(C) for the release of aliens cooperating or testifying in an investigation. The exception for testifying aliens simply has no meaning if releases are committed to DHS's sole and unreviewable discretion.

2. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844

AMERICAN OVERSIGHT

(2018). Thus, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up)).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Interim Guidance (or its predecessor 100-day Moratorium) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for other justifications for release, let alone complete discretion to release.

Application of the e*xpressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). But DHS's conjured second exception does no such thing: instead it swallows the rest of the subsection and renders it a nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful.

1. 1996 Amendments To Statutory Text.

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

AMERICAN OVERSIGHT

("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of Sections 1226 and 1231 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting removals and detaining aliens subject to removal.

The plain language of Section 1226 is already perfectly clear, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides . . . that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. 104-828, at 210-211.

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

AMERICAN OVERSIGHT

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*." 8 U.S.C. §1252 (1996) (emphasis added).	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231(a)(2) (emphasis added).

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month

AMERICAN OVERSIGHT

removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252(c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (6 months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

AMERICAN OVERSIGHT

2. Legislative History And Intent

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals and to

AMERICAN OVERSIGHT

encourage illegal entries. That is neither what Congress intended nor can Congress's text bear that construction.

CONCLUSION

The border is in crisis. This Administration is increasingly and alarmingly lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from the Administration's control. This Court should deny Federal Defendants' motion for a stay pending appeal.

Respectfully submitted,

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-005656

CERTIFICATE OF COMPLIANCE

This brief contains 3,672 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count). Because it is an amicus brief relating to a motion, there is no specifically applicable word limitation. It is, however, within the general limitation of 6,500 words for merits-stage amicus briefing under Rule 29(a)(5).

s/ Drew C. Ensign
Drew C. Ensign

Dated: August 30, 2021

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of Amici Curiae States of States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, and West Virginia in Opposition to the Emergency Motion for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 30, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

AMERICAN OVERSIGHT

No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

The STATE OF TEXAS and the STATE OF LOUISIANA,
Plaintiff-Appellees,

v.

The UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division
Civil Action No. 6:21-cv-00016

CORRECTED MOTION OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND PROPOSED BRIEF

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AMERICAN OVERSIGHT

MOTION

Proposed *amici curiae* the States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Utah, and West Virginia ("Amici" or "Amici States") respectfully move for leave to file the attached proposed brief in opposition to Federal Defendants' motion for a stay pending appeal.

As outlined in the attached proposed brief, the States continue to suffer ongoing irreparable harm caused by Defendants' unlawful actions. The district court's injunction ensures that the *status quo ante* will prevail pending adjudication of this dispute, and thus will ameliorate the harms that the Amici States are suffering.

The legal issues in this case, and the real-world impact of their resolution, are of enormous importance to the Amici States. Indeed, the States of Arizona, Florida, and Montana are litigating similar claims against the Defendants in the the Ninth and Eleventh Circuits. *See, e.g.*, *Arizona v. DHS*, No. 21-16118 (9th Cir. filed June 30, 2021); *Florida v. United States*, No. 21-11715 (11th Cir. docketed May 19, 2021).

Counsel for Plaintiffs and Defendants have consented to the filing of this brief.

AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI 1

ARGUMENT 1

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force 1

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts 4

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality 4

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments 6

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime 7

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must" 10

A. Plain Text 10

B. Canons of Construction 11

1. Canon Against Surplusage 12

2. *Expressio Unius* 13

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful 14

1. 1996 Amendments To Statutory Text. 14

2. Legislative History And Intent 17

CONCLUSION 19

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005661

TABLE OF AUTHORITIES

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Arizona v. DHS, No. CV-21-00186-PHX-SRB,,
2021 WL 2787930 (D. Ariz. June 30, 2021) 7, 9

Alabama Ass'n of Realtors v. HHS,
141 S. Ct. 2320 (2021).....4

Alabama Ass'n of Realtors v. HHS,
2021 WL 3783142 (U.S. Aug. 26, 2021).....5, 6

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004).....10

Christensen v. Harris Cty.,
529 U.S. 576 (2000).....14

Coyt v. Holder,
593 F.3d 902 (9th Cir. 2010) 15, 18

Fed. Exp. Corp. v. Holowecki,
552 U.S. 389 (2008).....11

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995).....10

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..... 13-14

Jimenez v. Quarterman,
555 U.S. 113 (2009).....10

Kucana v. Holder,
558 U.S. 233 (2010).....18

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998).....11

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005662

Syed v. M-I, LLC,
853 F.3d 492 (9th Cir. 2017) 14

Texas v. United States,
2021 WL 3683913 n.30 (S.D. Tex. Aug. 19, 2021) 12

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....12

Statutes

2 U.S.C. §1531 6

2 U.S.C. §1534.....6

8 U.S.C. §1227 (1996) 17

8 U.S.C. §1252 (1996) 15, 16

8 U.S.C. §1231 ..... 12, 17

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32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996) 18

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AMERICAN OVERSIGHT

Joseph Biden, Remarks at the White House (August 3,2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/. 4

AMERICAN OVERSIGHT

INTERESTS OF AMICI

The Amici States and their citizens continue to suffer significant costs from illegal immigration—including billions of dollars in new expenses relating to law enforcement, education, and healthcare as a direct result of Defendants' failures to enforce immigration law. Those harms are exacerbated by the Biden Administration's increasingly brazen disrespect for the legal requirements in general, and those relating to immigration in particular.

As sovereigns within our federal system of dual sovereigns, the States also have an interest in ensuring that the federal government respects the rule of law. Defendants' challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force

The Interim Guidance's severe restrictions on removals is leading to an increase in attempted border crossings because it eliminates one of the major disincentives to being caught. This has, in turn, increased the Amici States' enforcement expenses related to the flow and traffic of individuals.

DHS itself has recently admitted in a sworn declaration that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their

AMERICAN OVERSIGHT

normal operating capacity." Exhibit 1, Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's control of the border. July 2021 had the highest number of encounters in *decades*. *Id.* at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") The most recent data for July's show the trend since 2018 (copied below). Notably, the number of encounters in July 2021 was more than *five times* the July 2020 and July 2018 numbers, and roughly *2.5 times* July 2019.

The Amici States are thus facing an unprecedented crisis, and every day that the Interim Guidance remains in force further compounds the consequences of it.

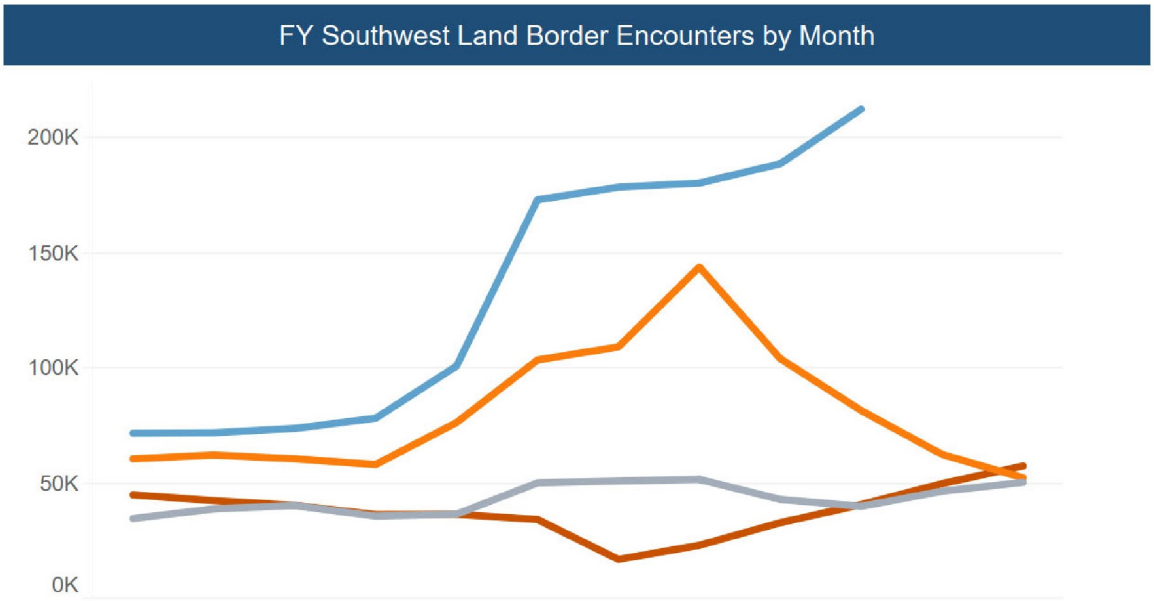
AMERICAN OVERSIGHT

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

AMERICAN OVERSIGHT

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts

The Biden Administration's brazen defiance of legal requirements underscores the need for this Court to act quickly and forcefully to break the Administration's escalating pattern of contempt for the rule of law. That disrespect is apparent both in this case, and is also particularly apparent from its recent unlawful extension of the eviction moratorium and refusal to abide by legal obligations to consider impacts on States and local governments.

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality

On June 29, the Supreme Court issued an opinion in which five justices expressed their clear view that the Centers for Disease Control lacked statutory authority to impose a nationwide eviction moratorium, absent new legislation from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). President Biden admitted as much, explaining that "[t]he bulk of the constitutional scholarship says that [an additional moratorium is] not likely to pass constitutional muster."[1] Similarly, White House Press Secretary Jen Psaki admitted that "CDC Director Rochelle Walensky and her team have been unable to find legal authority

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[1] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

AMERICAN OVERSIGHT

for a new, targeted eviction moratorium."[2] The next day, Ms. Psaki again said that "the Supreme Court ... made clear ... that any further action [on an eviction moratorium] would need legislative steps forward."[3]

But despite acknowledging the near-certain illegality of extending the eviction moratorium, the Biden Administration did so anyway. And not only that, but admitted that the slowness of courts in responding to such unlawful behavior meant that such action was likely to be substantially effective despite its unlawfulness. President Biden thus confessed that "by the time it gets litigated, it will probably give some additional time ... to people who are, in fact, behind in the rent."

This brazen defiance of Supreme Court precedent and the rule of law underscores the need for courts to take expeditious and decisive action in response to such actions: another of which is squarely presented here. The Supreme Court has now done so, reinstating an injunction against the moratorium extension. *See Alabama Ass'n of Realtors v. HHS*, __ U.S. __, 2021 WL 3783142 (Aug. 26, 2021). In doing so, the Supreme Court explained that the Plaintiffs were—as

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[2] Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.

[3] Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/.

AMERICAN OVERSIGHT

President Biden correctly predicted—"virtually certain to succeed on the merits." *Id.* at *1. Indeed, it was "difficult to imagine them losing." *Id.* at *3.

The district court properly acted to enjoin similarly brazen legal violations here. This Court should decline to stay this sorely and sadly necessary corrective action.

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments

Further underscoring Defendants' violations of legal requirements here is their failure to comply with their legal obligations in relation to state, local, tribal, and small governments in crafting the Memorandum and Interim Guidance. The Unfunded Mandates Reform Act (UMRA) requires that "[e]ach agency shall ... assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector." 2 U.S.C. §1531. But it appears that Defendants never assessed the impact on the Amicus States and their constituent local governments of the Memorandum and the Interim Guidance. Certainly, no such analysis appears on the face of Defendants' decision documents.

UMRA also requires that "[e]ach agency shall ... develop an effective process to permit elected officers of State, local, and tribal governments ... to provide *meaningful and timely input* in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. §1534(a) (emphasis added). But Defendants never allowed elected leaders in the Amicus

AMERICAN OVERSIGHT

States to provide *any* such input.

More generally, Defendants never offered an opportunity for commenting generally, which might at least have offered the States to weigh in on these issues. Nor does it appear that Defendants intend to do so in the future: they have announced that they will replace the Interim Guidance "the end of September." Stay Mot. at 1. But that timetable would not permit notice-and-comment rulemaking, so it appears that Defendants intend to violate notice-and-comment rulemaking requirements *yet again*, despite the district court repeatedly holding below that such actions violated the APA. (Nor did Defendants appeal the district court's holding that the 100-Day Moratorium violated notice-and-comment requirements.)

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime

Amici States are also suffering harms under the Interim Guidance similar to those suffered by Plaintiff States here. Arizona's experience provides an illustration of this, including harms recognized by the District of Arizona. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930, at *6–8 (D. Ariz. June 30, 2021). These harms are ongoing and compounding by the day as the backlog of unremoved individuals grows.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the

AMERICAN OVERSIGHT

challenged actions. Significantly, the Interim Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. Instead of being removed, these individuals are instead being released on the street and into communities.

DHS's actions have directly led to States incurring supervised-release costs that it otherwise would not occur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since the institution of new removal priorities. *See* Decl. of Jennifer Abbotts, Exhibit 2, AZMT007439-7441. Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR") business records and emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at internal Ex. E, AZMT007455-AZMT007458.[4] These individuals were placed on community supervision (similar to federal supervised release), which costs the State $4,163.60 annually per individual. *See id.* AZMT007439; Decl. of Shaka Okougbo, Exhibit 3, AZMT008128. The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE

[4] For example, an April 14, 2021, email titled "316717 Detainer lift" from ICE employee Christopher Murphy informs ADCRR that the detainer for inmate 316717 has been lifted, explaining "Subject does not meet the current enforcement priorities." Decl. of Jennifer Abbotts, Ex. 2, at internal Ex. C, AZMT007450.

AMERICAN OVERSIGHT

detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, Decl. of Brian Lockerby, Exhibit 4, AZMT007419-AZMT007422. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Given those recidivism rates, the release of convicts into the community pursuant to the Interim Guidance makes it virtually certain that the Plaintiff States will incur additional law enforcement and incarceration costs and direct crime-based losses.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals overall from before and after February 2021 is the new enforcement priorities. Deposition of Albert Carter at 81:10-84:5; 87:1-89:11, Exhibit 5.[5] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at

[5] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. Deposition of Albert Carter, Ex. 5, at 15:20-24; 18:15-19:19.

AMERICAN OVERSIGHT

84:6-14.

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must"

A core issue in this case is whether "shall" in 8 U.S.C. §§1231(a)(2) and 1226(c) imposes mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in this context means "must," and that the Interim Guidance is accordingly unlawful.

A. Plain Text

The plain text of Sections 1231(a)(2) and 1226(c) establishes that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary

AMERICAN OVERSIGHT

definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, premise, requirement, or obligation." *Shall*, *American Heritage Dictionary* (5th ed.).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

The plain text of Sections 1231(a)(2) and 1226(c) therefore creates an unequivocal obligation to detain the aliens with final orders of removal and to detain the specified types of criminal aliens. Defendants thus lack *any* discretion not to detain them—let alone so unbounded discretion as to be completely unreviewable by courts.

B. Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(2) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

AMERICAN OVERSIGHT

1. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(2) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation.

Section 1231(a)(2) requires that "during the removal period," the government "shall detain the alien." Section 1231(c)(2)(C) provides a limited exception similar to Section 1226(c)(2), allowing for the release from detention of an alien arriving at a port of entry who has been ordered removed, "if the alien is needed to testify in the prosecution of a person." 8 U.S.C. §1231(c)(2).

In prior filings, DHS has claimed that Section 1231(a)(2) grants broad discretion because it also says that "[u]nder no circumstance, during the removal period shall the Attorney General release an alien" with certain types of criminal convictions or who is involved in terrorism. *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *35 n.30 (S.D. Tex. Aug. 19, 2021). As the

AMERICAN OVERSIGHT

district court explained, however, this language is best read in concert with the rest of section 1231 and requires a conclusion that detention is mandatory. *Id.* Thus, because Section 1231(c)(2)(C) contains the only enumerated exception to the command that aliens be detained during their removal period, the "[u]nder no circumstance" language in Section 1231(a)(2) is best read as a limitation on that grant of authority in Section 1231(c)(2)(C). Therefore, when Section 1231 is read as a whole, the "[u]nder no circumstance" language makes most sense when understood as a limitation of the government's authority to release testifying aliens, and not as a broad grant of discretion.

If DHS were correct that "shall detain" in Section 1231(a)(2) really means only "may detain," then there would be no need for 1231(c)(2) to allow for the release of aliens needed to testify, as DHS would already have the discretion to release such aliens. Similarly, if DHS were correct that "shall take into custody" in Section 1226(c)(1) really means "may take into custody," then there would be no reason to allow in Section 1231(c)(2)(C) for the release of aliens cooperating or testifying in an investigation. The exception for testifying aliens simply has no meaning if releases are committed to DHS's sole and unreviewable discretion.

2. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005677

(2018). Thus, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up)).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Interim Guidance (or its predecessor 100-day Moratorium) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for other justifications for release, let alone complete discretion to release.

Application of the e*xpressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). But DHS's conjured second exception does no such thing: instead it swallows the rest of the subsection and renders it a nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful.

1. 1996 Amendments To Statutory Text.

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

AMERICAN OVERSIGHT

("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of Sections 1226 and 1231 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting removals and detaining aliens subject to removal.

The plain language of Section 1226 is already perfectly clear, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides . . . that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. 104-828, at 210-211.

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

AMERICAN OVERSIGHT

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*." 8 U.S.C. §1252 (1996) (emphasis added).	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231(a)(2) (emphasis added).

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month

AMERICAN OVERSIGHT

removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252(c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (6 months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

AMERICAN OVERSIGHT

2. Legislative History And Intent

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals and to

AMERICAN OVERSIGHT

encourage illegal entries. That is neither what Congress intended nor can Congress's text bear that construction.

CONCLUSION

The border is in crisis. This Administration is increasingly and alarmingly lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from the Administration's control. This Court should deny Federal Defendants' motion for a stay pending appeal.

Respectfully submitted,

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-005684

CERTIFICATE OF COMPLIANCE

This brief contains 3,672 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count). Because it is an amicus brief relating to a motion, there is no specifically applicable word limitation. It is, however, within the general limitation of 6,500 words for merits-stage amicus briefing under Rule 29(a)(5).

s/ Drew C. Ensign
Drew C. Ensign

Dated: August 30, 2021

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of Amici Curiae States of States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, and West Virginia in Opposition to the Emergency Motion for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 30, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
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AMERICAN OVERSIGHT

No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

The STATE OF TEXAS and the STATE OF LOUISIANA,
Plaintiff-Appellees,

v.

The UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division
Civil Action No. 6:21-cv-00016

CORRECTED MOTION OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND PROPOSED BRIEF

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Dated: August 30, 2021

AMERICAN OVERSIGHT

MOTION

Proposed *amici curiae* the States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Utah, and West Virginia ("Amici" or "Amici States") respectfully move for leave to file the attached proposed brief in opposition to Federal Defendants' motion for a stay pending appeal.

As outlined in the attached proposed brief, the States continue to suffer ongoing irreparable harm caused by Defendants' unlawful actions. The district court's injunction ensures that the *status quo ante* will prevail pending adjudication of this dispute, and thus will ameliorate the harms that the Amici States are suffering.

The legal issues in this case, and the real-world impact of their resolution, are of enormous importance to the Amici States. Indeed, the States of Arizona, Florida, and Montana are litigating similar claims against the Defendants in the the Ninth and Eleventh Circuits. *See, e.g.*, *Arizona v. DHS*, No. 21-16118 (9th Cir. filed June 30, 2021); *Florida v. United States*, No. 21-11715 (11th Cir. docketed May 19, 2021).

Counsel for Plaintiffs and Defendants have consented to the filing of this brief.

AMERICAN OVERSIGHT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI 1

ARGUMENT 1

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force 1

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts 4

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality 4

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments 6

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime 7

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must" 10

A. Plain Text 10

B. Canons of Construction 11

1. Canon Against Surplusage 12

2. *Expressio Unius* 13

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful 14

1. 1996 Amendments To Statutory Text. 14

2. Legislative History And Intent 17

CONCLUSION 19

AMERICAN OVERSIGHT

TABLE OF AUTHORITIES

Cases

Arizona v. DHS, No. CV-21-00186-PHX-SRB,,
2021 WL 2787930 (D. Ariz. June 30, 2021) 7, 9

Alabama Ass'n of Realtors v. HHS,
141 S. Ct. 2320 (2021).....4

Alabama Ass'n of Realtors v. HHS,
2021 WL 3783142 (U.S. Aug. 26, 2021).....5, 6

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004).....10

Christensen v. Harris Cty.,
529 U.S. 576 (2000).....14

Coyt v. Holder,
593 F.3d 902 (9th Cir. 2010) 15, 18

Fed. Exp. Corp. v. Holowecki,
552 U.S. 389 (2008).....11

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995).....10

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..... 13-14

Jimenez v. Quarterman,
555 U.S. 113 (2009).....10

Kucana v. Holder,
558 U.S. 233 (2010).....18

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998).....11

AMERICAN OVERSIGHT

Syed v. M-I, LLC,
853 F.3d 492 (9th Cir. 2017) 14

Texas v. United States,
2021 WL 3683913 n.30 (S.D. Tex. Aug. 19, 2021) 12

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....12

Statutes

2 U.S.C. §1531 6

2 U.S.C. §1534.....6

8 U.S.C. §1227 (1996) 17

8 U.S.C. §1252 (1996) 15, 16

8 U.S.C. §1231 ..... 12, 17

Other Authorities

32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996) 18

H.R. Conf. Rep. 104-828 ..... 15, 16, 18

Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/. 5

Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.....5

AMERICAN OVERSIGHT

Joseph Biden, Remarks at the White House (August 3,2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/. 4

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005692

INTERESTS OF AMICI

The Amici States and their citizens continue to suffer significant costs from illegal immigration—including billions of dollars in new expenses relating to law enforcement, education, and healthcare as a direct result of Defendants' failures to enforce immigration law. Those harms are exacerbated by the Biden Administration's increasingly brazen disrespect for the legal requirements in general, and those relating to immigration in particular.

As sovereigns within our federal system of dual sovereigns, the States also have an interest in ensuring that the federal government respects the rule of law. Defendants' challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

I. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force

The Interim Guidance's severe restrictions on removals is leading to an increase in attempted border crossings because it eliminates one of the major disincentives to being caught. This has, in turn, increased the Amici States' enforcement expenses related to the flow and traffic of individuals.

DHS itself has recently admitted in a sworn declaration that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their

AMERICAN OVERSIGHT

normal operating capacity." Exhibit 1, Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's control of the border. July 2021 had the highest number of encounters in *decades*. *Id.* at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") The most recent data for July's show the trend since 2018 (copied below). Notably, the number of encounters in July 2021 was more than *five times* the July 2020 and July 2018 numbers, and roughly *2.5 times* July 2019.

The Amici States are thus facing an unprecedented crisis, and every day that the Interim Guidance remains in force further compounds the consequences of it.

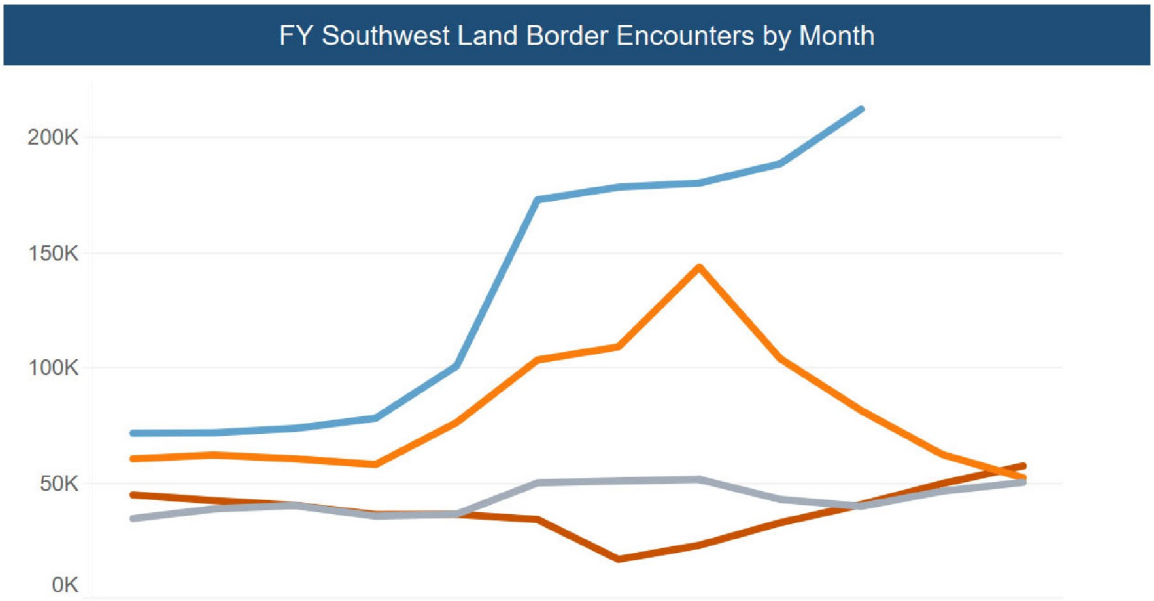
AMERICAN OVERSIGHT

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

AMERICAN OVERSIGHT

II. The Need For The District Court's Injunction Is Underscored By The Biden Administration's Lawless Acts

The Biden Administration's brazen defiance of legal requirements underscores the need for this Court to act quickly and forcefully to break the Administration's escalating pattern of contempt for the rule of law. That disrespect is apparent both in this case, and is also particularly apparent from its recent unlawful extension of the eviction moratorium and refusal to abide by legal obligations to consider impacts on States and local governments.

A. Issuing Eviction Order While Acknowledging Its Near-Certain Illegality

On June 29, the Supreme Court issued an opinion in which five justices expressed their clear view that the Centers for Disease Control lacked statutory authority to impose a nationwide eviction moratorium, absent new legislation from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). President Biden admitted as much, explaining that "[t]he bulk of the constitutional scholarship says that [an additional moratorium is] not likely to pass constitutional muster."[1] Similarly, White House Press Secretary Jen Psaki admitted that "CDC Director Rochelle Walensky and her team have been unable to find legal authority

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[1] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

AMERICAN OVERSIGHT

for a new, targeted eviction moratorium."[2] The next day, Ms. Psaki again said that "the Supreme Court ... made clear ... that any further action [on an eviction moratorium] would need legislative steps forward."[3]

But despite acknowledging the near-certain illegality of extending the eviction moratorium, the Biden Administration did so anyway. And not only that, but admitted that the slowness of courts in responding to such unlawful behavior meant that such action was likely to be substantially effective despite its unlawfulness. President Biden thus confessed that "by the time it gets litigated, it will probably give some additional time ... to people who are, in fact, behind in the rent."

This brazen defiance of Supreme Court precedent and the rule of law underscores the need for courts to take expeditious and decisive action in response to such actions: another of which is squarely presented here. The Supreme Court has now done so, reinstating an injunction against the moratorium extension. *See Alabama Ass'n of Realtors v. HHS*, __ U.S. __, 2021 WL 3783142 (Aug. 26, 2021). In doing so, the Supreme Court explained that the Plaintiffs were—as

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[2] Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.

[3] Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/.

AMERICAN OVERSIGHT

President Biden correctly predicted—"virtually certain to succeed on the merits." *Id.* at *1. Indeed, it was "difficult to imagine them losing." *Id.* at *3.

The district court properly acted to enjoin similarly brazen legal violations here. This Court should decline to stay this sorely and sadly necessary corrective action.

B. Defendants Failed To Consult With, And Consider Impacts To, States And Local Governments

Further underscoring Defendants' violations of legal requirements here is their failure to comply with their legal obligations in relation to state, local, tribal, and small governments in crafting the Memorandum and Interim Guidance. The Unfunded Mandates Reform Act (UMRA) requires that "[e]ach agency shall ... assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector." 2 U.S.C. §1531. But it appears that Defendants never assessed the impact on the Amicus States and their constituent local governments of the Memorandum and the Interim Guidance. Certainly, no such analysis appears on the face of Defendants' decision documents.

UMRA also requires that "[e]ach agency shall ... develop an effective process to permit elected officers of State, local, and tribal governments ... to provide *meaningful and timely input* in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. §1534(a) (emphasis added). But Defendants never allowed elected leaders in the Amicus

AMERICAN OVERSIGHT

States to provide *any* such input.

More generally, Defendants never offered an opportunity for commenting generally, which might at least have offered the States to weigh in on these issues. Nor does it appear that Defendants intend to do so in the future: they have announced that they will replace the Interim Guidance "the end of September." Stay Mot. at 1. But that timetable would not permit notice-and-comment rulemaking, so it appears that Defendants intend to violate notice-and-comment rulemaking requirements *yet again*, despite the district court repeatedly holding below that such actions violated the APA. (Nor did Defendants appeal the district court's holding that the 100-Day Moratorium violated notice-and-comment requirements.)

III. The Interim Guidance Harms States Through Increased Law Enforcement Costs And Crime

Amici States are also suffering harms under the Interim Guidance similar to those suffered by Plaintiff States here. Arizona's experience provides an illustration of this, including harms recognized by the District of Arizona. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930, at *6–8 (D. Ariz. June 30, 2021). These harms are ongoing and compounding by the day as the backlog of unremoved individuals grows.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the

AMERICAN OVERSIGHT

challenged actions. Significantly, the Interim Guidance has directly resulted in ICE lifting detainers on criminals who have completed their sentences. Instead of being removed, these individuals are instead being released on the street and into communities.

DHS's actions have directly led to States incurring supervised-release costs that it otherwise would not occur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since the institution of new removal priorities. *See* Decl. of Jennifer Abbotts, Exhibit 2, AZMT007439-7441. Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR") business records and emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at internal Ex. E, AZMT007455-AZMT007458.[4] These individuals were placed on community supervision (similar to federal supervised release), which costs the State $4,163.60 annually per individual. *See id.* AZMT007439; Decl. of Shaka Okougbo, Exhibit 3, AZMT008128. The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE

[4] For example, an April 14, 2021, email titled "316717 Detainer lift" from ICE employee Christopher Murphy informs ADCRR that the detainer for inmate 316717 has been lifted, explaining "Subject does not meet the current enforcement priorities." Decl. of Jennifer Abbotts, Ex. 2, at internal Ex. C, AZMT007450.

AMERICAN OVERSIGHT

detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, Decl. of Brian Lockerby, Exhibit 4, AZMT007419-AZMT007422. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Given those recidivism rates, the release of convicts into the community pursuant to the Interim Guidance makes it virtually certain that the Plaintiff States will incur additional law enforcement and incarceration costs and direct crime-based losses.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals overall from before and after February 2021 is the new enforcement priorities. Deposition of Albert Carter at 81:10-84:5; 87:1-89:11, Exhibit 5.[5] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at

[5] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. Deposition of Albert Carter, Ex. 5, at 15:20-24; 18:15-19:19.

AMERICAN OVERSIGHT

84:6-14.

IV. "Shall" In 8 U.S.C. §§1231(a)(2) And 1226(c) Means "Must"

A core issue in this case is whether "shall" in 8 U.S.C. §§1231(a)(2) and 1226(c) imposes mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in this context means "must," and that the Interim Guidance is accordingly unlawful.

A. Plain Text

The plain text of Sections 1231(a)(2) and 1226(c) establishes that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a readily-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary

AMERICAN OVERSIGHT

definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, premise, requirement, or obligation." *Shall*, *American Heritage Dictionary* (5th ed.).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

The plain text of Sections 1231(a)(2) and 1226(c) therefore creates an unequivocal obligation to detain the aliens with final orders of removal and to detain the specified types of criminal aliens. Defendants thus lack *any* discretion not to detain them—let alone so unbounded discretion as to be completely unreviewable by courts.

B. Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(2) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

AMERICAN OVERSIGHT

1. Canon Against Surplusage

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(2) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation.

Section 1231(a)(2) requires that "during the removal period," the government "shall detain the alien." Section 1231(c)(2)(C) provides a limited exception similar to Section 1226(c)(2), allowing for the release from detention of an alien arriving at a port of entry who has been ordered removed, "if the alien is needed to testify in the prosecution of a person." 8 U.S.C. §1231(c)(2).

In prior filings, DHS has claimed that Section 1231(a)(2) grants broad discretion because it also says that "[u]nder no circumstance, during the removal period shall the Attorney General release an alien" with certain types of criminal convictions or who is involved in terrorism. *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *35 n.30 (S.D. Tex. Aug. 19, 2021). As the

AMERICAN OVERSIGHT

district court explained, however, this language is best read in concert with the rest of section 1231 and requires a conclusion that detention is mandatory. *Id.* Thus, because Section 1231(c)(2)(C) contains the only enumerated exception to the command that aliens be detained during their removal period, the "[u]nder no circumstance" language in Section 1231(a)(2) is best read as a limitation on that grant of authority in Section 1231(c)(2)(C). Therefore, when Section 1231 is read as a whole, the "[u]nder no circumstance" language makes most sense when understood as a limitation of the government's authority to release testifying aliens, and not as a broad grant of discretion.

If DHS were correct that "shall detain" in Section 1231(a)(2) really means only "may detain," then there would be no need for 1231(c)(2) to allow for the release of aliens needed to testify, as DHS would already have the discretion to release such aliens. Similarly, if DHS were correct that "shall take into custody" in Section 1226(c)(1) really means "may take into custody," then there would be no reason to allow in Section 1231(c)(2)(C) for the release of aliens cooperating or testifying in an investigation. The exception for testifying aliens simply has no meaning if releases are committed to DHS's sole and unreviewable discretion.

2. *Expressio Unius*

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844

AMERICAN OVERSIGHT

(2018). Thus, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up)).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Interim Guidance (or its predecessor 100-day Moratorium) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception allowing for other justifications for release, let alone complete discretion to release.

Application of the e*xpressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). But DHS's conjured second exception does no such thing: instead it swallows the rest of the subsection and renders it a nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.

C. The Legislative History Makes It Clear That the Interim Guidance is Unlawful.

1. 1996 Amendments To Statutory Text.

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

AMERICAN OVERSIGHT

("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to the text of Sections 1226 and 1231 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting removals and detaining aliens subject to removal.

The plain language of Section 1226 is already perfectly clear, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides . . . that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. 104-828, at 210-211.

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

AMERICAN OVERSIGHT

Table 1: Comparison Of Language Pre- and Post-IIRIRA	
Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*." 8 U.S.C. §1252 (1996) (emphasis added).	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231(a)(2) (emphasis added).

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month

AMERICAN OVERSIGHT

removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252(c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (6 months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

AMERICAN OVERSIGHT

2. Legislative History And Intent

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added).

The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals and to

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encourage illegal entries. That is neither what Congress intended nor can Congress's text bear that construction.

CONCLUSION

The border is in crisis. This Administration is increasingly and alarmingly lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from the Administration's control. This Court should deny Federal Defendants' motion for a stay pending appeal.

Respectfully submitted,

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Dated: August 30, 2021

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MO-AG-22-0644-A-005712

CERTIFICATE OF COMPLIANCE

This brief contains 3,672 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count). Because it is an amicus brief relating to a motion, there is no specifically applicable word limitation. It is, however, within the general limitation of 6,500 words for merits-stage amicus briefing under Rule 29(a)(5).

s/ Drew C. Ensign
Drew C. Ensign

Dated: August 30, 2021

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CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of Amici Curiae States of States of Arizona, Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, and West Virginia in Opposition to the Emergency Motion for Stay Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 30, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

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Your message

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definitions=main-2108300147
Return-Path: Drew.Ensign@azag.gov

AMERICAN OVERSIGHT

21-1498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,

Plaintiff-Appellee,

v.

HILARION KAPRAL, AKA METROPOLITAN HILARION, NICHOLAS OLKHOVSKIY, VICTOR POTAPOV, SERGE LUKIANOV, DAVID STRAUT, ALEXANDRE ANTCHOUTINE, GEORGE TEMIDIS, SERAFIM GAN, BORIS DMITRIEFF, EASTERN AMERICAN DIOCESE OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, MARK MANCUSO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York, No. 20-cv-6597

DEFENDANTS-APPELLANTS' OPENING BRIEF

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AMERICAN OVERSIGHT

RULE 26.1 DISCLOSURE STATEMENT

Defendants Eastern American Diocese of the Russian Orthodox Church Outside of Russia and The Synod of Bishops of the Russian Orthodox Church Outside of Russia state that they have no parent corporation and do not issue stock.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005721

TABLE OF CONTENTS

Page

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

INTRODUCTION 1

JURISDICTIONAL STATEMENT 4

STATEMENT OF ISSUES 4

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 11

STANDARD OF REVIEW 13

ARGUMENT 13

I. Father Alexander's claims are barred by the church autonomy doctrine. 13

A. The church autonomy doctrine can bar defamation claims. 15

B. The church autonomy doctrine bars Father Alexander's defamation claims. 20

1. Father Alexander's claims interfere with Church discipline. 21

2. Father Alexander's claims require courts to interpret Church policy and answer religious questions. 24

3. The discovery process necessary to adjudicate Father Alexander's claims will itself violate church autonomy. 30

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005722

C. The neutral principles doctrine does not apply in this case. 33

II. Father Alexander's claims are barred by the ministerial exception. 35

A. The ministerial exception bars defamation claims that interfere with a church's selection and supervision of its ministers. 36

B. The ministerial exception bars Father Alexander's defamation claims because they interfere with the Church's selection and control of its priests and bishops. 43

C. The district court erred by refusing to dismiss the complaint under the ministerial exception. 45

III. This Court has jurisdiction over this appeal under the collateral order doctrine. 49

A. The Church's First Amendment defenses will be effectively unreviewable after merits discovery. 50

1. The Religion Clauses provide protections akin to immunity. 51

2. The Church's Religion Clauses immunities will be irreparably lost absent immediate appeal. 54

B. The order below conclusively determined the Church's immunity from trial and merits discovery. 55

C. The Church's immunity against merits discovery is collateral to the merits of Father Alexander's defamation claims. 56

IV. The district court erred by failing to limit initial discovery to the resolution of the Religion Clauses defenses. 57

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005723

CONCLUSION 59

CERTIFICATE OF COMPLIANCE 61

CERTIFICATE OF SERVICE 62

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005724

TABLE OF AUTHORITIES

Page(s)

Cases

Baker v. Afr. Methodist Episcopal Church,
No. 3-01-CV-2485, 2002 WL 1840931
(N.D. Tex. Aug. 8, 2002) 41

Behrens v. Pelletier,
516 U.S. 299 (1996) 51, 55

Bell v. Presbyterian Church (U.S.A.),
126 F.3d 328 (4th Cir. 1997) 38, 47

Bouchard v. N.Y. Archdiocese,
No. 04 CIV. 9978, 2006 WL 3025883
(S.D.N.Y. Oct. 24, 2006) 6

Bouldin v. Alexander,
82 U.S. (15 Wall.) 131 (1872) 1

Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.,
796 N.E.2d 286 (Ind. 2003) 19, 34

Britt v. Garcia,
457 F.3d 264 (2d Cir. 2006) 56

Bryce v. Episcopal Church in the Diocese of Colo.,
289 F.3d 648 (10th Cir. 2002) ..... *passim*

Byrd v. DeVeaux,
No. 17-3251, 2019 WL 1017602 (D. Md. Mar. 4, 2019) 24, 41

Cannata v. Catholic Diocese of Austin,
700 F.3d 169 (5th Cir. 2012) 46

Cha v. Korean Presbyterian Church of Wash.,
553 S.E.2d 511 (Va. 2001) 40, 42, 43

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 49

AMERICAN OVERSIGHT

Collette v. Archdiocese of Chi.,
200 F. Supp. 3d. 730 (N.D. Ill. 2016) 58

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 30

Conlon v. InterVarsity Christian Fellowship/USA,
777 F.3d 829 (6th Cir. 2015) 37, 52, 56

Coollick v. Hughes,
699 F.3d 211 (2d Cir. 2012) 51

Corp. of Presiding Bishop v. Amos,
483 U.S. 327 (1987) 22

Crowder v. S. Baptist Convention,
828 F.2d 718 (11th Cir. 1987) 34

Dayner v. Archdiocese of Hartford,
23 A.3d 1192 (Conn. 2011) 53

Demkovich v. St. Andrew the Apostle Par.,
3 F.4th 968 (7th Cir. 2021) 32, 44, 52, 55

Dermody v. Presbyterian Church,
530 S.W.3d 467 (Ky. Ct. App. 2017) 19

Digit. Equip. Corp. v. Desktop Direct,
511 U.S. 863 (1994) 49

In re Diocese of Lubbock,
624 S.W.3d 506 (Tex. 2021) ..... *passim*

Downs v. Roman Catholic Archbishop of Balt.,
683 A.2d 808 (Md. Ct. Spec. App. 1996) 19

Edrei v. Maguire,
892 F.3d 525 (2d Cir. 2018) 55

EEOC v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 42, 48

AMERICAN OVERSIGHT

EEOC v. Roman Catholic Diocese of Raleigh,
48 F. Supp. 2d 505 (E.D.N.C. 1999) 47

Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.,
824 F. App'x 680 (11th Cir. 2020) 16-17

El-Farra v. Sayyed,
226 S.W.3d 792 (Ark. 2006) 41, 48

Farley v. Wis. Evangelical Lutheran Synod,
821 F. Supp. 1286 (D. Minn. 1993) 41

Fassl v. Our Lady of Perpetual Help Roman Catholic Church,
No. CIV.A. 05-CV-0404, 2005 WL 2455253
(E.D. Pa. Oct. 5, 2005) 58

Fratello v. Archdiocese of N.Y.,
863 F.3d 190 (2d Cir. 2017) ..... *passim*

Fratello v. Roman Catholic Archdiocese of N.Y.,
175 F. Supp. 3d 152 (S.D.N.Y. 2017) 58

Friedlander v. Port Jewish Ctr.,
347 F. App'x 654 (2d Cir. 2009) 38

Garcia v. Does,
779 F.3d 84 (2d Cir. 2015) 13, 55

Gingras v. Think Fin., Inc.,
922 F.3d 112 (2d Cir. 2019) 55

Gonzalez v. Roman Catholic Archbishop of Manila,
280 U.S. 1 (1929) 1, 14, 15, 45

In re Grand Jury Subpoenas Returnable Dec. 16, 2015,
871 F.3d 141 (2d Cir. 2017) 54

Grussgott v. Milwaukee Jewish Day Sch. Inc.,
260 F. Supp. 3d 1052 (E.D. Wis. 2017) 58

AMERICAN OVERSIGHT

Hartwig v. Albertus Magnus Coll.,
93 F. Supp. 2d 200 (D. Conn. 2000) 41

Heard v. Johnson,
810 A.2d 871 (D.C. 2002) 41

Herzog v. St. Peter Lutheran Church,
884 F. Supp. 2d 668 (N.D. Ill. 2012) 58

Hiles v. Episcopal Diocese of Mass.,
773 N.E.2d 929 (Mass. 2002) 19

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) ..... *passim*

Hubbard v. J Message Grp. Corp.,
325 F. Supp. 3d 1198 (D.N.M. 2018) 17

Hutchison v. Thomas,
789 F.2d 392 (6th Cir. 1986) 39, 48

InterVarsity Christian Fellowship/USA v. Bd. of Governors,
---F. Supp. 3d---, No. 19-10375, 2021 WL 1387787
(E.D. Mich. Apr. 13, 2021) 47

Jackson v. Presbytery of Susquehanna Valley,
686 N.Y.S.2d 273 (N.Y. Sup. Ct.) 19

Jones v. Wolf,
443 U.S. 595 (1979) 33, 34

Kaufmann v. Sheehan,
707 F.2d 355 (8th Cir. 1983) 41

Kavanagh v. Zwilling,
997 F. Supp. 2d 241 (S.D.N.Y.) 26, 30

Kedroff v. St. Nicholas Cathedral,
344 U.S. 94 (1952) ..... *passim*

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005728

Kirby v. Lexington Theological Seminary,
426 S.W.3d 597 (Ky. 2014) 53

Klouda v. Sw. Baptist Theological Seminary,
543 F. Supp. 2d 594 (N.D. Tex. 2008) 40

Kraft v. Rector, Churchwardens & Vestry of Grace Church,
No. 01-CV-7871, 2004 WL 540327
(S.D.N.Y. Mar. 17, 2004) 40

Kreisberg v. HealthBridge Mgmt., LLC,
732 F.3d 131 (2d Cir. 2013) 13

Kreshik v. St. Nicholas Cathedral,
363 U.S. 190 (1960) 17

Lee v. Sixth Mount Zion Baptist Church,
903 F.3d 113 (3d Cir. 2018) 29, 32, 37, 38

Lee v. Sixth Mount Zion Baptist Church,
No. 15-1599, 2017 WL 3608140 (W.D. Pa. Aug. 22, 2017) 39

Lewis v. Seventh Day Adventists Lake Region Conf.,
978 F.2d 940 (6th Cir. 1992) 38

Liberty Synergistics Inc. v. Microflo Ltd.,
718 F.3d 138 (2d Cir. 2013) 49, 53, 55, 56

Lishu Yin v. Columbia Int'l Univ.,
No. 3:15-CV-03656, 2017 WL 4296428
(D.S.C. Sept. 28, 2017) 58

Lynch v. Ackley,
811 F.3d 569 (2d Cir. 2016) 51

Maize v. Friendship Cmty. Church, Inc.,
No. E201900183COAR3CV, 2020 WL 6130918
(Tenn. Ct. App. Oct. 19, 2020) 19

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013) ..... *passim*

AMERICAN OVERSIGHT

Miller v. InterVarsity Christian Fellowship/USA,
No. 09-CV-680, 2010 WL 2803123
(W.D. Wis. July 14, 2010) 58

Mitchell v. Forsyth,
472 U.S. 511 (1985) 49, 50, 56, 57

Mitchell v. Helms,
530 U.S. 793 (2000) 30

Moll v. Telesector Res. Grp., Inc.,
760 F.3d 198 (2d Cir. 2014) 13

Moon v. Moon,
431 F. Supp. 3d 394 (S.D.N.Y. 2019) 17, 27

Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y,
719 F. App'x 926 (11th Cir. 2018) 18

Natal v. Christian & Missionary All.,
878 F.2d 1575 (1st Cir. 1989) 38

Natal v. Christian & Missionary All.,
No. 88-0676, 1988 WL 159169 (D.P.R. 1988) 39-40

Nicosia v. Amazon.com, Inc.,
834 F.3d 220 (2d Cir. 2016) 23

NLRB v. Catholic Bishop,
440 U.S. 490 (1979) 30

Ogle v. Church of God,
153 F. App'x 371 (6th Cir. 2005) 40

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) ..... *passim*

Paul v. Watchtower Bible & Tract Soc. of N.Y.,
819 F.2d 875 (9th Cir. 1987) 41

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005730

Penn v. N.Y. Methodist Hosp.,
884 F.3d 416 (2d Cir. 2018) 23, 48

Pfeil v. St. Matthews Evangelical Lutheran Church,
877 N.W.2d 528 (Minn. 2016) 19

Presbyterian Church v. Edwards,
566 S.W.3d 175 (Ky. 2018) 58

Prince v. Massachusetts,
321 U.S. 158 (1944) 41

Rayburn v. Gen. Conf. of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 35, 42, 44, 52

Roman Catholic Archdiocese of San Juan v. Feliciano,
140 S. Ct. 696 (2020) 50

Rweyemamu v. Cote,
520 F.3d 198 (2d Cir. 2008) ..... *passim*

Schleicher v. Salvation Army,
518 F.3d 472 (7th Cir. 2008) 47

Serbian E. Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) ..... *passim*

Skrzypczak v. Roman Catholic Diocese of Tulsa,
611 F.3d 1238 (10th Cir. 2010) 51

Stabler v. Congregation Emanu-El of the City of New York,
No. 16 CIV.9601, 2017 WL 3268201
(S.D.N.Y. July 28, 2017) 58

Sterlinski v. Catholic Bishop of Chi.,
934 F.3d 568 (7th Cir. 2019) 57

Sterlinski v. Catholic Bishop of Chi.,
No. 16 C 00596, 2017 WL 1550186
(N.D. Ill. May 1, 2017) 57, 58

AMERICAN OVERSIGHT

Thibodeau v. Am. Baptist Churches of Conn.,
994 A.2d 212 (Conn. App. Ct. 2010) 19

Tomic v. Catholic Diocese of Peoria,
442 F.3d 1036 (7th Cir. 2006) 52

United Methodist Church v. White,
571 A.2d 790 (D.C. 1990) 53

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871) 14

Werft v. Desert Sw. Ann. Conf.,
377 F.3d 1099 (9th Cir. 2004) 37

Whole Woman's Health v. Smith,
896 F.3d 362 (5th Cir. 2018) 31, 32, 53

Will v. Hallock,
546 U.S. 345 (2006) 49, 52

In re World Trade Ctr. Disaster Site Litig.,
521 F.3d 169 (2d Cir. 2008) 49

Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church in Am.,
64 F.3d 664 (6th Cir. 1995) 40

Statutes

28 U.S.C. § 1258 50

28 U.S.C. § 1291 ..... 4, 49

28 U.S.C. § 1292 10

28 U.S.C. § 1332 4

Other Authorities

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-005732

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Fed. R. Civ. P. 59 10

Fed. R. Evid. 201 6

Individual Practices of United States District Judge Victor Marrero 9-10

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Regulations of the Russian Orthodox Church Outside of Russia 6

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-005733

INTRODUCTION

This lawsuit strikes at the heart of the First Amendment's protection for church autonomy. The Supreme Court has long held that disgruntled clergy members cannot sue their churches over matters of church discipline or appointment to ecclesiastical office. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). Ever since, disgruntled clergy members have tried to evade this rule by repackaging ecclesiastical disputes as church property, breach of contract, or tort claims. Yet the result has been the same: Courts have repeatedly held that when a minister's claim implicates the authority of churches to handle matters of internal governance and selection of clergy, it is barred by the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976). That is this case.

Father Alexander Belya, the Plaintiff, was a Russian Orthodox Priest. He claims he was elected Bishop of Miami. But other priests and key leaders of the Russian Orthodox Church disagreed. As a matter of church procedure, they wrote a letter to church leaders asserting that Father Alexander had not been properly elected Bishop of Miami. The letter also called for investigation of serious allegations of priestly malfeasance, including breaking the seal of the confessional, manipulating parishioners, and financial improprieties. Church leadership responded

AMERICAN OVERSIGHT

with an investigation, concluded Father Alexander had not been elected bishop, and removed him from all priestly duties.

Father Alexander has now sued the Russian Orthodox Church and its leaders, alleging that the letter—an ecclesiastical communication contesting his supposed election and calling for his investigation—constitutes defamation. And he seeks millions of dollars in damages for his alleged "loss of standing" within the Russian Orthodox Church.

This lawsuit, on its face, is barred by the First Amendment in two ways. First, it violates the church autonomy doctrine, which prevents courts from interfering in "ecclesiastical hierarchies, church administration, and appointment of clergy." *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008). Church autonomy also prevents courts from interfering in a church's right to "facilitate[] religious communication and religious dialogue" between a church and its flock, especially communications promoting transparency in the church community on matters of church leadership and discipline. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002). Second, it violates the ministerial exception, which protects the church's "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

The district court declined to engage with these constitutional barriers, determining in three separate opinions that it had the authority

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005735

to delve into the truth or falsity of Father Alexander's claims. But that means a court can weigh in on how a church communicates among its leadership and with its community about the selection of bishops. It also means allowing discovery of internal church documents, permitting depositions of church leadership—including Metropolitan Hilarion, the First Hierarch of the Church—about internal church procedures, judging the truth or falsity of church statements about disciplinary procedures, and ultimately passing judgment on Father Alexander's status within the church. These decisions are appealable under the collateral order doctrine because they deny the church the immunity from suit provided by the First Amendment. Without this Court's intervention, that immunity will be lost.

Finally, at a minimum, this Court should reverse the district court's order requiring the parties to immediately proceed to merits discovery before resolution of the Religion Clauses defenses. This Court has previously recognized that this path is appropriate, and other district and appellate courts to consider the question have uniformly required bifurcation to avoid church-state entanglement. And ruling otherwise would entangle civil courts in deeply sensitive matters by allowing disgruntled priests to depose their bishops any time a promotion doesn't go their way.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005736

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 and the collateral order doctrine. Plaintiff's claims, however, challenge church discipline and governance, matters on which civil courts lack subject matter jurisdiction under the First Amendment of the Constitution.

The district court denied the motion to dismiss on May 19, 2021. On June 17, the Church timely filed a notice of appeal. On July 6, 2021, the district court denied the Church's Rule 59(e) motion to alter or amend the May 19 judgment. The Church timely amended its notice of appeal to include that order on July 16. On July 27, 2021, the district court denied the Church's motion to bifurcate discovery or stay the case pending this appeal. The Church timely amended its notice of appeal to include that order on August 13. Father Alexander's motion to dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1291 is fully briefed and pending in this Court.

STATEMENT OF THE ISSUES

I. Is Father Alexander's suit arising from statements made during internal church disciplinary processes and regarding an ecclesiastical dispute barred by the church autonomy doctrine?

II. Is Father Alexander's suit as a minister against his former church implicating the church's selection and control of its ministers barred by the ministerial exception?

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005737

III. Are the district court's orders denying the motion to dismiss and the motion to bifurcate discovery immediately appealable under the collateral order doctrine?

IV. Did the district court err in refusing to limit discovery to resolution of the Religion Clauses defenses, and instead requiring the parties to start merits discovery?

STATEMENT OF THE CASE

This case involves a dispute between a priest and his former church over his failed appointment to the ecclesiastical office of Vicar Bishop. The case below is No. 1:20-cv-6597 in the Southern District of New York, before U.S. District Judge Victor Marrero. The decisions appealed are from a denial of a motion to dismiss, JA.67; a denial of reconsideration of that ruling, JA.114; and a denial of a motion to bifurcate discovery or stay proceedings, JA.146. Defendants-Appellants have appealed those orders under the collateral order doctrine. JA.112, 143, 149.

Defendants. Defendants-Appellants are the Synod of Bishops of the Russian Orthodox Church Outside of Russia, along with individual clergy, a diocese, and other senior leaders of the church (collectively, "the Church" or "ROCOR"). The lead Appellant is the ruling bishop and First Hierarch of the Church, Metropolitan Hilarion, whose legal name is Hilarion Kapral.

ROCOR is part of the Russian Orthodox Church. Founded in 1920 following the 1917 Bolshevik revolution, ROCOR exists to promote "the overall spiritual nourishment of the Orthodox Russian flock in the

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005738

diaspora[.]"[1] ROCOR's highest ecclesiastical body is the Sobor (Council) of Bishops. Regulations at ¶7; *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 96 n.1 (1952) ("A sobor is a convention of bishops, clergymen and laymen with superior powers" and aids "church officials [to] rule their dioceses"). The Sobor is ROCOR's controlling body, meeting every two years to make the Church's laws, carry out its ministry, adjudicate its internal disputes, and elect bishops. Regulations at ¶¶7-8. The Sobor's president is Metropolitan Hilarion. *Id.* ¶8.

The defendant Synod of Bishops is the Sobor's executive organ. *Id.* ¶16. The Synod consists of Metropolitan Hilarion, two of his deputies, and four members of the Sobor. *Id.* As relevant here, the Synod is also charged with several ecclesiastical responsibilities, including investigation of "serious disruption" in a diocese; activities involving the appointment, transfer, release, and retirement of bishops between Sobors; conducting an appellate court to defrock clergy; resolving matters involving church property; and among other things, "the resolution of questions concerning various aspects of church life and church administration." *Id.* ¶¶19, 29.

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[1] Regulations of the Russian Orthodox Church Outside of Russia ¶3, https://perma.cc/TN4H-FNSG. This Court can take judicial notice of a church's publicly available religious law. Fed. R. Evid. 201; *see, e.g.*, *Bouchard v. N.Y. Archdiocese*, No. 04 CIV. 9978, 2006 WL 3025883, at *5 (S.D.N.Y. Oct. 24, 2006).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005739

Plaintiff. The Plaintiff-Appellee is Father Alexander Belya, an "Orthodox Christian archimandrite"—a monastic priest. JA.87. Father Alexander claims he was elected "by a majority of the Bishops" in the Church to the position of Bishop of Miami, Vicar of the Eastern Archdiocese of Florida, on December 6, 2018. JA.92.

According to the complaint, on September 3, 2019, after the Moscow leadership of the Church had recognized Father Alexander's supposed appointment as bishop, several ROCOR Clergy, including members of the Synod, wrote a letter (the Clergy Letter) to the Synod and Metropolitan Hilarion raising concerns about "irregular" aspects of the documents relating to Father Alexander's election as a bishop. JA.19-21. The documents with irregularities were letters allegedly sent by Metropolitan Hilarion and a Canadian archbishop to senior church officials regarding Father Alexander's candidacy and election to the bishopric. JA.19-20. The Clergy Letter also called on the Synod not to consider Father Alexander's candidacy in the future because of "the submission of so many serious complaints against him." JA.20. It described problems with Father Alexander's priestly performance, including him "breaking the seal of Confession," using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and failing to ensure proper accountability for church property and finances. JA.20. The Clergy Letter asked "the Synod to ascertain the circumstances of the confirmation of the non-existent 'election,'" and it closed by calling

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005740

on Metropolitan Hilarion to conduct an investigation into these complaints and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21.

As Father Alexander admits and the district court recognized, this letter—from a group of clergy to the governing Synod, contesting the supposed election of a bishop, describing problems of priestly performance, and requesting an ecclesiastical investigation—is the crux of Father Alexander's complaint and the source of each of the alleged "specific Defamatory Statements" at issue in this case. Mot. to Dismiss at 2, ECF 22-2; JA.71.[2]

Father Alexander's complaint discusses at length his alleged election, the Clergy Letter challenging that election, and the actions of the Church in response, *see* JA.91-99, including the Clergy Letter's alleged publication within the Church and, eventually, alleged publication on a website the Church uses to communicate with members and subsequent coverage by media outlets which cover the Church. JA.98.

The Clergy Letter was followed by a "public decree" from Metropolitan Hilarion instituting an investigation of Father Alexander and his activities and removing him from all ministerial duties. JA.99. Rather than submit to investigation or appeal internally, Father Alexander left the Church and sued for defamation. JA.99. Father Alexander claims

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[2] Filings in this Court are cited as "ECF," and district court filings not included in the appendix are cited as "Dkt."

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005741

damages for the loss of income from members leaving his congregation, and for "severely impaired reputation and standing" within the Russian Orthodox Church Outside of Russia. JA.105-06, 108.

Proceedings in the district court. Father Alexander brought this lawsuit on August 18, 2020, alleging, as relevant here, defamation, defamation per se, and defamation by innuendo against Metropolitan Hilarion and nearly a dozen clergy and senior leaders of the Church, as well as vicarious liability against the Eastern American Diocese and the Synod of Bishops.[3]

On November 24, 2020, the Church sought permission to file a motion to dismiss and requested a hearing. It argued, *inter alia*, that the First Amendment prohibits judicial interference in ecclesiastical disputes, particularly those over the nomination, election, and confirmation of bishops. JA.17. The Church attached the full Clergy Letter to its letter brief to demonstrate the ecclesiastical context of the communication. JA.19-21. Although it had not been attached to Father Alexander's complaint, the Church argued that it should be incorporated by reference because it was integral to all the claims and the complaint quoted it repeatedly.

The district court's practice rules limited both sides to letter briefs of no more than three pages. *See* Individual Practices of United States

[3] Defendant Pavel Loukianoff has not appeared in this appeal as he was not properly served with a complaint.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005742

District Judge Victor Marrero II.B, https://perma.cc/77NM-KKLH. The district court denied the Church's three-page request and directed Father Alexander to respond with a letter brief and an amended complaint, JA.30, which Father Alexander filed as a proposed complaint on January 14, 2021, Dkt. 42-1. The Church replied via three-page letter brief on January 22, explaining that the first amended complaint had the same constitutional flaws and requesting dismissal. JA.35-37.

On May 19, the court construed the Church's November 24 letter brief as a motion to dismiss and denied the motion without permitting full briefing or oral argument. JA.84. The court held that the First Amendment does not bar Father Alexander's defamation claims because the suit "may be resolved by appealing to neutral principles of law." JA.77.

On June 16, 2021, the Church filed a timely Rule 59(e) motion to alter the judgment. Dkt. 51; Fed. R. Civ. P. 59(e). On June 25, the Church filed a separate request that the district court certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. 54.

On July 6, the district court denied both motions in a single five-page order. JA.114-18. The court acknowledged that "the ministerial exception and the doctrine of ecclesiastical abstention" were "the controlling legal doctrines at issue," but reaffirmed its previous order denying the Religion Clauses as a defense and held that disputes "as to whether the factual

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005743

situation presented fits into the ministerial exception or ecclesiastical abstention" warranted denying certification. JA.117.

The Church sought to limit any discovery to resolution of the ministerial exception and church autonomy defenses, or, alternatively, a stay pending this appeal. Dkt. 62. The court denied that motion and ordered the parties to promptly commence and complete merits discovery. JA.146-48; 142.

On June 17, the Church timely filed this collateral order appeal of the order denying the motion to dismiss. JA.112. On July 16, the Church amended its notice of appeal to include the July 6 order denying the Rule 59(e) motion. JA.143. On August 13, the Church amended its notice of appeal to include the July 27 order denying the motion for bifurcated discovery or stay. JA.149.

Proceedings in this Court. Father Alexander moved to dismiss this appeal on July 15, 2021, and that motion remains pending. On August 14, the Church filed a motion to stay district court proceedings to prevent the Church and its leadership from being required to undergo intrusive discovery and depositions regarding the events and communications surrounding the election, confirmation, and suspension of a Bishop.

SUMMARY OF THE ARGUMENT

Father Alexander's defamation claims strike at the heart of the church autonomy doctrine. They seek to punish the Church for ecclesiastical communications about its internal religious policies and decisions about

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005744

choosing and disciplining its clergy. Adjudicating these claims would both violate the Church's right to choose its clergy and unconstitutionally entangle civil courts in ecclesiastical matters. Father Alexander's claims also call for intrusive discovery into the Church's decision-making process, including probing the mind of the highest Church officials regarding their decision to suspend a priest.

Father Alexander's defamation claims are also barred by the ministerial exception, because he is a priest challenging the manner in which his Church selected its bishops and controlled its clergy. Permitting his claims to proceed would undermine the ministerial exception's purpose of leaving the selection and control of ministers solely in the hands of their church.

This Court has jurisdiction over this appeal through the collateral order doctrine. As numerous courts have recognized, church autonomy is not only a defense to *liability*, but also a form of *immunity* protecting against entangling discovery and trial. Thus, the district court's orders rejecting the Religion Clauses defenses and speeding the case toward merits discovery and trial are subject to collateral order review. The district court's orders immediately expose the Church and its senior hierarchy to intrusive merits discovery, which will cause irreparable and unreviewable First Amendment harm if allowed to remain in place. The orders are accordingly conclusive as to the Church's claimed First

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005745

Amendment immunity and entirely separate from the merits of Father Alexander's defamation claim.

Finally, the district court abused its discretion by denying bifurcation of discovery and ordering the parties to commence merits discovery before resolution of the Religion Clauses defenses.

STANDARD OF REVIEW

The standard of review for orders on motions to dismiss and on the district court's interpretation of the Constitution is de novo. *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2015) (denial of qualified immunity on a motion to dismiss); *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir. 2013) (constitutional interpretation). The standard of review for the district court's denial of the motion to bifurcate discovery or stay proceedings is abuse of discretion. *Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 204 (2d Cir. 2014). Abuse of discretion includes "errors of law." *Id.*

ARGUMENT

I. Father Alexander's claims are barred by the church autonomy doctrine.

For over a century, courts have recognized that the First Amendment's Religion Clauses protect against government interference in internal church affairs, guaranteeing a heightened "independence" for churches "from secular control or manipulation." *Kedroff*, 344 U.S. at 116. Under this "general principle of church autonomy," the Religion Clauses protect

AMERICAN OVERSIGHT

a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061.[4] "State interference" in such matters would "obviously" violate the Free Exercise Clause, and "any attempt" by the judiciary to "dictate or even to influence such matters" is an equally clear violation of the Establishment Clause. *Id.* at 2060.

This principle especially applies to disputes over "church discipline [and] ecclesiastical government." *Milivojevich*, 426 U.S. at 714-15. Those who "unite themselves to" a religious organization "do so with an implied consent to this government, and are bound to submit to it," "in all cases of ecclesiastical cognizance." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). As relevant here, that includes a church's selection and discipline of its clergy, as well as church communications about those internal matters. *See Gonzalez*, 280 U.S. at 16 ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Bryce*, 289 F.3d at 659 ("internal ecclesiastical dispute and dialogue [are] protected by the First Amendment").

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[4] The term "church" in church autonomy is used generically to mean religious institutions in any faith tradition. Courts have also used "religious autonomy" and "ecclesiastical abstention" to signify the doctrine.

AMERICAN OVERSIGHT

Based solely on the allegations in the complaint, this Court cannot adjudicate Father Alexander's claims without adjudicating the Church's decision to investigate and discipline its own clergy, interfering in matters of religious doctrine and church policy. Doing so would violate the separation between church and state set by the church autonomy doctrine. The district court erred by holding otherwise.

A. The church autonomy doctrine can bar defamation claims.

The church autonomy doctrine has been held to bar civil authorities from intervening in a broad range of internal church matters involving governance of the Church, including clergy appointment and church discipline. Courts have specifically held that the church autonomy doctrine bars defamation and other tort claims based on communications about clergy appointment, church discipline, and church policies and doctrine.

"Church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern," and courts thus routinely bar suits that interfere with churches' decisions involving clergy selection and discipline. *Milivojevich*, 426 U.S. at 717. For example, in *Gonzalez*, the plaintiff sued the Roman Catholic Archbishop of Manila for appointment to a chaplaincy under the terms of a trust, though "he was ineligible under the then existing canon law." 280 U.S. at 18. The Supreme Court held that since the chaplain's qualifications were "purely ecclesiastical,"

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005748

it must accept the decision of the Archbishop that the plaintiff was not qualified. *Id.* at 16.

The Supreme Court later elaborated on *Gonzalez* in its *Milivojevich* decision. There, the Court considered the Serbian Orthodox Church's decision to discipline and remove a bishop. 426 U.S. at 713. Instead of participating in the church's appeal process, the Bishop sued in Illinois state court, arguing that control of his diocese was a property matter that could be determined by neutral principles of law. *Id.* at 706-07. The Supreme Court held that even though the mother church's decision affected who had control over church property, "the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation." *Id.* at 720. It also found that the Illinois Supreme Court's "detailed review of the evidence" regarding the bishop's claims, including "conflicting testimony concerning internal church procedures," was "impermissible." *Id.* at 718.

Courts have long interpreted this line of cases to bar judicial interference in the selection or discipline of clergy. *See, e.g.*, *Rweyemamu*, 520 F.3d at 204-05 ("Since at least the turn of the century, courts have declined to interfere with ecclesiastical hierarchies, church administration, and appointment of clergy." (cleaned up)); *Bryce*, 289 F.3d at 658 ("letter[] to other church leaders [that] discussed an internal church personnel matter and the doctrinal reasons for . . . proposed personnel decision" protected by church autonomy doctrine); *Eglise*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005749

Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla., 824 F. App'x 680, 683 (11th Cir. 2020) (claim rejected involving "whether [defendant] was the rightful successor to the church's leadership").

Recognizing the "independence from secular control" granted to churches in ecclesiastical matters, *Kedroff*, 344 U.S. at 116, courts "generally do not permit [defamation and other] tort claims arising from internal processes by which religious organizations discipline their members." *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1214 (D.N.M. 2018); *cf. Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (rejecting common law claim seeking to transfer control of cathedral). Statements made by clergy as part of a disciplinary process and based on religious concerns "may be incorrect, but they are not actionable." *Bryce*, 289 F.3d at 658.

Those statements include criticism of religious leaders. For instance, in *Moon v. Moon*, the Southern District of New York considered a succession dispute following the death of the Unification Church's leader. 431 F. Supp. 3d 394, 400 (S.D.N.Y. 2019), *aff'd as modified* 833 F. App'x 876 (2d Cir. 2020). The plaintiff argued that statements made by church leadership "disput[ing] [his] proper authority to lead" the church were defamatory. *Id.* at 401. But in a decision affirmed by this Court, the district court held that it could not consider the "truth or falsity of statements concerning [parties'] purported religious standing." *Id.* at 413.

AMERICAN OVERSIGHT

And in *In re Diocese of Lubbock*, the Texas Supreme Court barred defamation claims based on public church discipline. A deacon of the Catholic Church brought defamation claims against a Catholic diocese for including his name on a public list of "clergy against whom credible allegations of sexual abuse of a minor" had been made. 624 S.W.3d 506, 510 (Tex. 2021). The deacon claimed neutral principles could apply to determine whether a woman "with a history of mental and emotional disorders" was a minor under canon law. *Id.* at 509, 514. When the lower courts were going to allow the claims to proceed, the Texas Supreme Court granted mandamus and held that even if the truth or falsity of the deacon's claim could be determined by a factfinder, the suit "ultimately challenge[d] the result of a church's internal investigation into its own clergy," and "[i]nvestigations that relate to the character and conduct of church leaders are inherently ecclesiastical" and off-limits to civil courts. *Id.* at 517-18.

For the reasons articulated in these cases, courts around the country have often barred defamation and other tort claims arising from communications about clergy appointment and church discipline. For example:

- *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 928-29 (11th Cir. 2018) (tort claims against religious institution were barred because they "required an examination of doctrinal beliefs and internal church procedures");

AMERICAN OVERSIGHT

- *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 541 (Minn. 2016) (defamation claim that involved statements made during disciplinary proceeding was barred);
- *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 294 (Ind. 2003) (defamation claim to "penalize communication and coordination among church officials . . . on a matter of internal church policy and administration" would violate church autonomy doctrine if adjudicated);
- *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-37 (Mass. 2002) (defamation claim based on letter accusing priest of adultery as part of ecclesiastical disciplinary proceedings was barred);
- *Maize v. Friendship Cmty. Church, Inc.*, No. E201900183COAR3CV, 2020 WL 6130918, at *7 (Tenn. Ct. App. Oct. 19, 2020) (communications "inextricably linked to the termination process" of a pastor were barred by church autonomy);
- *Dermody v. Presbyterian Church*, 530 S.W.3d 467, 474 (Ky. Ct. App. 2017) (a civil court "cannot" "review the determinations of an ecclesiastical body applying its own . . . rules");
- *Thibodeau v. Am. Baptist Churches of Conn.*, 994 A.2d 212, 221 (Conn. App. Ct. 2010) (defamation claim regarding letter discussing ordination candidate's fitness for ministry was barred);
- *Jackson v. Presbytery of Susquehanna Valley*, 686 N.Y.S.2d 273, 275 (N.Y. Sup. Ct.), *aff'd*, 697 N.Y.S.2d 26 (N.Y. App. Div. 1999) (defamation allegations related "to a dispute over the plaintiff's fitness or suitability to act as a clergyman" barred);
- *Downs v. Roman Catholic Archbishop of Balt.*, 683 A.2d 808, 812 (Md. Ct. Spec. App. 1996) ("Questions of truth, falsity, malice, and the various privileges that exist [in defamation claims] often take on a different hue when examined in the light of religious precepts and procedures.").

AMERICAN OVERSIGHT

B. The church autonomy doctrine bars Father Alexander's defamation claims.

In this case, Father Alexander's claims seek to penalize the church for "the incidental effect of an ecclesiastical determination," *Milivojevich*, 426 U.S. at 720, namely: to deny him a bishopric and suspend his priestly duties. Civil courts do not have the authority to intervene in that ecclesiastical process and second-guess those determinations.

The district court erred by holding otherwise. After sharply limited briefing and no oral argument, the court addressed the church autonomy defenses at issue here in just two paragraphs, holding that the complaint "raise[d] secular inquiries" that did not involve "weighing matters of ecclesiastical concern." JA.77. Those inquiries included "whether . . . Defendants made the alleged statements, the truth of the alleged statements, [and] Defendants' knowledge of the alleged statements' falsity . . . ." *Id.* But each of those inquiries involves not just finding out "what occurred," JA.147; they render judgment upon the Church's very process of selecting and disciplining its clergy.

Father Alexander's claims interfere in that process and violate church autonomy in at least four ways: they interfere with church discipline, entangle the court in doctrine and Church policy, require adjudication of a minister's religious standing, and necessitate intrusive discovery.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005753

1. Father Alexander's claims interfere with Church discipline.

First, Father Alexander asks this Court to impose liability on the Church for two of its "ecclesiastical determinations" regarding clergy discipline: whether Father Alexander was properly appointed to be a bishop, and whether he was qualified for his ministry role.

The Clergy Letter is an internal church communication from diocesan leadership, including members of the ROCOR Synod, to the Synod and Metropolitan Hilarion, the church leadership responsible for disciplining and selecting clergy. The Letter pointed out "irregular" aspects of the documents submitted to demonstrate Father Alexander's alleged election and confirmation as a bishop, JA.19, and described problems with Father Alexander's priestly performance, including his "breaking the seal of Confession" and using "information obtained during Confession . . . for the purpose of denigrating parishioners and of controlling them," and a "total lack of financial (and other) accountability" and "a whole range of unseemly behavior . . . requiring specific investigation," JA.20. The Letter closed by asking the Metropolitan to conduct an investigation into these "serious complaints against him," including "the circumstances of the confirmation of the non-existent 'election'" to the bishopric, and to suspend Father Alexander "from performing any clerical functions" in the meantime. JA.20-21. As Father Alexander admits, Metropolitan Hilarion responded by suspending Father Alexander from his priestly duties

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005754

pending an investigation. JA.99. For his part, Father Alexander chose not to pursue the Church investigation, but instead left ROCOR and filed this lawsuit. *Id.*

Holding the Church liable for statements made by its clergy regarding internal church processes and the character of other clergy would chill all manner of religious exercise across religious institutions. It would hinder religious organizations' ability to carry out their most basic functions, including selecting clergy, and would expose religious organizations to the "significant burden" of having to "predict which of its activities a secular court will consider religious." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). In response, religious organizations would either refrain from speaking altogether, or would refrain from implementing directives that require transparent communication between clergy and with the broader church. But the "church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely," including on "internal church disciplinary procedures" and matters. *Bryce*, 289 F.3d at 658. Allowing this case to proceed further would uproot those rights.

Father Alexander attempts to cherry-pick parts of the Clergy Letter—concerning whether the election happened and the irregularities in the letters central to his appointment to bishop—that he claims a secular court can review. But even these narrowly quoted sections do not help

AMERICAN OVERSIGHT

him. As a part of an internal ecclesiastical process concerning both discipline and the church's selection of its leadership, the Clergy Letter cannot be divided up by secular and religious claims because "courts are ill-equipped" to determine whether a "dispute between a minister and his or her religious group is premised on religious grounds" as opposed to "secular considerations." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017) (recognizing "judicial incompetence with respect to strictly ecclesiastical matters"). In holding otherwise, the district court "glosse[d] over core Establishment Clause issues" in "significant ways," including by "cross[ing] the permissible constitutional line and . . . defining 'Church policy, administration, and governance'" in a way that was inconsistent with the Church's own judgment of those matters. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 429 (2d Cir. 2018).

Further, the district court mistakenly considered *only* the portions of the Clergy Letter quoted in the complaint. JA.79 n.4. In doing so, it ignored the ecclesiastical context of the Letter omitted by Father Alexander, including charges of abuse of doctrine and Church policy. Because the complaint "relie[d] heavily" on the "terms and effect" of the Clergy Letter, the court should have considered it in its entirety. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230-31 (2d Cir. 2016).[5]

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[5] Father Alexander has never objected to consideration of the entire Clergy Letter. *See* Dkts. 39, 42, 45 (no opposition to attached Letter); 53 (no response to argument that court erred in ignoring it).

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005756

But even the allegedly "secular" components Father Alexander points to relate to the entirely ecclesiastical determination of whether Father Alexander had been properly appointed as bishop. The Church's highest authority determined that he had not, which is a determination that "legal tribunals must accept . . . as binding on them." *Kedroff*, 344 U.S. at 113. For a court to intervene in that determination by parsing the communication involved in it would be to overturn the highest authority in the Church in a "matter[] of church government." *Id.* at 116.

In sum, Father Alexander's claims against Metropolitan Hilarion, the Eastern American Diocese, and the Synod are all premised on contesting their disciplinary decisions. Father Alexander attacks those decisions as intentionally erroneous ecclesiastical determinations of his status as bishop. *See, e.g.*, JA.104 ("intentional and malicious conduct"). He wants not only a civil court's review of "ecclesiastical decisions made by a church body *created to* make those decisions," *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *7 (D. Md. Mar. 4, 2019) (emphasis added), but also civil liability on the decision-making church bodies themselves. Neither is permissible.

2. Father Alexander's claims require courts to interpret Church policy and answer religious questions.

Father Alexander's claims require the court to answer religious questions, including those about the Church's internal religious procedure. They do so in three ways: they ask the court to interpret

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005757

proper ROCOR ecclesiastical election procedures; they ask the court to determine Father Alexander's standing as a minister; and they ask the court to resolve matters of church membership and authority in order to determine damages.

First, Father Alexander has repeatedly argued that the Clergy Letter will be shown false if he proves the authenticity of the Metropolitan's signature on the documents the Clergy Letter addresses. ECF 22-2 at 7. Not so. The Clergy Letter claims irregularities were present in letters sent from the Metropolitan regarding Father Alexander's election. Therefore, even if the signature were proper, that would not resolve the question of the irregularities in the *letters*. Thus, a court would still have to rule on the truth or falsity of the *actual* statements in the Clergy Letter in order to determine whether the appointment communications to Moscow were in fact "drawn up in an irregular manner." JA.19. And "irregularity" is determined by ROCOR and its policies, not civil courts.

Moreover, the irregularities actually identified by the Clergy Letter all involved matters of internal church procedure—including whether appointment communications "contain[ed] the appropriate citation from the decision of the Synod of the Bishops," whether the letter from Archbishop Gabriel was "issued" according to ROCOR custom, and whether it was properly produced "on the official letterhead of the Most Reverend Gabriel." JA.19-20. Whether the Church "complied with church laws and regulations" in executing and communicating about these

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005758

procedures "is exactly the inquiry that the First Amendment prohibits." *Milivojevich*, 426 U.S. at 713; *see also Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 252 (S.D.N.Y.), *aff'd*, 578 F. App'x 24 (2d Cir. 2014) (defamation claim challenging press release describing church discipline would require the court to consider "the truth or falsity of the Catholic Church's characterization of its own law and doctrine"). Such "[r]eligious questions" must be "answered by religious bodies," not juries or judges. *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).

As Father Alexander admits, and the district court recognized, the Clergy Letter is "the heart" of Father Alexander's complaint and each of the alleged "specific Defamatory Statements" are contained within it. ECF 22-2 at 2; *see* JA.71. Thus, because the heart of his claims turns on interpreting Church policy, his claims must fail.

Father Alexander alleges that one defendant—Archpriest Gan, the rector of St. Seraphim of Sarov Memorial Church and Chancellor of the ROCOR Synod—used the word "forgery" outside the Clergy Letter in a statement on St. Seraphim's website. JA.98. The church denies Father Alexander's account, but even taking it as true, his claims of publication implicate the Church's ability to communicate with its members about the status and character of its ministers. Indeed, "communication of the results of" an internal church investigation and disciplinary process "cannot be severed from" the religious requirements that invoke the investigation "in the first place." *Diocese of Lubbock*, 624 S.W.3d at 509.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005759

A church's efforts to maintain transparency with its membership through its own website and social media channels cannot be second-guessed by a court. And First Amendment defenses do not depend "on whether a publication goes beyond church walls but rather whether the substance and nature of the plaintiff's claims implicate ecclesiastical matters." *Id.* at 516.[6]

Second, Father Alexander ultimately asks this Court to adjudicate his "religious standing" as a minister. *Moon*, 431 F. Supp. 3d at 413. Father Alexander's complaint is built around his failed elevation from "an Orthodox Christian archimandrite" to the "Bishop of Miami." JA.87. Father Alexander admits that the whole purpose of the Clergy Letter was to contest his claimed "appointment as Bishop of Miami." JA.101-02. He likewise admits that the Clergy Letter was issued in response to a public statement by the Church just days earlier announcing "the decision of the ROCOR Synod appointing [Father] Alexander as Bishop of Miami," and was part of an effort by the Synod to "undo" this statement. JA.94-95. On that ground alone, his attempt to claim defamation from the

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[6] In any event, "forgery" under the Model Penal Code is defined as "the act of fraudulently altering, authenticating, issuing, or transferring a writing *without appropriate authorization*." Black's Law Dictionary (11th ed. 2019) (emphasis added). And whether the letters were authenticated, issued, or transferred with the "appropriate authorization" is a religious question governed by Church law.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005760

Clergy Letter is inextricably intertwined with the Church's internal ministerial selection and his standing as a bishop.

Further, Father Alexander's complaint makes clear that he wishes the court to recompense him for losing standing in the eyes of his congregation based on whether his appointment to the role of bishop was correct. Father Alexander claims the Church's disciplinary action was "damaging to [his] reputation [as] a religious leader" because it was communicated to the Synod, "parishes, churches, monasteries, and other institutions within ROCOR," and to "parishioners in the Orthodox Christian community." JA.87, 97, 103. He alleges this resulted in him having "severely impaired . . . standing in the community" and a "drastic decrease of the membership in his church," and left him "no future within ROCOR and, more importantly, . . . unable to serve his parish as a ROCOR priest." JA.99, 105-06, 108. But this all goes to his "standing" as a "religious leader." Civil courts cannot adjudicate a priest's claims against his church over his diminished status as a religious leader. This is a quintessential "religious thicket." *Milivojevich*, 426 U.S. at 719.

Third, Father Alexander asks the court to answer religious questions by claiming damages based on his "severely impaired reputation and standing" in the ROCOR community and the resulting "decrease of the membership in his church." JA.105-06.

Even if the court could award damages on those bases, it could not answer the religious questions asked by the damages claim. Father

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005761

Alexander claims that he has lost income as a result of people leaving his church because of the Clergy Letter and its aftermath. But when it comes to a congregant's religious decision whether to attend church or give an offering, for a court to even consider "decreased giving and reduced membership in the Church . . . and how that translates into donations and attendance" would "impermissibly entangle the court in religious governance and doctrine." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 121 (3d Cir. 2018).

Here, the Clergy Letter itself, in statements that Father Alexander does not challenge, identifies several religious reasons congregants might wish to leave his church unrelated to the allegedly defamatory statements: his "breaking of the seal of Confession," "his use of information obtained during Confession and confidential discussions for the purpose of denigrating parishioners and of controlling them," and his failure to organize his cathedral and monastery "according to the norms of the Russian Church Abroad." JA.20. How is a civil court supposed to determine which church members left because of the unchallenged statements in the letter, and which left because of the statements Father Alexander contests?

* * * *

In sum, if allowed to proceed, every stage of the litigation would entail inquiries into internal Church communications and decision-making, with damages based upon Father Alexander's reputation as a Bishop and

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005762

predicted future earnings as a Bishop. Each jurisdictional fact alleged against the non-domiciliary defendants is based upon internal communications among church leadership, and each of the defamatory statements alleged was made in official communications among senior church leadership. JA.99-101. These inquiries are the antithesis of "purely secular," and they are not permitted by the First Amendment. *Kavanagh*, 997 F. Supp. 2d at 251.

3. The discovery process necessary to adjudicate Father Alexander's claims will itself violate church autonomy.

Putting the Church through the discovery that will be necessary to resolve Father Alexander's claims will itself violate the Religion Clauses. The district court asserted that it has the ability to conduct a "fact-based inquiry into what occurred" without "pass[ing] judgment on the internal policies and or determinations of the" Church. JA.147. But in the inherently religious context of internal church discipline of church leaders, the "very process of inquiry" itself will "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *see also Milivojevich*, 426 U.S. at 718 ("detailed review of the evidence" of church policy was "impermissible"). Indeed, it is well established that courts must "refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)).

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005763

This principle was illustrated in *Whole Woman's Health v. Smith*, where the Fifth Circuit accepted a collateral order appeal to prevent the Catholic Church from having to turn over internal documents in a civil lawsuit. 896 F.3d 362 (5th Cir. 2018). The Fifth Circuit held that courts should "protect the inner workings" of religious organizations and "maintain their internal organizational autonomy intact from ordinary discovery." *Id.* at 372, 374. For this reason, church autonomy defenses are "similar to a government official's defense of qualified immunity" and must be "resolved at the earliest possible stage of litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 & n.1; *see* Part III.A.1 *infra*.

Here, discovery beyond document production of the already-public documents mentioned in the complaint would entangle civils courts in internal Church deliberations, including:

- A deposition of Metropolitan Hilarion as to whether he "went along, consented to, authorized and participated in the scheme to deny his authorship of" letters, and his "willingness to falsely deny that he had authored the letters," JA.97, 101;
- Depositions of fellow ministers in the search for malice and hostility in their religious judgments regarding Father Alexander's election, *see, e.g.*, JA.104;
- Depositions of clergy on such matters as Father Alexander's suspension, internal clergy communications, and the validity of Father Alexander's alleged election in the Synod; *see, e.g.*, JA.99-101;

AMERICAN OVERSIGHT

- Document requests involving internal church communications, including church discipline, church procedure, or church organization and polity, *e.g.*, JA.94-96;
- Interrogatories demanding clergy opinions on internal church procedures; *see, e.g.*, JA.95-97, 100; and
- Evidence regarding the "drastic decrease of the membership" in Father Alexander's church, JA.105.

This kind of entangling discovery is forbidden by the First Amendment. The Constitution bars the "onerous" burden of "depositions of fellow ministers and the search for a subjective motive behind the alleged hostility" to Father Alexander. *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc). It also forbids "attempting to parse the internal communications [of a church] and discern which are 'facts' and which are 'religious' [as] tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause." *Whole Woman's Health*, 896 F.3d at 373. And it does not permit investigation into damages flowing from reduced tithes and church membership related to religious leadership disputes. *Lee*, 903 F.3d at 121; Part I.B.2 *supra*.

If this case is allowed to proceed, it would proliferate defamation lawsuits between ministers and their churches where an employment claim would be barred. Following Father Alexander's footsteps, for instance, a Catholic nun could gain the right to depose her Archbishop, Cardinal, or even the Pope, by appointing herself to a mother superior role and suing the Vatican for de-recognizing her position in a church

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005765

disciplinary document. *Contra McCarthy*, 714 F.3d at 976. That is not the kind of separation of church and state contemplated by the First Amendment.

C. The neutral principles doctrine does not apply in this case.

For the reasons explained above, Father Alexander's claims cannot be resolved by "neutral principles of law," as he claims and as the district court held. JA.32, 77. Where, as here, a lawsuit is brought by a minister against his Church for statements made as part of a disciplinary proceeding involving his candidacy and suitability as a bishop and priest, it cannot be removed from the realm of the Religion Clauses and brought into the secular jurisdiction of this Court.

The "neutral principles" doctrine was developed for church property disputes, and the Supreme Court has never applied it outside that context. *Compare Jones v. Wolf*, 443 U.S. 595 (1979) (applying neutral principles to property dispute), *with Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (no mention of neutral principles doctrine), *and Our Lady*, 140 S. Ct. 2049 (same). Indeed, even when a matter "affects the control of church property," the Supreme Court has explicitly rejected application of neutral principles to cases where the matter is one of "internal [church] discipline and government." *Milivojevich*, 426 U.S. at 709, 724. In *Milivojevich*, for instance, the lower court held that it could determine the bishop's

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005766

property claims based on neutral principles. *Id.* at 721. But the Supreme Court reversed, concluding that the claims could not be resolved "without engaging in a searching and therefore impermissible inquiry into church polity." *Id.* at 723.

Many courts have recognized that "neutral principles" cannot be applied to religious disputes about internal church discipline and procedures. Indeed, even where "a civil court might be able to avoid questions of religious beliefs or doctrines," it cannot consider "questions of church discipline and the composition of the church hierarchy [that] are at the core of ecclesiastical concern." *Crowder v. S. Baptist Convention*, 828 F.2d 718, 726 (11th Cir. 1987).

Diocese of Lubbock is directly on point. There, the plaintiff deacon sued for defamation, claiming that neutral principles could apply to determine whether the church was factually incorrect to include his name on a list of "clergy credibly accused of sexual abuse of a minor." 624 S.W.3d at 509. The court squarely rejected this argument, finding that exercising jurisdiction over the dispute would "invade the Diocese's internal management decision to investigate its clergy consistent with its own norms and policies." *Id.* at 518. The neutral principles doctrine, the court held, must be "narrowly drawn to avoid inhibiting the free exercise of religion or imposing secular interests on religious controversies." *Id.* at 513 (citing *Jones*, 443 U.S. at 603-05; *Milivojevich*, 426 U.S. at 710); *see also Brazauskas*, 796 N.E.2d at 294 (rejecting argument that the court

AMERICAN OVERSIGHT

could apply neutral principles to resolve defamation and other tort claims involving "communication" about church procedure).

So too here. The district court held that it could determine "what occurred" without "pass[ing] judgment on the internal policies or determinations" of the Church. JA.147. But in order for the litigation to proceed, the court *must* "pass judgment" on the truth or falsity of ecclesiastical judgments made by clergy in the church discipline process, "probe the mind of the church" through intrusive discovery about its internal procedures, *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.), and ultimately decide whether the Church should be held liable for how it rejected Father Alexander's appointment as bishop and later removed him from ministry. None of those things can be done by neutral law and without violating the First Amendment.

II. Father Alexander's claims are barred by the ministerial exception.

This case presents a straightforward application of the ministerial exception. Neither of the more commonly disputed elements of the exception are in question: Father Alexander is undisputedly a minister, and the defendants are undisputedly a church and its senior hierarchy.

So the narrow issue here is whether the ministerial exception bars Father Alexander's defamation claims. It does.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005768

Courts have long and repeatedly recognized that defamation claims by a minister against a church can be barred, especially when they are intertwined with a church's selection or discipline of its ministers. Here, Father Alexander's claims are inextricably wrapped up in both the Church's decision whether to select him as a Bishop and its investigation and discipline of him. And Father Alexander's counterarguments are meritless.

A. The ministerial exception bars defamation claims that interfere with a church's selection and supervision of its ministers.

The ministerial exception is an aspect of the church autonomy doctrine that specifically safeguards churches' "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. This rule prohibits civil adjudication of a minister's claims against religious bodies that would interfere with "the authority to select and control who will minister to the faithful," since that is a "strictly ecclesiastical" matter for a religious body "alone" to decide. *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff*). Thus, "where a defendant is able to establish that the ministerial exception applies, the 'First Amendment has struck the balance for us' in favor of religious liberty" and a civil claim is barred from proceeding. *Fratello*, 863 F.3d at 199 (quoting *Hosanna-Tabor*, 565 U.S. at 196).

AMERICAN OVERSIGHT

The rule is required by both Religion Clauses of the First Amendment. Adjudication of a civil claim that interferes in a ministerial relationship "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and it "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89.

This foundation in both Clauses is related to its role in "ensur[ing] the separation of church and state," *Fratello*, 863 F.3d at 199, which means both church and state have independent interests in maintaining its vitality. That is, "this constitutional protection is not only a personal one" for a religious body; "it is a structural one" that is "imposed on the government by the Religion Clauses" and "categorically prohibits . . . governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015); *accord Lee*, 903 F.3d at 118 n.4 (the "exception is rooted in constitutional limits on judicial authority").

While some civil claims may survive this structural bar because they are unrelated to ministerial selection or control—such as a slip-and-fall on the church steps, *Rweyemamu*, 520 F.3d at 208—"*any* federal or state cause of action" that would "impinge on the Church's prerogative to choose its ministers" is barred. *Werft v. Desert Sw. Ann. Conf.*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004) (emphasis added); *see also id.* at 1103 ("The

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005770

ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy, termed the 'lifeblood' of the religious institution."). This is because such claims, "whatever their 'emblemata,'" will "inexorably entangle [courts] in doctrinal disputes." *Rweyemamu*, 520 F.3d at 208 (quoting *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577 (1st Cir. 1989)).

"However a suit may be labelled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal*, 878 F.2d at 1576-78. Thus, the operative question is not whether the action sounds in tort, contract, or statute, but whether it "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188.

Accordingly, courts have barred not only Title VII and other employment discrimination claims under the ministerial exception, as in *Fratello*, but also contract and tort claims. *See, e.g.*, *Lee*, 903 F.3d at 122 (rejecting minister's contract claim against church; noting that "sister circuit courts have repeatedly" done the same); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009) (barring contract claim); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997) (rejecting claims for "breach of contract and various torts"); *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940 (6th Cir. 1992)

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005771

(rejecting tort and contract claims). Indeed, such common-law claims are often part and parcel to a standard wrongful termination claim, all of which can be subject to the ministerial exception. 2 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 14:54 (2020) ("Wrongful termination claims are often joined with claims of common law torts such as defamation and intentional or negligent infliction of emotional distress.").

Courts have thus long and repeatedly applied the ministerial exception to bar defamation and similar claims. *See Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *34 (W.D. Pa. Aug. 22, 2017), *aff'd*, 903 F.3d 113 (3d Cir. 2018) (collecting cases where courts have "clearly held that the ministerial exception applies to . . . defamation claims"). Thirty-five years ago, the Sixth Circuit rejected a defamation claim that was "really seeking civil court review of subjective judgments made by religious officials and bodies that he had become 'unappointable,'" reasoning that "secular authorities may not interfere with the internal ecclesiastical workings and disciplines of religious bodies." *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986). Three years later, the First Circuit affirmed a ruling barring libel and slander claims that were "inextricably intertwined" with an "ecclesiastical dispute" over a church's decision to terminate its minister. *Natal v. Christian & Missionary All.*, No. 88-0676, 1988 WL 159169 (D.P.R. 1988),

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005772

aff'd, 878 F.2d 1575 (1st Cir. 1989) (affirming the district court and praising its "opinion [a]s a scholarly piece of work").

Other federal courts and state supreme courts have consistently arrived at the same result ever since. Indeed, "most courts that have considered the question" have broadly concluded that "a pastor's defamation claims against a church and its officials" is barred. *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 (Va. 2001) (collecting cases, rejecting defamation claim that would "substitute [the court's] secular judgment for a church's judgment . . . regarding the selection or retention of its pastor"). The basic rule is that where the "plaintiff's claims of . . . defamation are essentially tied to" a ministerial dispute, the claim is barred. *Kraft v. Rector, Churchwardens & Vestry of Grace Church*, No. 01-CV-7871, 2004 WL 540327, at *6 (S.D.N.Y. Mar. 17, 2004). Thus:

- *Ogle v. Church of God*, 153 F. App'x 371, 375-76 (6th Cir. 2005) (rejecting defamation claim by minister arising from statements made as "part of church disciplinary proceedings" as "squarely within the class of cases" barred by the ministerial exception).
- *Yaggie v. Ind.-Ky. Synod, Evangelical Lutheran Church in Am.*, 64 F.3d 664 (6th Cir. 1995) (Table) (affirming dismissal of minister's defamation claim concerning statements made during internal church investigation to "resolve an in[ternal] church conflict" and which "concerned the minister's current and future employment relationship with the church").
- *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 613 (N.D. Tex. 2008) (barring defamation claim that was "intimately related to the employment action taken" against minister);

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005773

- *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 218-19 (D. Conn. 2000) (barring defamation and libel claims regarding defendants' statements to "the press and the public that [minister] had misrepresented his priestly status");
- *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (minister's defamation claim barred because it "challenges [church's] authority to request [internal] records pursuant to its internal procedures and to comment on [his] actions and abilities as a [church] minister");
- *Byrd v. DeVeaux*, No. 17-3251, 2019 WL 1017602, at *9 (D. Md. Mar. 4, 2019) (barring false-light claim because the "claim is rooted in the [church's] disciplinary review of Plaintiff and decision that Plaintiff should be placed on administrative leave");
- *Baker v. Afr. Methodist Episcopal Church*, No. 3-01-CV-2485, 2002 WL 1840931, at *2 (N.D. Tex. Aug. 8, 2002) (barring defamation claim since constitution "prohibits judicial encroachment into church decisions concerning the employment of ministers").
- *El-Farra v. Sayyed*, 226 S.W.3d 792, 796 (Ark. 2006) (dismissing defamation claims involving whether appellant's conduct "contradicts the Islamic law," in part because the challenged "statements were made in the context of a dispute over [minister's] suitability to remain as Imam");
- *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) ("Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader").[7]

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[7] *See also Paul v. Watchtower Bible & Tract Soc. of N.Y.*, 819 F.2d 875, 877 (9th Cir. 1987) (barring defamation claim by church member against church arising from church disciplinary actions, since "religious activities which concern only members of the faith are and ought to be free") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)); *Kaufmann v. Sheehan*, 707 F.2d 355, 357-59 (8th Cir. 1983) (barring under the First Amendment due-process claims arising from

AMERICAN OVERSIGHT

Nor could it be otherwise, since virtually all religious leadership disputes barred as employment actions could easily be re-cast as defamation cases. *Cha*, 553 S.E.2d at 516 ("[I]f our civil courts enter upon disputes between bishops and priests because of allegations of defamation . . . it is difficult to conceive the termination case which could not result in a sustainable lawsuit."). That would burden internal church management in ways the Religion Clauses forbid. "[T]he prospect of future investigations and litigation would inevitably affect to some degree" ministerial decisions, and pressure churches, synagogues, mosques, and temples to make those decisions "'with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (quoting *Rayburn*, 772 F.2d at 1171).

For instance, knowing that communications with and about ministers could be made the basis of a defamation case—to include being "deposed, interrogated, and haled into court," *id.*—cannot help influencing how church hierarchy chooses and controls the shepherds of its flock. Among other things, it will pressure religious bodies to either immediately terminate wayward ministers instead of rehabilitating them, or to overlook clergy misconduct for fear that disciplining problematic

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allegedly defamatory statements because the statements "relate[d] to his status and employment as a priest").

AMERICAN OVERSIGHT

ministers will lead to lawsuits. *Cha*, 553 S.E.2d 511, 517 (noting "chilling effect" of defamation suits). This distortion of ministerial relationships, church doctrine, and discipline, is impermissible: "any attempt . . . even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady*, 140 S. Ct. at 2060.

B. The ministerial exception bars Father Alexander's defamation claims because they interfere with the Church's selection and control of its priests and bishops.

The ministerial exception bars Father Alexander's defamation claims. Indeed, this is a heartland case, meaning there's no need to "delineate the boundaries of the ministerial exception," because the claims here "easily f[all] within them." *Fratello*, 863 F.3d at 202 (quoting *Rweyemamu*, 520 F.3d at 209). There are three ways to see that adjudicating Father Alexander's claim would unconstitutionally interfere with the Church's internal ministerial selection and control.

First, the Clergy Letter at the "heart" of the complaint is a church disciplinary communication between the senior leadership of Father Alexander's church concerning whether to select him as bishop or to discontinue his priestly duties. ECF 22-2 at 2. Thus, the "heart" of his claims is literally a matter of ministerial "selection and control," which means that they concern issues that courts cannot adjudicate. *See* Part I.B.2 *supra*.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005776

Second, proving up his claims will necessarily intrude into the minister-church relationship. The ministerial exception exists in part to prevent "Church personnel" from "becom[ing] subject to subpoena, discovery, cross-examination, [and] the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Compelling "depositions of fellow ministers" in "the search for a subjective motive" regarding ministerial decisions is an "onerous" and "prejudicial" burden the ministerial exception forbids. *Demkovich*, 3 F.4th at 982-83. But here, that's exactly the point: Father Alexander's claims seek to compel the deposition of the head of his former church, Metropolitan Hilarion, to try to prove that he "intentional[ly] and malicious[ly]" lied to prevent Father Alexander from becoming a bishop. JA.101-02, 104 (alleging the Metropolitan was "the key and willing participant" in the Clergy Letter, and "but for" him "the [Clergy] letter would not have gotten off the ground"). That he cannot do.

Third, the measure of damages Father Alexander claims is "loss of income, resulting from the drastic decrease of the membership in his church," JA.105-06, and the damage is based upon his standing and reputation within the church community. JA.105-08. "[A]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister and would be no less prohibited by the First Amendment than an order overturning the termination." *Hosanna-Tabor*, 565 U.S. at 194.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005777

Father Alexander is a minister who is suing his church for over $5,000,000 to penalize it for internal communications among senior church hierarchs about whether he was qualified to be appointed to one of the highest offices of the church. The ministerial exception bars such claims.

C. The district court erred by refusing to dismiss the complaint under the ministerial exception.

Father Alexander has argued that the district court "properly rejected" this defense because the ministerial exception *only* applies to employment discrimination claims, and *only* to paid employees of a church. ECF 22-2 at 8-10. He also suggests that "neutral principles" analysis should control. He is wrong.

First, as shown above, the ministerial exception has regularly been applied to bar common-law claims, including by this Court. Father Alexander cites no contrary case holding that the ministerial exception applies "only" to "employment discrimination claims." ECF 22-2 at 11. There are none. Indeed, the first Supreme Court ruling that barred courts from second-guessing a church's religious leadership decision arose in the context of a claim sounding in trust. *Gonzalez*, 280 U.S. at 16 (rejecting trust claim to chaplaincy position because "church authorities"—not government officials or judges—"determine what the essential qualifications of a chaplain are").

AMERICAN OVERSIGHT

Second, the ministerial exception is not restricted to paid positions. While courts take into account various "considerations" to determine ministerial status, the "focus" is "primarily" on the religious functions they perform. *Fratello*, 863 F.3d at 205. None of the relevant considerations turn on whether the position is paid.

Further, limiting the First Amendment's protections only to formal paid employment would raise serious problems. It would once again turn fundamental church-state separation into a pleadings game, incentivizing plaintiffs to skip over their employers and instead sue any deeper-pocketed ministry partners that allegedly exercised religious influence over the employer.

Courts have avoided this obvious issue by routinely protecting non-employer ministries from similar suits. *Fratello* applied the exception in a suit against both the employer school and the non-employer archdiocese. *Compare* 863 F.3d at 192 ("Fratello was employed by St. Anthony's School"), *with id.* at 206 ("[T]he ministerial exception bars Fratello's . . . claims against the Archdiocese, the Church, and the School, all of which are religious groups within the meaning of the ministerial exception."). In *Cannata v. Catholic Diocese of Austin*, the Fifth Circuit relied on the ministerial exception to dismiss a suit against the employer church and the non-employer diocese. 700 F.3d 169 (5th Cir. 2012). And in *Bell*, the Fourth Circuit dismissed a lawsuit by a minister against religious denominations that contributed to his former religious

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005779

employer. 126 F.3d at 332.[8] These outcomes are correct. Otherwise, in *Fratello* for example, the school would have been protected but the archdiocese would not, even though the core issue—whether a religious body must allow a particular person to hold a religiously significant role—is the same.

Father Alexander's paid-ministers-only rule would also risk "privileging religious traditions" with more formal employment structures "over those that are less formal." *Our Lady*, 140 S. Ct. at 2064. Moneyed religious bodies which could afford to pay their leaders would be protected, while the less well-heeled would be more vulnerable to suit by their unpaid deacons, elders, Sunday School teachers, and worship leaders. Moreover, leaders in many faith bodies are also volunteers, such as the bishops of the Church of Jesus Christ of Latter-day Saints.[9] Thus,

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[8] *See also Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008) ("Ministers of the Salvation Army receive no wages"); *EEOC v. Roman Catholic Diocese of Raleigh*, 48 F. Supp. 2d 505, 513-14 (E.D.N.C. 1999), *aff'd*, 213 F.3d 795 (4th Cir. 2000) (position that could be filled by "an employee or volunteer" was ministerial); *InterVarsity Christian Fellowship/USA v. Bd. of Governors*, ---F. Supp. 3d---, No. 19-10375, 2021 WL 1387787 (E.D. Mich. Apr. 13, 2021) (ministerial exception applies to unpaid volunteer leadership roles).

[9] *See Lay Priesthood*, ChurchofJesusChrist.org, https://perma.cc/GQ7T-YLQ9 ("the bishop . . . receives no pay of any kind for his service in the Church"); *see also* G. Jeffrey MacDonald, *As denominations decline, number of unpaid minsters rise*, Religion News Service (Sept. 17, 2013), https://perma.cc/Y7ES-UXSX ("The unpaid cleric model is gaining traction among Episcopalians.").

AMERICAN OVERSIGHT

treating payment as dispositive would undermine "the purpose of the ministerial exception": ensuring religious organizations alone have "the authority to select and control" those who lead a church's faith. *Penn*, 884 F.3d at 423.

Third, neutral-principles doctrine is "simply not applicable" to claims that relate to a plaintiff's "status and employment as a minister of the church," including in the defamation context. *Hutchison*, 789 F.2d at 396. A minister's claims cannot generally "be resolved . . . by invoking 'neutral principles of law,'" since the inherently religious ministerial relationship makes inquiries "in themselves" too entangling and thus "forbidden by the First Amendment." *Catholic Univ.*, 83 F.3d at 465-67; *accord El-Farra*, 226 S.W.3d at 795 (rejecting defamation claim under ministerial exception, finding that the "narrow" neutral-principles doctrine applies "only with regard to real-property disputes"). Hence this Court's ruling in *Fratello* that, in the employment discrimination context, courts cannot try to use neutral principles to navigate their way around "excessive entanglement . . . in [a] particular case," since courts are "ill-equipped to assess" such matters in the ministerial context. 863 F.3d at 202-03.

In sum, Father Alexander provides no reason for this Court to split from five circuits and state courts of last resort by setting entangling new precedent allowing ministers to sue their churches in defamation over internal church election and disciplinary communications. His claims are barred by the ministerial exception.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005781

III. This Court has jurisdiction over this appeal under the collateral order doctrine.

This Court has jurisdiction to hear appeals of "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This includes collateral orders resolving rights that are "too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For an order to be collateral, it must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

Qualifying collateral orders include those that involve a party's "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and those that implicate compelling interests of a constitutional dimension, Opp'n to Mot. to Dismiss at 8, ECF 41 (collecting cases). Rights "originating in the Constitution" receive solicitude under the collateral order doctrine. *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 179 (2d Cir. 2008) (denials of "constitutional immunities" immediately appealable). This includes orders causing irreparable harm to First Amendment rights, such as

AMERICAN OVERSIGHT

rights to church autonomy. *See* ECF 41 at 9; *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696 (2020) (accepting interlocutory appeal in church autonomy case arising under 28 U.S.C. § 1258); *McCarthy*, 714 F.3d at 976 (immediate appeal permitted because "harm of . . . governmental intrusion into religious affairs would be irreparable").

This appeal falls squarely within the collateral order doctrine, as it involves the denial of a First Amendment immunity from discovery and trial. It thus fulfills all three criteria of the collateral order doctrine: The district court's orders denying dismissal and ordering merits discovery (1) irreparably harm the Church absent immediate review, making it effectively unreviewable after a final judgment; (2) conclusively reject the Church's immunity from merits adjudication under the church autonomy and ministerial exception doctrines; and (3) implicate the Church's constitutional right to autonomy in its internal religious affairs, an issue collateral to the merits.

A. The Church's First Amendment defenses will be effectively unreviewable after merits discovery.

The central characteristic of an appealable collateral order is that, if the order is not "reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell*, 472 U.S. at 525 (cleaned up). Here, the Church has raised defenses that are akin to an immunity in that they protect the Church not only from liability, but also from entanglement in

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005783

merits litigation over its internal religious affairs. Now that these defenses have been denied and merits discovery ordered, only immediate appeal can avoid the constitutional injury the Church faces from the district court's refusal to dismiss this case and to limit discovery.

1. The Religion Clauses provide protections akin to immunity.

It is "well-settled" that denials of immunity from suit are proper collateral-order appeals. *Coollick v. Hughes*, 699 F.3d 211, 217 (2d Cir. 2012). The immunities are meant both "to avoid 'standing trial'" and "also to avoid the burdens of 'such *pretrial* matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996). Courts have recognized that the Religion Clauses provide protections to churches "similar to" such immunities. *Bryce*, 289 F.3d at 654; *accord Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238, 1242 (10th Cir. 2010) (the "ministerial exception, like the broader church autonomy doctrine, can be likened 'to . . . qualified immunity'"). Like qualified immunity, church autonomy questions must be resolved "early in litigation" to avoid harm to the protected right. *Bryce*, 289 F.3d at 654 n.1; *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016) (immunity "should be resolved 'at the earliest possible stage in litigation"). And like qualified immunity, the Religion Clauses' rule against interference in internal religious affairs provides "immunity from the travails of a trial and not just from an adverse judgment." *McCarthy*, 714 F.3d at 975.

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005784

Unlike qualified immunity, though, the legal interest is much stronger: the constitutional command that "courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Obeying this command protects not just one but two "substantial public interest[s]" of "a high order." *Will*, 546 U.S. at 352-53. It protects both the church's Free Exercise interest in the autonomy of its religious affairs and the judiciary's Establishment Clause interest in avoiding improper entanglement in those affairs. Indeed, a "federal court" has an independent duty "not [to] allow itself to get dragged into a religious controversy," *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), a duty which reflects the weighty constitutional "structural limitation[s]" that "categorically prohibit[]" the judiciary "from becoming involved in religious leadership disputes." *Conlon*, 777 F.3d at 836.

The "harm of such a governmental intrusion into religious affairs would be irreparable." *McCarthy*, 714 F.3d at 976. And the harm starts with "the beginnings of discovery" into the merits of a minister's claims, since those beginnings can have "prejudicial effects" on "rights guaranteed by the Religion Clauses." *Demkovich,* 3 F.4th at 982-83 (resolving certified interlocutory appeal); *Rayburn*, 772 F.2d at 1171 ("rights guaranteed by the Religion Clauses" limit courts from allowing discovery to "probe the mind of the church in the selection of its ministers"); *see also* Parts I & II *supra*. Thus, "the consequence of forced

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005785

discovery" into internal religious affairs "is 'effectively unreviewable' on appeal from the final judgment." *Whole Woman's Health*, 896 F.3d at 367. For this reason, federal courts have found that this harm to church autonomy rights is just as irreparable as "the other types of case[s] in which the collateral order doctrine allows interlocutory appeals." *McCarthy*, 714 F.3d at 976; *see also Liberty Synergistics, Inc.*, 718 F.3d at 150-51 (finding that harm to First Amendment rights from subjugation to litigation would be effectively unreviewable post-trial).[10]

State courts too have repeatedly found that "the denial of a religious institution's assertion of the ministerial exception . . . is appropriate for interlocutory appeal." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014). This is because "once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated." *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990); *see also Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1199-1200 (Conn. 2011)

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[10] *See also* Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) ("the ministerial exception closely resembles qualified immunity for purposes of the collateral-order doctrine," making "immediate appeal" appropriate); *see also* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 294 (2012) ("equitable consideration[s], coupled with the importance of the threshold constitutional question," warrant "immediate appeal").

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005786

("[L]itigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy . . . ."). And the Supreme Court of Texas recently accepted and resolved an interlocutory appeal because allowing lower courts to "exercis[e] jurisdiction" over a defamation case challenging a church's publication of an internal investigation into clergy "would necessarily encroach on the church's ability to manage its internal affairs." *Diocese of Lubbock*, 624 S.W.3d at 518 (cleaned up).

2. The Church's Religion Clauses immunities will be irreparably lost absent immediate appeal.

The Church's Religion Clauses defenses thus fit neatly within this Court's recognition that "a later recognition of immunity" against enduring litigation cannot possibly "mitigate the harm" absent an immediate appeal. *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017). And that is precisely the kind of "irreparable" harm the district court's orders will cause. *McCarthy*, 714 F.3d at 976. The district court denied the Church's Religion Clauses defenses, JA.84, refused to certify them for appeal, JA.118, denied a motion to bifurcate discovery to allow resolution of the Religion Clauses defenses, JA.146-48, and ordered the parties to complete merits discovery by the end of the year, JA.142. Meanwhile, Father Alexander insists that he is entitled to full discovery, including the ability to depose bishops and the Metropolitan. Dkt. 63. These are exactly the kinds of intrusion into

AMERICAN OVERSIGHT
MO-AG-22-0644-A-005787

internal religious governance on matters of church discipline and selection of clergy that the Seventh Circuit has just found—on interlocutory appeal—impermissible under the Religion Clauses. *Demkovich*, 3 F.4th at 983; *see* Part I.B.3 *supra*.

Thus, as with qualified immunity, the district court's orders are immediately appealable because the Church's "entitlement not to . . . face the . . . burdens of litigation" will be "effectively lost if a case is erroneously permitted to" proceed. *Mitchell*, 472 U.S. at 526.

B. The order below conclusively determined the Church's immunity from trial and merits discovery.

This Court has repeatedly recognized that, when a claimed immunity from suit applied, a court's denial of the immunity on a motion to dismiss conclusively determines the issue. *See, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119-20 (2d Cir. 2019); *Edrei v. Maguire*, 892 F.3d 525, 531-32 (2d Cir. 2018); *Garcia*, 779 F.3d at 91. This is because where the "essence of the claimed right" at issue includes "a right not to face the . . . burdens of litigation," then "a denial of that right 'conclusively determines' the disputed issue by ensuring that 'the defendant must bear the burdens of discovery.'" *Liberty Synergistics*, 718 F.3d at 147 (cleaned up). As shown above, the district court's denial of the motion to dismiss conclusively foreclosed the Church's claimed immunity from merits discovery. *Behrens*, 516 U.S. at 308 ("denial of a motion to dismiss is conclusive as to this right."). And the combination of the court's denial of

AMERICAN OVERSIGHT

bifurcation and ordered merits discovery means this immunity will soon be irreparably lost.

C. The Church's immunity against merits discovery is collateral to the merits of Father Alexander's defamation claims.

Finally, an issue "is 'separate' from the merits" if "it turns on matters 'significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.'" *Liberty Synergistics*, 718 F.3d at 148; *see also Britt v. Garcia*, 457 F.3d 264, 271-72 (2d Cir. 2006) (finding jurisdiction because the issue raised was a purely legal question that could be "decided with reference only to undisputed facts and in isolation from the remaining issues of the case"). Whether the Religion Clauses preclude Father Alexander's claims is "a pure question of law." *Conlon*, 777 F.3d at 833; *see also Bryce*, 289 F.3d at 654 (application of the church autonomy doctrine is a "question of law"). And the First Amendment's prohibition on "governmental intrusion into religious affairs" gives rise to an immunity that is "'conceptually distinct' from the merits." *McCarthy*, 714 F.3d at 975-76 (quoting *Mitchell*, 472 U.S. at 527). Because an immunity from trial inheres in these First Amendment

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005789

defenses, they are separate "from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

IV. The district court erred by failing to limit initial discovery to resolution of the Religion Clauses defenses.

The district court denied the Church's motion to limit initial discovery to resolution of the Religion Clauses defenses, and instead ordered the parties to commence and complete merits discovery before the end of the year. This order was an abuse of discretion and will cause irreparable harm both to the Church's First Amendment rights and the corresponding structural limitations on judicial authority.

As explained above in Parts I.B.3 and III.A.2, the Supreme Court "established the rule of *Hosanna-Tabor*" "precisely to avoid . . . judicial entanglement" such as "subjecting religious doctrine to discovery." *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019). Thus, in cases where discovery is necessary to resolve Religion Clauses defenses, this Court has recognized that it is "appropriate[]" to "order[] discovery limited to" those defenses before allowing merits proceedings. *Fratello*, 863 F.3d at 198.

Other courts likewise routinely "limit discovery to the applicability of the ministerial exception" "[b]efore launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid." *Sterlinski v. Catholic Bishop of Chi.*, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017); *see*

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005790

also Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2017) (court "directed the parties to engage in limited discovery on the [ministerial exception]"); *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) ("Plaintiff was permitted to conduct limited discovery" on the ministerial exception defense); *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d. 730, 735 (N.D. Ill. 2016) (where a ministerial exception defense is asserted, "the scope of the issue subject to discovery is narrow," limited to whether the role "was ministerial"); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (allowing "limited discovery to determine whether the ministerial exception applies").[11] Requiring merits discovery before resolution of the threshold Religion Clauses defenses has been recognized as "result[ing] in a substantial miscarriage of justice." *Presbyterian Church v. Edwards*, 566 S.W.3d 175, 178 (Ky. 2018) (allowing merits discovery before resolving a church's ministerial exception defense).

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[11] *Stabler v. Congregation Emanu-El of the City of New York*, No. 16 CIV.9601, 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (authorizing discovery "limited to the ministerial exception defense" and specifically whether plaintiff performed religious functions); *Sterlinski*, 2017 WL 1550186, at *5 ("limit[ing] discovery to the applicability of the ministerial exception"); *Lishu Yin v. Columbia Int'l Univ.*, No. 3:15-CV-03656, 2017 WL 4296428, at * 4 (D.S.C. Sept. 28, 2017) (same); *Miller v. InterVarsity Christian Fellowship/USA*, No. 09-CV-680, 2010 WL 2803123, at *2 (W.D. Wis. July 14, 2010) (same); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) (court authorized "very limited discovery" as to whether job functions were ministerial in nature).

AMERICAN OVERSIGHT

Against this uniform practice and such significant First Amendment considerations, neither Father Alexander nor the district court identified any reason, or any precedent, against delaying merits discovery until resolution of the threshold defenses. Rather, after briefing limited to three-page letters, the district court again deemed the matter adequately briefed and denied bifurcation based solely on its perceived ability to decide whether the Clergy Letter was defamatory without offending the "doctrine of ecclesiastical abstention." JA.147. As demonstrated above, that conclusion is incorrect. Further, it failed to consider the Church's additional argument under the ministerial exception for granting bifurcation.

Because allowing merits discovery to proceed will cause irreparable harm to First Amendment rights, and do so entirely unnecessarily, the district court abused its discretion. At a minimum, then, this Court should remand and require bifurcation.

CONCLUSION

The district court's decisions below should be reversed.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005792

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AMERICAN OVERSIGHT
MO-AG-22-0644-A-005793

CERTIFICATE OF COMPLIANCE

This document complies with the requirements of 2d Cir. R. 32.1(a)(4) because it has 13,619 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 26, 2021

/s/ Diana M. Verm
Diana M. Verm

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005794

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 26, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

August 26, 2021

/s/ Diana M. Verm
Diana M. Verm

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005795

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Questions Presented

1. Did the Court of Appeals incorrectly hold, in direct contradiction to the United States Supreme Court's holding in *Ohio v. Johnson*, 467 U.S. 493 (1984), that Defendant's guilty plea to some, but not all, of the charges in a single indictment precluded the State from trying Defendant on the remaining charge based on the Double Jeopardy Clause's protection against successive prosecutions?

   Ohio v. Johnson, 467 U.S. 493, 498 (1984);

   State v. Taylor, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991);

   State v. Bally, 869 S.W.2d 777, 780 (Mo. App. W.D. 1994);

   State v. Young, 597 S.W.3d 214, 225 (Mo. App. W.D. 2019).

2. Did the Court of Appeals misapply the law, in direct contradiction to this Court's holding in *State v. Hardin*, 429 S.W.3d 417 (Mo. 2014), by applying an indictment-based test—instead of the elements test applied in *Hardin*—to conclude that possession of a controlled substance is an included offense of unlawful use of a weapon under subsection 11 of § 571.030?

   State v. Hardin, 429 S.W.3d 417, 424 (Mo. 2014).

AMERICAN OVERSIGHT

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Statement of Facts

The State charged Defendant in a single indictment with five offenses, including possession of a controlled substance (Count I) and unlawful use of a weapon while possessing a controlled substance (Count II). Slip Op. at 2. After pleading guilty to Counts II-V, the trial court dismissed the pending Count I, on the grounds that Count I was an included offense of Count II and, consequently, a future conviction on Count I would violate Defendant's right to be free from double jeopardy. Slip Op. 1, 14, 19.

The Court of Appeals affirmed the trial court's dismissal of Count I, finding that a conviction for both unlawful possession of a firearm while possessing a controlled substance and possession of a controlled substance would violate the Double Jeopardy Clause's protection against multiple or successive prosecutions. Slip Op. at 1, 14, 19. The Court reasoned that, although the offenses had all been charged in a single indictment, the Defendant's guilty plea to some of the charges effectively transformed the pending trial on Count I into a successive prosecution for purposes of its double jeopardy analysis. Slip op. at 14, 19.

Reasons to Grant Transfer

The Court of Appeals' holding that it would violate double jeopardy to permit the State to prosecute Count I after Defendant pleaded guilty to Count II is directly contrary to the United States Supreme Court's decision in *Ohio v.*

AMERICAN OVERSIGHT

Johnson, 467 U.S. 493, 498 (1984). The holding also conflicts with prior Missouri precedent. *See also State v. Taylor*, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991); *State v. Bally*, 869 S.W.2d 777, 780 (Mo. App. W.D. 1994); *State v. Young*, 597 S.W.3d 214, 225 (Mo. App. W.D. 2019). The direct conflict with *Ohio v. Johnson* and the Court's effectively holding that a defendant can prevent the remainder of a single prosecution by strategically pleading guilty to fewer than all of the counts present questions of general interest and importance. The direct conflict with the holding of *Ohio v. Johnson* also presents a federal question of constitutional magnitude.

In addition, in holding that the legislature did not intend cumulative punishments for possession of a controlled substance and unlawful use of a weapon while possessing a controlled substance, the Court of Appeals applied an indictment-based test instead of the elements test that this Court applied in *State v. Hardin*. 429 S.W.3d 417, 424 (Mo. banc 2014). The conflict with this Court's decision in *Hardin* presents a question of general interest and importance, as the competing tests will inevitably lead to confusion and disparate results.

i. Double Jeopardy

The Double Jeopardy Clause affords a defendant three basic protections: " '[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction.

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

And it protects against multiple punishments for the same offense.' " *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969))). The protection against subsequent prosecutions is not applicable in cases where a single proceeding is at issue. *Johnson*, 467 U.S. at 498.

ii. Analysis

In affirming the trial court's decision, the Court of Appeals held that a defendant can effectively sever pending charges against him and turn a single prosecution into multiple prosecutions, in direct contradiction to the Supreme Court's decision in *Ohio v. Johnson*.

The Supreme Court of the United States has squarely addressed whether double jeopardy is implicated in a single proceeding (as opposed to a successive proceedings) where a defendant selectively chooses to plead guilty to some, but not all, of the charges. *Johnson*, 467 U.S. at 497-501. The *Johnson* Court held that in a multicount indictment, a defendant's guilty plea to some of the offenses does not trigger double jeopardy. *Id.* at 500-502. (Rejecting defendant's argument "that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded."). The Court observed that to

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

hold that double jeopardy was implicated would prevent the fact finder from determining a defendant's guilt and "would deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Id.* at 502. The Court held that a defendant is not "entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.*

Missouri Courts have previously followed *Johnson's* precedent when defendants have attempted to strategically sever counts against them in a single prosecution case. In *State v. Bally*, the defendant decided during trial to plead guilty to driving while intoxicated in order to block a felony manslaughter charge. 869 S.W.2d 777, 780 (Mo. App. W.D. 1994). The Western District found that this was "an impermissible use of the Fifth Amendment as a sword." *Id.* The State entered a nolle prosequi in Bally's case and the Court found that "the state acted within its rights to continue to prosecute the still-pending assault charge and to add the manslaughter charge even though both were greater offenses to the DWI charge." *Id.* The Court noted that the Supreme Court in *Johnson* made clear that a defendant is not permitted to use the Fifth Amendment as a "sword" to prevent the State's prosecution of him for any previously-charged offenses. *Id.*; *See State v. Thompson*, 581 S.W.3d 632, 636 (Mo. App. W.D. 2019) ("The protection against multiple punishments for the same offense does not, however, prohibit the state from prosecuting

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

multiple offenses in a single prosecution." (quoting *State v. Taylor*, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991) (citing *Johnson*, 467 U.S. at 500)).

In *State v. Young*, a defendant argued that his conviction of a lesser-included offense amounted to an acquittal of the greater offense when both were submitted to the jury in the same proceeding. 597 S.W.3d at 226 The Western District noted that Defendant's cited cases in support of his argument were all cases of a retrial after acquittal in a prior trial. *Id.* (citing *Wilson v. Czerniak*, 355 F.3d 1151 (9th Cir. 2004); *Ashe v. Swenson*, 397 U.S. 436 (1970); *Yeager v. United States*, 557 U.S. 110 (2009)). The Western District stated that "these cases are easily distinguishable from this case in which there was no acquittal or retrial," and the Court held that the defendant "was not acquitted of murder in the second degree by the jury's finding of guilt in a lesser included offense." *Id.*

Here, in a break with prior precedent, the Eastern District has held that a trial court's finding of guilt on one charge of a multi-count indictment transforms a single prosecution into multiple prosecutions. This notion was expressly rejected by the United States Supreme Court in *Johnson*, 467 U.S. at 497-501, and Missouri Courts have, until now, followed *Johnson*. *See Young*, 597 S.W.3d at 225-26; *see also State v. Flenoy*, 968 S.W.2d 141, 144 (Mo. banc 1998) ("Had the charges been tried in one proceeding, the Court stated there could be no question the defendant's claim of double jeopardy would fail since

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

the legislature had, in section 565.004, RSMo 1986, clearly stated its intent to allow the convictions.") (footnote omitted).

The Court of Appeals acknowledged the holding in *Johnson*, stating, "We agree that, according to *Johnson* and its progeny, when the defendant pleads guilty to a lesser-included offense over the State's objection, the State is not barred by double jeopardy from continuing prosecution of the remaining greater offense." Slip op. at 15 (citing *Johnson*, 467 U.S. at 501-502). The Court found that *Johnson* and its progeny were distinguishable because the defendants in those cases did not plead guilty to the purported "greater" offense like the Defendant purportedly did here.[1]

However, this distinction has no legal significance because under double jeopardy principles a conviction or acquittal of an offense bars *any* subsequent prosecution of the same offense no matter if the offense is "greater or lesser[.]" *Johnson*, 467 U.S. at 501. This is a separate protection from the protection against multiple punishments for the same offense under the Double Jeopardy Clause. *Thompson*, 581 S.W.3d at 636.

The Court of Appeals further acknowledged that Defendant apparently

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[1] The legislature classified possession of a controlled substance (the purported "lesser included offense") as a higher level felony than unlawful use of a weapon. Compare §§ 579.015, 570.030. Defendant did not plead guilty to this charge but instead pleaded guilty to the purported "greater offense" which carried a lesser penalty and left the "lesser-included offense of possession pending." Slip Op. at 9-11, 15-16.

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

pleaded guilty to Count II strategically in an attempt to sever the counts against him and to turn a single prosecution into multiple prosecutions case. Slip Op. at 16. While recognizing that such actions are improper under *Ohio v. Johnson* and its progeny, the Court stated that *Johnson* did not apply to the facts of the present case and instead faulted the State for not preventing the successive resolution of the charges either by objecting to Defendant's guilty plea, or by electing a single charge to proceed on, or by dismissing one of the charges against Defendant. Slip Op. at 16-19. The Court, thus, inferred from the record that "the State abandoned its pursuit of one trial for all the charged offenses in this indictment when it took no action to prevent separate dispositions of them." Slip Op. at 17.

However, while the State was willing to resolve four of the counts through a guilty plea, the record demonstrates that the State made plain its intent to continue to prosecute Defendant for Count I and to complete the single prosecution of Defendant for all the charged counts. (Tr. 22, 28, 34-35, 45). After Defendant pleaded guilty to Counts II-V, the parties made plain that the plea agreement as to those counts did not include any plea agreement as to Count I. (Tr. 39-40, 43-44). The Court of Appeals' observation that the State did not elect a single count or dismiss one of the counts is difficult to understand, in that either action would have been contrary to the State's intent to prosecute Defendant for all of the charges in the indictment.

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AMERICAN OVERSIGHT

MO-AG-22-0644-A-005803

Regardless, the State's alleged failure to "prevent separate dispositions" of the charges did not affect whether there was a single prosecution or multiple prosecutions against Defendant. To the contrary, by not dismissing Count I, the single prosecution plainly *had not* concluded, and it remained to be completed. A criminal prosecution is not final until *all* of the Counts have been resolved. *See State v. Waters*, 597 S.W.3d 185, 189 (Mo. 2020) ("A judgment of conviction is not final so long as any count in an indictment or information remains pending before the circuit court.").[2]

In short, this case was not a multiple or successive-prosecution case. The State acted within its discretion in charging Defendant with multiple counts in a single indictment, and "[t]he State is not . . . barred from charging a greater and a lesser-included offense in the *same* indictment." *Ohio v. Johnson*, 467 U.S. at 500. The Court of Appeals incorrectly found that Defendant's election to plead guilty to some, but not all, of the charges against him transformed the

[2] Additionally, because the trial court dismissed the pending count before sentencing, the question of whether the legislature clearly intended cumulative punishment for unlawful use of a weapon and possession of a controlled substance was not ripe and the Court of Appeal's determination that the legislature did not intend cumulative punishment amounted to an advisory opinion. *See State v. Thompson*, 581 S.W.3d 632, 637 (Mo. App. W.D. 2019) (reversing the trial court's premature dismissal of unlawful use of a weapon and possession of a controlled substance prior to the commencement any trial or presentation of formal evidence by the State, holding: "A pre-trial motion raising a double jeopardy challenge to the possibility of multiple punishments for the same offense in a single proceeding is…premature.").

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

AMERICAN OVERSIGHT

case into a successive-prosecutions case.

In sum, there has not been a trial on Count I, much less a sentence, and, consequently, the trial court's dismissal of Count I was premature. *See Thompson*, 581 S.W.3d 637 ("The double jeopardy *protection* against multiple punishments does not arise until the time of sentencing." *Id.* (quoting *Taylor*, 807 S.W.2d at 675)). The Double Jeopardy Clause permits the State one "full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502. The Court of Appeals' holding that double jeopardy was implicated here effectively bars the fact finder from determining Defendant's guilt and denies the State its right to obtain a conviction for Count I.

In addition, the Court applied the wrong test in determining that possession of a controlled substances was an included offense of unlawful use of a weapon. Double Jeopardy is only violated when a defendant is actually found guilty of multiple offenses arising from the same conduct and the legislature has not clearly signaled an intent to punish such conduct cumulatively. *Thompson*, 581 S.W.3d at 637.

Here, the Court of Appeals found that possession of a controlled substance is an included offense of unlawful use of a weapon by examining the specifically charged method in the indictment instead of the elements included in the statute defining unlawful use of a weapon. *See* Slip Op. at 12-14. However, this Court made plain in *Hardin* that in order to determine whether

AMERICAN OVERSIGHT

Electronically Filed - SUPREME COURT OF MISSOURI - April 14, 2021 - 04:56 PM

an offense is an included offense a court must examine the elements as laid out in the statute and not as charged. 429 S.W.3d at 424 ("[A]n indictment-based application of this definition has been expressly rejected."). The Court of Appeals' use of an indictment-based rule will lead to confusion and disparate results.

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MO-AG-22-0644-A-005806

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the application for transfer and all attachments was served by e-mail on April 14, 2021, to Abraham Copi at Abe.Copi@mspd.mo.gov.

/s/ Julia E. Rives
JULIA E. RIVES

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SUPREME COURT OF THE UNITED STATES

No. 21A24

WHOLE WOMAN'S HEALTH ET AL. *v.* AUSTIN REEVE JACKSON, JUDGE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[September 1, 2021]

The application for injunctive relief or, in the alternative, to vacate stays of the district court proceedings presented to JUSTICE ALITO and by him referred to the Court is denied. To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits," that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest. *Nken* v. *Holder*, 556 U. S. 418, 434 (2009); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (citing *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008)). The applicants now before us have raised serious questions regarding the constitutionality of the Texas law at issue. But their application also presents complex and novel antecedent procedural questions on which they have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. *California* v. *Texas*, 593 U. S. ___, ___ (2021) (slip op., at 8). And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409 (2013) ("threatened injury must be *certainly impending*" (citation omitted)). The State has represented

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005808

that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. See *Ex parte Young*, 209 U. S. 123, 163 (1908). Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law. In light of such issues, we cannot say the applicants have met their burden to prevail in an injunction or stay application. In reaching this conclusion, we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts.

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting.

The statutory scheme before the Court is not only unusual, but unprecedented. The legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large. The desired consequence appears to be to insulate the State from responsibility for implementing and enforcing the regulatory regime.

The State defendants argue that they cannot be restrained from enforcing their rules because they do not enforce them in the first place. I would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner. Defendants argue that existing doctrines preclude judicial intervention, and they may be correct. See *California* v. *Texas*, 593 U. S. ___, ___ (2021) (slip op., at 8). But the con-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005809

sequences of approving the state action, both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect.

We are at this point asked to resolve these novel questions—at least preliminarily—in the first instance, in the course of two days, without the benefit of consideration by the District Court or Court of Appeals. We are also asked to do so without ordinary merits briefing and without oral argument. These questions are particularly difficult, including for example whether the exception to sovereign immunity recognized in *Ex parte Young*, 209 U. S. 123 (1908), should extend to state court judges in circumstances such as these.

I would accordingly preclude enforcement of S. B. 8 by the respondents to afford the District Court and the Court of Appeals the opportunity to consider the propriety of judicial action and preliminary relief pending consideration of the plaintiffs' claims.

Although the Court denies the applicants' request for emergency relief today, the Court's order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue. But although the Court does not address the constitutionality of this law, it can of course promptly do so when that question is properly presented. At such time the question could be decided after full briefing and oral argument, with consideration of whether interim relief is appropriate should enforcement of the law be allowed below.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005810

SUPREME COURT OF THE UNITED STATES

No. 21A24

WHOLE WOMAN'S HEALTH ET AL. *v.* AUSTIN REEVE JACKSON, JUDGE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[September 1, 2021]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

The procedural posture of this case leads a majority of this Court to deny the applicants' request for provisional relief. In my view, however, we should grant that request.

I agree with THE CHIEF JUSTICE, JUSTICE SOTOMAYOR, and JUSTICE KAGAN. Texas's law delegates to private individuals the power to prevent a woman from obtaining an abortion during the first stage of pregnancy. But a woman has a federal constitutional right to obtain an abortion during that first stage. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 846 (1992); *Roe* v. *Wade*, 410 U. S. 113, 164 (1973). And a "State cannot delegate . . . a veto power [over the right to obtain an abortion] which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 69 (1976) (internal quotation marks omitted). Indeed, we have made clear that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Ibid.* The applicants persuasively argue that Texas's law does precisely that.

The very bringing into effect of Texas's law may well threaten the applicants with imminent and serious harm. One of the clinic applicants has stated on its website that

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005811

"[d]ue to Texas' SB 8 law," it is "unable to provide abortion procedures at this time." Planned Parenthood South Texas, https://www.plannedparenthood.org/planned-parenthood-south-texas. And the applicants, with supporting affidavits, claim that clinics will be unable to run the financial and other risks that come from waiting for a private person to sue them under the Texas law; they will simply close, depriving care to more than half the women seeking abortions in Texas clinics. See, *e.g.,* App. to Application 105, 148–150, 178–179. We have permitted those whom a law threatens with constitutional harm to bring pre-enforcement challenges to the law where the harm is less serious and the threat of enforcement less certain than the harm (and the threat) here. See *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 392–393 (1988); *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979); see also *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 164 (2014) (finding substantial threat of future enforcement where statute permits "'any person'" to file a complaint and "the universe of potential complainants is not restricted").

I recognize that Texas's law delegates the State's power to prevent abortions not to one person (such as a district attorney) or to a few persons (such as a group of government officials or private citizens) but to any person. But I do not see why that fact should make a critical legal difference. That delegation still threatens to invade a constitutional right, and the coming into effect of that delegation still threatens imminent harm. Normally, where a legal right is "'invaded,'" the law provides "'a legal remedy by suit or action at law.'" *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) (quoting 3 W. Blackstone Commentaries *23). It should prove possible to apply procedures adequate to that task here, perhaps by permitting lawsuits against a subset of delegatees (say, those particularly likely to exercise the delegated powers), or perhaps by permitting lawsuits against

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005812

officials whose actions are necessary to implement the statute's enforcement powers. There may be other not-very-new procedural bottles that can also adequately hold what is, in essence, very old and very important legal wine: The ability to ask the Judiciary to protect an individual from the invasion of a constitutional right—an invasion that threatens immediate and serious injury.

As THE CHIEF JUSTICE writes, this Court should not permit the law to take effect without assuring the applicants (and the respondents) an opportunity first and fully to make (or to refute) these and other arguments supporting the request for an injunction.

For these reasons, and for the reasons stated by THE CHIEF JUSTICE, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, I dissent.

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005813

SUPREME COURT OF THE UNITED STATES

No. 21A24

WHOLE WOMAN'S HEALTH ET AL. *v.* AUSTIN REEVE JACKSON, JUDGE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[September 1, 2021]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting.

The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the State's own invention. *Ante,* at 1. Because the Court's failure to act rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas, I dissent.

In May 2021, the Texas Legislature enacted S. B. 8 (the Act). The Act, which took effect statewide at midnight on September 1, makes it unlawful for physicians to perform abortions if they either detect cardiac activity in an embryo or fail to perform a test to detect such activity. §3 (to be codified at Tex. Health & Safety Code Ann. §§171.201(1), 171.204(a) (West 2021)). This equates to a near-categorical ban on abortions beginning six weeks after a woman's last menstrual period, before many women realize they are pregnant, and months before fetal viability. According to the applicants, who are abortion providers and advocates in

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005814

Texas, the Act immediately prohibits care for at least 85% of Texas abortion patients and will force many abortion clinics to close.

The Act is clearly unconstitutional under existing precedents. See, *e.g.*, *June Medical Servs. L. L. C.* v. *Russo*, 591 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring in judgment) (slip op., at 5) (explaining that "the State may not impose an undue burden on the woman's ability to obtain an abortion" of a "nonviable fetus" (citing *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992); internal quotation marks omitted)). The respondents do not even try to argue otherwise. Nor could they: No federal appellate court has upheld such a comprehensive prohibition on abortions before viability under current law.

The Texas Legislature was well aware of this binding precedent. To circumvent it, the Legislature took the extraordinary step of enlisting private citizens to do what the State could not. The Act authorizes any private citizen to file a lawsuit against any person who provides an abortion in violation of the Act, "aids or abets" such an abortion (including by paying for it) regardless of whether they know the abortion is prohibited under the Act, or even intends to engage in such conduct. §3 (to be codified at Tex. Health & Safety Code Ann. §171.208). Courts are required to enjoin the defendant from engaging in these actions in the future and to award the private-citizen plaintiff at least $10,000 in "statutory damages" for each forbidden abortion performed or aided by the defendant. *Ibid.* In effect, the Texas Legislature has deputized the State's citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors' medical procedures.

The Legislature fashioned this scheme because federal constitutional challenges to state laws ordinarily are brought against state officers who are in charge of enforcing

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005815

the law. See, *e.g.*, *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 254 (2011) (citing *Ex parte Young*, 209 U. S. 123 (1908)). By prohibiting state officers from enforcing the Act directly and relying instead on citizen bounty hunters, the Legislature sought to make it more complicated for federal courts to enjoin the Act on a statewide basis.

Taken together, the Act is a breathtaking act of defiance—of the Constitution, of this Court's precedents, and of the rights of women seeking abortions throughout Texas. But over six weeks after the applicants filed suit to prevent the Act from taking effect, a Fifth Circuit panel abruptly stayed all proceedings before the District Court and vacated a preliminary injunction hearing that was scheduled to begin on Monday. The applicants requested emergency relief from this Court, but the Court said nothing. The Act took effect at midnight last night.*

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* The Court's inaction has had immediate impact. Two hours before the Act took effect, one applicant reported that its waiting rooms were "'filled with patients"' urgently seeking care while "'protesters [we]re outside, shining lights on the parking [lot].'" De Vogue, Texas 6-Week Abortion Ban Takes Effect after Supreme Court Inaction, CNN (Sept. 1, 2021), www.cnn.com/2021/09/01/politics/texas-abortion-supreme-court-sb8-roe-wade/index.html. Then, at midnight, the Act became law, and many abortion providers, including applicants, ceased providing abortion care after more than six weeks from a woman's last menstrual period (LMP). See, *e.g.*, Alamo Women's Reproductive Care (Sept. 1, 2021), https://alamowomensclinic.com ("We cannot provide abortion services to anyone with detectable embryonic or fetal cardiac activity[,] which is typically found at 6 weeks or more from last menstrual period"); Southwestern Women's Surgery Center (Sept. 1, 2021), https://southwesternwomens.com/southwestern-womens-surgery-center-dallas-texas/ ("In compliance with Texas Senate Bill 8 of 2021, starting on September 1st 2021, our facility cannot provide abortions to patients with detectible embryonic or fetal cardiac activity, which typically starts at 6 weeks LMP"). Since then, at least one applicant has stopped providing abortions entirely. Planned Parenthood South Texas (Sept. 1, 2021), https://www.plannedparenthood.org/planned-parenthood-south-texas ("Due to Texas' SB 8 law, we are unable to provide abortion procedures

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005816

Today, the Court finally tells the Nation that it declined to act because, in short, the State's gambit worked. The structure of the State's scheme, the Court reasons, raises "complex and novel antecedent procedural questions" that counsel against granting the application, *ante,* at 1, just as the State intended. This is untenable. It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry. Moreover, the District Court held this case justiciable in a thorough and well-reasoned opinion after weeks of briefing and consideration. 2021 WL 3821062, *8–*26 (WD Tex., Aug. 25, 2021). At a minimum, this Court should have stayed implementation of the Act to allow the lower courts to evaluate these issues in the normal course. *Ante,* at 2 (ROBERTS, C. J., dissenting). Instead, the Court has rewarded the State's effort to delay federal review of a plainly unconstitutional statute, enacted in disregard of the Court's precedents, through procedural entanglements of the State's own creation.

The Court should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law.

I dissent.

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at this time").

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005817

SUPREME COURT OF THE UNITED STATES

No. 21A24

WHOLE WOMAN'S HEALTH ET AL. *v.* AUSTIN REEVE JACKSON, JUDGE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[September 1, 2021]

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Without full briefing or argument, and after less than 72 hours' thought, this Court greenlights the operation of Texas's patently unconstitutional law banning most abortions. The Court thus rewards Texas's scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State's behalf. As of last night, and because of this Court's ruling, Texas law prohibits abortions for the vast majority of women who seek them—in clear, and indeed undisputed, conflict with *Roe* and *Casey*.

Today's ruling illustrates just how far the Court's "shadow-docket" decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail. In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more un-

AMERICAN OVERSIGHT

MO-AG-22-0644-A-005818

reasoned, inconsistent, and impossible to defend. I respectfully dissent.

AMERICAN OVERSIGHT