No. 22-3272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF ARIZONA, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF FOR APPELLANTS

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INTRODUCTION

The "federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Congress constructed an immigration enforcement system whose "principal feature" is the "broad discretion exercised by immigration officials." *Id.* at 395-96. That congressional choice reflects the realities that the Executive has limited resources and that deciding how best to deploy those resources requires the exercise of discretion. Indeed, Congress has vested the Secretary of Homeland Security with the responsibility to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

For decades, the Executive has issued guidance informing immigration officers' exercise of their enforcement discretion. Last year, the Secretary of Homeland Security issued updated enforcement guidance encouraging officers to prioritize enforcement action against noncitizens who pose the greatest threats to national security, public safety, and border security. The guidance preserves officers' discretion to enforce the immigration laws on a case-by-case basis.

Arizona, Montana, and Ohio challenge that guidance, contending primarily that the Immigration and Nationality Act (INA) imposes inflexible mandates to detain and, in some cases, remove certain categories of noncitizens. According to the States, the guidance contradicts those supposed statutory mandates. The district court agreed and entered a nationwide preliminary injunction.

As a stay panel of this Court recognized, the States and district court have misread federal law. The relevant statutes contain no unyielding or judicially enforceable mandate displacing the Executive's deep-rooted enforcement discretion regarding whom to arrest and remove. The text, context, and history of the INA demonstrate Congress's intent to allow the Executive to exercise prosecutorial discretion as the Department of Homeland Security (DHS) has done here.

In addition, the States cannot establish the concrete, judicially cognizable injury required for standing. And the States' claims are not reviewable under the Administrative Procedure Act (APA) for multiple reasons. Thus, the States cannot show a likelihood of success on the merits. In addition, the remaining preliminary-injunction factors strongly counsel against cabining the federal government's enforcement discretion at the behest of the States.

Those flaws in the plaintiffs' claims reflect a more fundamental problem. For most of our Nation's history, a lawsuit like this one would have been unheard of: States did not sue the federal government based on the indirect, downstream effects of federal policies. And district judges did not purport to enter nationwide injunctions, which "take the judicial power beyond its traditionally understood uses," "incentivize forum shopping," and "short-circuit" the judicial process by forcing appellate courts to resolve complex disputes on short notice and without the benefit of percolation or full briefing. Stay Op. 19 (Sutton, C.J., concurring). Yet over the

last several years, lawsuits like this—relying on similarly attenuated claims of injury, and seeking nationwide relief—have become routine.

Lawsuits of this sort are inconsistent with bedrock Article III principles because they enmesh the judiciary in policy disputes between the States and the federal government that should be—and, until recently, have been—resolved through the democratic process. The Court should reaffirm the stay panel's conclusions and reverse the preliminary injunction.

STATEMENT OF JURISDICTION

As relevant to the claims at issue here, plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Complaint, R.1, Page ID #8. As explained below, the district court lacks jurisdiction over this case because plaintiffs do not have standing to sue, *see infra* pp. 16-25, and lacks jurisdiction to enter injunctive relief under 8 U.S.C. § 1252(f)(1), *see infra* p. 48. The district court granted plaintiffs' motion for a preliminary injunction on March 22, 2022. Order, R.44, Page ID #1068. Defendants timely appealed on March 28, 2022. Notice of Appeal, R.48, Page ID #1156. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in entering a nationwide preliminary injunction prohibiting the implementation of enforcement-prioritization guidance issued by the Secretary of Homeland Security.

STATEMENT OF THE CASE

A. Legal Background

The INA, 8 U.S.C. § 1101 *et seq.*, sets forth procedures for removal of noncitizens. As relevant here, the process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a). An immigration judge determines whether the noncitizen is removable and, if so, whether to enter a removal order. *Id.* § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12.

The INA also sets forth the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a). That framework "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies generally to removable noncitizens pending removal proceedings and allows the government "to issue warrants for their arrest and detention." *Id.* at 846. Such noncitizens may be released on bond or conditional parole. 8 U.S.C. § 1226(a)(2). 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, "when the alien is released" from criminal custody, and that DHS "may release [such] an alien . . . only if" a specified condition not relevant here is satisfied, 8 U.S.C. § 1226(c)(2).

Once a removal order is administratively final and other conditions are satisfied, DHS may remove the noncitizen. Section 1231 sets a "removal period" of

90 days and provides that noncitizens with final removal orders generally are subject to detention and removal during that period. 8 U.S.C. § 1231(a). It further provides that "[u]nder no circumstance during the removal period shall the [Secretary] release" a specified subset of noncitizens. *Id.* § 1231(a)(2). And, consistent with Congress's understanding that not "all reasonably foreseeable removals could be accomplished" within the removal period, *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), § 1231 provides additional instruction regarding the release and supervision of noncitizens who are not removed during the removal period, 8 U.S.C. § 1231(a)(3).

"A principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). "[A]s an initial matter," the Executive "must decide whether it makes sense to pursue removal at all." *Id.* And "the Executive has discretion to abandon the endeavor" at "each stage" of the removal process. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483 (1999). Those features of the immigration system reflect the reality of limited resources. For example, there are an estimated 11 million potentially removable noncitizens in the United States and more than 3 million noncitizens in removal proceedings or with final orders of removal. Considerations Memorandum 5-8, R.27-2, Page ID #447-50. Yet as of September 2021, United States Immigration and Customs Enforcement (ICE) had only approximately 6,500 officers, far too few trial attorneys to manage that many cases, and "the ability to

detain approximately 26,800 noncitizens at any given time—less than 1% of the number in removal proceedings or subject to orders of removal." *Id.*

B. Factual Background

This appeal concerns guidance issued by the Secretary of Homeland Security to guide agency officials' exercise of their enforcement discretion.

1. For decades, the Executive has adopted guidance to focus the use of limited resources. *See, e.g.*, Bernsen Op. (July 15, 1976), R.27-3, Page ID #464; Meissner Mem. (Nov. 17, 2000), R.27-4, Page ID #472; Morton Mem. (June 30, 2010), R.27-5, Page ID #485. Consistent with that history, when Congress established DHS, it directed the Secretary to develop "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

In January 2021, then-Acting Secretary David Pekoske directed DHS components "to conduct a review of policies and practices concerning immigration enforcement" and to develop recommendations concerning "policies for prioritizing" the agency's limited enforcement resources. Pekoske Mem. 1-2, R.27-9, Page ID #507-08. He also articulated interim enforcement priorities, with further guidance and granularity provided by ICE, *see* ICE Mem., R.27-10, Page ID #512, to guide officers' determinations during that review.

2. After thorough consideration and consultation with internal and external stakeholders, Secretary Alejandro Mayorkas issued the guidance at issue here on September 30, 2021. *See* Guidance, R.1-1, Page ID #24-30. The guidance begins by

observing that the "exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition." Guidance 2, R.1-1, Page ID #25. The guidance explains that DHS "do[es] not have the resources to apprehend and seek the removal of every one of" the "more than 11 million undocumented or otherwise removable noncitizens in the United States." *Id.* Thus, DHS necessarily must "exercise [its] discretion and determine whom to prioritize for immigration enforcement action." *Id.*

Specifically, "to most effectively achieve [the agency's] goals with the resources" available, the guidance directs agency officials to "prioritize for apprehension and removal noncitizens who are a threat to" national security, public safety, and border security. Guidance 3, R.1-1, Page ID #26. The guidance eschews "bright lines or categories" in determining whether any particular noncitizen constitutes a priority and instead "requires an assessment of the individual and the totality of the facts and circumstances." *Id.* For example, the guidance includes a non-exhaustive list of aggravating factors and mitigating factors for officers to consider in determining "whether the noncitizen poses a current threat to public safety." Guidance 3-4, R.1-1, Page ID #26-27. Similarly, with respect to border security, the guidance directs officials to "evaluate the totality of the facts and circumstances and exercise their judgment accordingly." Guidance 4, R.1-1, Page ID #27.

In all respects, "the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." Guidance 5, R.1-1, Page ID #28. It "does not

compel an action to be taken or not taken." *Id.* And it applies only to decisions related to "apprehension and removal," Guidance 1, R.1-1, Page ID #24; it therefore does not directly apply to the separate decision about whether a noncitizen who has been arrested should be released or detained.

C. Prior Proceedings

1. Plaintiffs, the States of Arizona, Montana, and Ohio, challenged the guidance in district court. The court entered a nationwide preliminary injunction prohibiting DHS from fully implementing the guidance. *See* Op. 78-79, R.44, Page ID #1145-46.

The district court concluded that plaintiffs have standing on the theory that the guidance would ultimately cause the States to spend some additional unspecified sum on "public safety," Medicaid, and education, and that plaintiffs' asserted "sovereign or quasi-sovereign interests" might also support their standing. Op. 19-28, R.44, Page ID #1086-95. The court rejected the federal government's arguments that the guidance was not subject to judicial review. Op. 28-52, R.44, Page ID #1095-119.

On the merits, the court held that the guidance impermissibly "displaces" what the court regarded as enforceable statutory mandates to apprehend and remove particular noncitizens; that the guidance was likely arbitrary and capricious for failing to consider all relevant factors and connect the guidance's approach to the agency's resource constraints; and that the guidance likely had to be issued through notice-and-comment rulemaking. Op. 52-71, R.44, Page ID #1119-38.

Finally, the court determined that plaintiffs' asserted financial effects constituted irreparable harm sufficient to justify a preliminary injunction and determined that a nationwide injunction, rather than one limited to the plaintiff States, was appropriate. Op. 71-78, R.44, Page ID # 1138-45. As the government understands it, the injunction prohibits immigration officers from relying on the guidance to: (1) decline to take custody, upon receiving advance and official notice of their release from criminal custody, of individuals who are currently in removal proceedings and whom DHS had previously determined are subject to § 1226(c); (2) decide whether to release certain detained individuals from DHS custody during the removal period; and (3) delay, continue, or stay the removal of anyone with a final order of removal who is currently in DHS custody. *See* Op. 78-79, R.44, Page ID #1145-46.

2. The government appealed and moved for a stay pending appeal. After briefing and argument, a motions panel of this Court unanimously granted a stay.

At the outset, the Court determined that plaintiffs had likely not demonstrated standing to sue. The Court explained that plaintiffs' alleged harms based on increased expenditures they may make were impermissibly "speculative," both because it is not clear that any prioritization will occasion an increase in plaintiffs' expenditures and because the asserted injuries "turn[] on" discretionary "choices made by" DHS officers. Stay Op. 5-7. It also concluded that those asserted harms, which are not "uniquely sovereign," do not appear to qualify as the sort of interests for which States

may receive "special solicitude" in the standing analysis. Stay Op. 7-8 (quotation omitted).

Next, the Court concluded that the guidance is likely not "final agency action," 5 U.S.C. § 704, reviewable under the APA. The Court concluded that the guidance likely lacked legal effect because it "preserves officials' discretion," "makes clear that it" does not create any rights or benefits, and does not impose any "direct or appreciable legal consequences" on anybody, Stay Op. 9-12 (quotation omitted).

In addition, the Court expressed "doubts about the merits of the States' arguments that the" guidance violates the APA. Stay Op. 12. First, the Court concluded that, in light of the INA's history and context and the "considerable discretion already baked into the immigration system," §§ 1226(c) and 1231 likely do not "create[] a judicially enforceable mandate that the Department arrest or remove certain noncitizens." Stay Op. 12-15. Second, the Court explained that DHS likely "address[ed] relevant concerns" and "offered a satisfactory explanation for" the guidance, meaning plaintiffs are unlikely to succeed on their arbitrary-and-capricious claim. Stay Op. 15-16. Third, the Court determined that notice and comment were likely not required because the guidance is a "general statement[] of policy," 5 U.S.C. § 553(b)(A). Stay Op. 16. Finally, the Court concluded that the equitable factors favored a stay. Such relief "should not substantially injure" plaintiffs, given the speculative nature of their alleged injuries, and avoids irreparable harm to the Executive caused by the preliminary injunction's "interfering with [DHS's] authority

to exercise enforcement discretion and allocate resources toward this administration's priorities." Stay Op. 16-17.

Chief Judge Sutton concurred to state his additional view that the district court's nationwide injunction "likely exceeded its authority." Stay Op. 18 (Sutton, C.J., concurring). He explained that constitutional and equitable principles generally require courts to "grant relief in a party-specific and injury-focused manner," rather than allowing relief to run to nonparties. Stay Op. 18-19 (Sutton, C.J., concurring). And nationwide injunctions additionally circumvent the class-action mechanism and create numerous practical problems for litigants and courts. Stay Op. 19 (Sutton, C.J., concurring). Thus, Chief Judge Sutton concluded, the "sooner" that nationwide injunctions "are confined to discrete settings or eliminated root and branch the better." Stay Op. 21 (Sutton, C.J., concurring).

SUMMARY OF ARGUMENT

I. The States lack standing. Most fundamentally, the district court erred in allowing the States to sue based on the guidance's potential indirect consequences on state expenditures. Given the nature of our federal system and the breadth of state and federal activities, countless federal policies could be said to have comparable indirect effects on the States. Treating those incidental effects as sufficient to create an Article III case or controversy would allow the federal courts to be drawn into all manner of generalized grievances at the behest of States seeking to secure by court order what they were unable to obtain through the political process. Indeed, the last

several years has seen an explosion of lawsuits by States seeking to do just that. Those novel lawsuits are foreign to our constitutional tradition and inconsistent with fundamental Article III principles, which exist to prevent courts from becoming venues for such generalized grievances.

In any event, the States' main theory of standing fails because it layers speculation on speculation. The States claim that implementation of the guidance will decrease immigration enforcement against noncitizens covered by §§ 1226(c) and 1231(a)(2) in the States and increase the number of noncitizens in the States and the States will then expend additional funds in response to crimes committed or benefits claimed by those noncitizens. But nothing in the guidance requires any reduction in overall immigration enforcement, much less a reduction in enforcement against noncitizens who might cause the States to expend money; to the contrary, the guidance is designed to direct enforcement resources toward the noncitizens who pose the greatest threat to national security, public safety, and border security—and who may well impose the largest fiscal burdens on the States.

II. The States' claims are also unreviewable as a statutory matter. First, the States' claims fail because the guidance is not "final agency action" subject to judicial review, 5 U.S.C. § 704, because it does not determine legal "rights or obligations," *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted), or have any other direct and appreciable legal consequences. The guidance merely articulates a set of priorities to guide agency personnel's future exercise of enforcement discretion in individual

cases. It does not require or forbid any action by any third party, it does not confer any legal benefits, and it preserves immigration officials' independent decisionmaking authority to determine whether to take enforcement action under the circumstances of any given case.

In addition, the States' claims are unreviewable because issuance of the guidance is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The choice whether to pursue particular enforcement actions "is a decision generally committed to an agency's absolute discretion" because it requires the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

The district court held that 8 U.S.C. §§ 1226(c) and 1231(a) override the Executive's discretion by imposing a mandatory, judicially enforceable command to arrest and remove certain noncitizens. But the Supreme Court has recognized that language similar to that used in those provisions cannot overcome the "deep-rooted nature of law-enforcement discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005).

Finally, judicial review is precluded and the States fail to satisfy the zone-of-interests test. Nothing in the text, structure, or purpose of either § 1226(c) or § 1231(a) suggests that Congress intended to permit States to proceed with a suit like this one.

III. The States' APA claims also fail on the merits. The guidance does not exceed DHS's statutory authority. Sections 1226(c) and 1231(a) cannot be read to impose any enforceable, unyielding command on the Secretary to arrest or remove any particular noncitizen, particularly in light of resource constraints and the substantial enforcement discretion baked into the INA. In any event, the guidance does not forbid officials from taking any enforcement action that the States claim the INA requires.

The States' arbitrary-and-capricious arguments fare no better. The administrative record belies the States' assertions that DHS failed to consider certain specific issues or to provide a reasoned explanation for its decision. DHS addressed each of the identified issues in depth in the administrative record and fully explained its own resource constraints and the need for prioritization.

The States are likewise mistaken to claim that the guidance required notice and comment. The APA's notice-and-comment requirements do not apply because the guidance is a "general statement[] of policy," 5 U.S.C. § 553(b)(A), that "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). DHS and its predecessor agencies have thus issued similar guidance for decades and have never used notice-and-comment rulemaking to do so.

IV. In any event, the potential for increased expenditures by plaintiffs could not support preliminary injunctive relief. A preliminary injunction would severely

harm the government and the public interest by intruding on the Executive's constitutional prerogatives, undermining the Secretary's expert determinations about how to address public safety and other important concerns, sowing confusion among enforcement officials, and preventing DHS from fully implementing a policy that has already demonstrated positive results.

V. Even if plaintiffs were entitled to some relief, the district court erred in granting a nationwide preliminary injunction. For one, the court did not have jurisdiction to enter any injunctive relief disconnected from the detention or removal of any particular noncitizen. *See* 8 U.S.C. § 1252(f)(1). In addition, the particular injunction entered contravenes core principles of Article II and of equity by extending relief well beyond the parties to this lawsuit. The injunction also illustrates the legal and practical problems caused by courts' increasing willingness to enter relief of this sort.

STANDARD OF REVIEW

A district court's "decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 546 (6th Cir. 2021) (quotation omitted). This Court "review[s] the district court's legal conclusions *de novo* and its factual findings for clear error." *Id.* (quotation omitted).

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The movant must

show that it is "likely to succeed on the merits," that it "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Plaintiffs have failed to carry their burden with respect to any of these factors.

I. Plaintiffs Lack Article III Standing

"The law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation omitted). "Under Article III, federal courts do not adjudicate hypothetical and abstract disputes" and "do not exercise general legal oversight of the Legislative and Executive Branches." *Id.* Instead, to establish standing, a plaintiff must prove (1) that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that the injury is "fairly traceable to the challenged conduct of the defendant, and not the result of the independent action of some third party not before the court," and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations, citations, and quotations omitted). The district court erred in concluding that these requirements were satisfied here.

1. Most fundamentally, the district court erroneously held that even when a federal policy neither regulates nor has any other direct effect on a State, the State may leverage the policy's potential downstream effects on its expenditures into an Article

III case or controversy. The States' theory reduces to the assertion that any federal action increasing the number of noncitizens within their borders inflicts an Article III injury because it increases their expenditures. Other States could use equivalent logic to claim the same thing about any action reducing their noncitizen populations, perhaps on the theory that noncitizens pay state taxes. If such incidental financial consequences were deemed sufficient to satisfy Article III, the federal courts could be drawn into every immigration policy dispute between a State and the federal government.

Nor is the problem limited to immigration. Virtually any federal action—from taxes to federal land management to criminal prosecution to regulatory and enforcement policies of all sorts—could be said to have some incidental impact on a State's fisc. But as the stay panel recognized, it would be astonishing "to say that any federal regulation of individuals through a policy statement that imposes peripheral costs on a State creates a cognizable Article III injury." Stay Op. 8. Adopting that view would draw the federal courts into all manner of generalized grievances at the behest of States seeking to secure by court order what they were unable to obtain through the political process.

That result cannot be squared with Article III, which "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), by preserving the "proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422

U.S. 490, 498 (1975). The recent explosion of suits brought by States with conflicting policy views seeking nationwide injunctions against national immigration and other policies vividly illustrates that this is far from a hypothetical concern. That novel and troubling development should lead the courts to examine deeply whether suits like this are consistent with our constitutional structure and tradition. They are not—for multiple reinforcing reasons.

First, suits like this one are inconsistent with our federal system. The Framers established a National Government with the power to act directly on individuals, not through the States as under the Articles of Confederation. *See New York v. United States*, 505 U.S. 144, 162-66 (1992); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). It was to be expected at the time of the Framing, as it is now, that when the federal government takes actions affecting individuals within a State, there may be incidental effects on that State's own actions affecting those same individuals. But the necessary autonomy of the national and state sovereigns, each acting directly upon individuals, is inconsistent with the notion that a State has a legally protected interest in avoiding those incidental and derivative effects.

Instead, whatever additional expenditures or other responses the State may make in light of those incidental effects are an expression of its own distinct sovereignty, not a judicially cognizable injury caused by the federal government. The proper channel for seeking a change in the federal policy incidentally affecting the State is for the State's citizens to advocate that change to their representatives in

Congress or to the federal agency concerned. That course—not resort to the judiciary—is the one the Framers anticipated. *See, e.g.*, *The Federalist No. 84*, at 516-17 (C. Rossiter ed. 1961). And as the Supreme Court emphasized in rejecting another novel theory of standing, the absence of suits like this one during the vast majority of our Nation's history is powerful evidence that such suits are incompatible with our constitutional structure, which "contemplates a more restricted role for Article III courts." *Raines v. Byrd*, 521 U.S. 811, 828 (1997).

Second, the Supreme Court has emphasized that standing is more difficult to establish where, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 504 U.S. at 562; *see, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2117 (2021); *Clapper*, 568 U.S. at 414. In such cases, the plaintiff's injury often cannot be deemed fairly traceable to the defendant, but instead is attributable to "the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Those principles apply with special force to suits by States: Where the possible effects of the federal policy on a State's spending decisions are mediated through the actions of, or the policy's effects on, the State's own inhabitants—as here, where the claims of harm are premised on commission of crimes or the consumption of state services—the structure of the Constitution counsels strongly against concluding that those incidental effects on the State are "fairly traceable" to the federal policy. The Supreme Court applied those principles in *Florida v. Mellon*, 273

U.S. 12 (1927). There, the Court rejected Florida's assertion that it had standing to challenge a federal tax law that would assertedly cause "tax-payers to withdraw property from the state," thereby diminishing its tax revenues. *Id.* at 17. The Court explained that the State's asserted injury was, "at most, only remote and indirect" and that the State had failed to establish "any *direct* injury" attributable to the federal law. *Id.* at 18.

Third, a plaintiff's already-heavy burden to demonstrate standing based on regulation or nonregulation of others ordinarily becomes insurmountable where, as here, the plaintiff challenges a federal law-enforcement policy. "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). An individual thus "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* An individual similarly has "no judicially cognizable interest in procuring enforcement of the immigration laws" against someone else. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). And a State, like a private individual, has no judicially cognizable interest in the enforcement or nonenforcement of the immigration laws against someone else, or in policies concerning such enforcement. The Constitution assigns the formation and enforcement of immigration policies exclusively to the National Government precisely because immigration is inherently a subject of national concern. *See Arizona*

v. United States, 567 U.S. 387, 394-95 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).

Finally, plaintiffs' asserted injuries do not include any sovereign or quasi-sovereign interest. The guidance does not impose any "regulation of [plaintiffs] as States," cause any physical "incursion[] on their territory," or create a "public nuisance[]" that threatens any State's ability "to safeguard its domain and its health, comfort and welfare," Stay Op. 7-8 (quotation omitted), even assuming that such an asserted nuisance would support a suit against the federal government. And even to the extent that the States attempted to assert any such sovereign interests in this case, they would run into the fundamental problem that "the key sovereign with authority and 'solicitude' with respect to immigration" is the federal government, "not the States." *Id.*

2. Plaintiffs' claim of standing fails even on its own terms. The district court's contrary conclusion rests on a series of unsupported assertions—that the guidance will reduce immigration enforcement and increase the number of noncitizens in plaintiff States and that plaintiffs will expend additional funds related to those noncitizens. Because "considerable speculation undergirds this claim," Stay Op. 5, the States have not demonstrated the requisite concrete and imminent—much less judicially cognizable—harm.

First, plaintiffs' predictions about the effect of the guidance on noncitizen populations are wholly speculative. Nothing in the guidance requires a reduction in

immigration enforcement. The guidance encourages officers to prioritize those noncitizens who pose the greatest threat to safety and security, including those who have recently entered the United States. But the fact that the government "decides to remove or detain person A over person B does not establish that it will pursue fewer people, particularly with respect to a Guidance that never *requires* agents to detain some noncitizens over others." Stay Op. 5.

In concluding otherwise, the district court relied on statistics proffered by plaintiffs suggesting that overall removals were much lower in January-July 2021 than they were in January-July 2019. Op. 24, R.44, Page ID #1091-92. But those cherry-picked statistics do not support the district court's conclusion. Most importantly, they do not account for noncitizens detained at, or expelled from, the border. DHS's "detention population is increasingly occupied by recent border crossers," and the guidance has permitted DHS to deploy additional resources to the border to address the "pressing operational needs" there. Bible Decl. ¶¶ 7-8, 49, R.49-1, Page ID #1180-81, 1198-99. Indeed, comparing October 2021-April 2022 to October 2019-April 2020, ICE has increased the number of individuals booked into ICE custody in each month (with a much larger percentage of book-ins coming from CBP arrests, reflecting increased activity at the border), and DHS undertook more than 600,000

expulsions in January-July 2021 under a public-health order that was not in existence in 2019.[1]

Nor have plaintiffs demonstrated a "certainly impending," *Clapper*, 568 U.S. at 409 (emphasis and quotation omitted), and material increase in State expenditures in areas such as criminal law enforcement in light of the guidance. The guidance is designed to direct resources toward those noncitizens whom DHS has determined pose the greatest threat to public safety or national or border security. And the record confirms that such prioritization has had that effect—such as by allowing DHS to arrest substantially more noncitizens convicted of aggravated felonies under the interim priorities, *see* Considerations Memorandum 17, R.27-2, Page ID #459, and to direct hundreds of additional officers to the Nation's southwest border, Bible Decl. ¶ 49, R.49-1, Page ID #1198-99. "Because the Guidance prioritizes the noncitizens with the greatest risks to public safety, it also is hard to know whether fewer detentions and removals means more injuries to States even on their own terms." Stay Op. 5-6.

The States' argument also ignores the Supreme Court's repeated admonition that courts should not lightly rely on the actions of third parties to establish that a plaintiff has standing. *See supra* pp. 19-20. Here, plaintiffs' asserted chain of causation

[1] For detention statistics, see spreadsheets at ICE, *Detention Management* (last visited May 3, 2022), https://go.usa.gov/xuUpf. And for expulsion statistics, see CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021* (last visited May 3, 2022), https://go.usa.gov/xuUph.

"hinge[s] on the response" of multiple other actors, *Lujan*, 504 U.S. at 562: the decisions of "individual immigration officers," who "retain control over the volume of removals and detentions they effect" (subject to the agency's broader resource constraints), Stay Op. 6, and the independent decisions of noncitizens to engage in activities that in turn may lead the plaintiff States, as independent sovereigns, to expend more resources.

The D.C. Circuit rejected a materially identical theory of standing in *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), where a county sheriff asserted that a federal immigration policy would result in more noncitizens remaining in his county and that "some portion of those [noncitizens] will commit crimes," *id.* at 24. The D.C. Circuit explained that the challenged programs were "designed to remove *more* criminals in lieu of removals of undocumented aliens who commit no offenses or only minor violations." *Id.* Accordingly, the court held that the sheriff's theory was nothing more than "unsupported assumption[s]" and "speculation." *Id.* So too here.

Moreover, many of the additional incidental expenses that the district court identified as potential sources for the States' standing—such as those related to the States' decisions to place some noncitizens on supervised release or stemming from Medicaid and education expenses, Op. 24-26, R.44, Page ID #1091-93—run into even more hurdles. Litigants cannot spend their way to standing. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020). And the district court cited no evidence suggesting that the plaintiff States are likely to spend more funds related to

the particular noncitizens who remain within their borders following the guidance than they would on the noncitizens who would remain within their borders absent the guidance—or that any such effects would not be outweighed by DHS's decision to focus on border security and on noncitizens most likely to endanger public safety.

Finally, plaintiffs could not prevail even if they had identified injuries sufficient to support their standing because they have failed to demonstrate that any injunction would redress those injuries. DHS cannot enforce the INA against all noncitizens potentially described in §§ 1226(c) and 1231(a), and no injunction could alter that reality. Bible Decl. ¶ 23, R.49-1, Page ID #1186-87. Those redressability problems are only compounded by the fact that the federal government retains substantial discretion regarding which noncitizens to pursue for arrest and removal in the first place; the "States do not challenge this classic form of prosecutorial discretion, and the consequential exercise of discretion when it comes to noncitizen populations in" plaintiff States. Stay Op. 6. Thus, the injunction "would not necessarily result in the Department arresting more people, detaining more people, or removing more people." *Id.*

II. Plaintiffs' Claims Are Unreviewable

A. The Guidance Is Not Final Agency Action

As the stay panel properly recognized, *see* Stay Op. 9-12, the guidance is not final agency action subject to judicial review. An action is "final" only if it represents "the consummation of the agency's decisionmaking process" and determines legal

"rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation omitted). Because the guidance does not determine any legal rights or obligations, it is not final.

To assess whether agency action has sufficient legal effect for purposes of finality, this Court has provided "some guidance and sharpening inquiries." Stay Op. 9 (citing *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162 (6th Cir. 2017)). On the one hand, actions that impose liability on third parties or bind government actors with respect to future actions that in turn affect private parties are likely final. Conversely, an action that preserves officials' "independent decisionmaking" authority is likely not final, even if officials may "discretionarily rel[y] on" the action to guide their future decisions. *Parsons*, 878 F.3d at 170. In such a circumstance, any consequence that flows from the "third-party's independent decision" does not constitute the requisite "direct or appreciable legal consequence" of the underlying action. *Id.* at 168, 170; *cf. Dalton v. Specter*, 511 U.S. 462, 469 (1994); *Jama v. DHS*, 760 F.3d 490, 496 (6th Cir. 2014).

The guidance articulates a set of priorities to guide agency officials' future exercise of enforcement discretion in individual cases. The priorities do not alter any noncitizen's rights or obligations; they do not, for example, confer lawful status or presence or other legal benefits on any noncitizen, nor may a noncitizen invoke them as a defense in any enforcement action. Instead, the guidance itself emphasizes that it "does not compel an action to be taken or not taken" and is "not intended to, does

not, and may not be relied upon to create any right or benefit." Guidance 5-7, R.1-1, Page ID #28-30; *cf. National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (explaining that similar language weighs in favor of nonfinality).

The guidance reinforces its discretion-preserving character throughout. For example, in discussing public-safety priorities, the guidance simply provides "examples of aggravating and mitigating factors [that] are not exhaustive," and it stresses that the "specific facts of a case should be determinative" and that officials should "evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." Guidance 3-4, R.1-1, Page ID #26-27. And in discussing border security, the guidance similarly emphasizes that officers are to "evaluate the totality of the facts and circumstances and exercise their judgment accordingly." Guidance 4, R.1-1, Page ID #27. Thus, as the stay panel concluded, the guidance "has the telltale signs of a non-binding policy statement, not of reviewable agency action." Stay Op. 10.

The district court suggested that the guidance alters noncitizens' rights because it allegedly allows immigration officers to make "custody determinations" and "non-removal decisions for reasons" that §§ 1226(c) and 1231(a) do not permit. Op. 48, R.44, Page ID #1115. That rests on the flawed premise that, even in the face of severe resource limitations and other enforcement considerations, §§ 1226(c) and 1231(a) eliminate the Executive's enforcement discretion regarding whom to arrest or remove. It also misunderstands the guidance, which does not govern detention

decisions, confers no legal rights on noncitizens, and permits officers to pursue enforcement action against any removable noncitizen in the exercise of officials' individualized discretion. And it misunderstands the relevant legal principles, which focus not on whether the action provides guidance to agency employees but instead on whether the action has an "actual legal effect" on "regulated entities," *National Mining Ass'n*, 758 F.3d at 252. The guidance does not do so.

The district court emphasized that the guidance may adversely affect plaintiffs' fiscs. Op. 48-49, R.44, Page ID #1115-16. But such speculative and incidental effects are not the "direct and appreciable legal" consequences that finality demands. *Bennett*, 520 U.S. at 178; *see also Parsons*, 878 F.3d at 167-70. To the extent that they exist at all, *but see supra* pp. 21-25, they are the indirect result of case-by-case decisions made by individual immigration officers, noncitizens' own choices, the States' independent spending decisions, and the operation of other laws. Such "practical consequences" contingent on future exercises of "independent decisionmaking" "are not legal" harms for purposes of finality. *Parsons*, 878 F.3d at 168-70; *accord Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645 (6th Cir. 2004) ("[A]dverse economic effects accompany many forms of indisputably non-final government action."). Thus, as the stay panel properly explained, "[w]hatever costs the Guidance creates for the States downstream arise only from officials who exercise their discretion under the Guidance, confirming that those costs are not the Guidance's direct or appreciable legal consequences." Stay Op. 10 (quotation omitted).

B. Immigration Enforcement Decisions Are Committed To Agency Discretion

1. Under the APA, a plaintiff may not obtain judicial review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Enforcement decisions are "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* For example, an agency must assess not only the existence and severity of a violation but also "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action." *Id.* And particularly where limited resources mean that an "agency generally cannot act against each technical violation of the statute it is charged with enforcing," it is DHS and ICE—not the courts or third parties like the States—that are best positioned "to deal with the many variables involved in the proper ordering of [their] priorities." *Id.* at 831-32.

Those "concerns are greatly magnified in the deportation context." *AADC*, 525 U.S. 471, 490 (1999). Not only does that context present the usual factors that require the exercise of discretion, such as resource limitations and achieving the agency's mission, but immigration enforcement and related policy also may "affect

trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws," *Arizona*, 567 U.S. at 395; *see Jama v. ICE*, 543 U.S. 335, 348 (2005); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

For these reasons, Congress constructed a removal system that has as a "principal feature" the "broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. That system gives the Executive the discretion to decide "whether it makes sense to pursue removal at all," *id.*, and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. at 483. Congress accordingly vested the Secretary with the responsibility to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "issue such instructions" and "perform such other acts as he deems necessary for carrying out his authority" under the INA, 8 U.S.C. § 1103(a)(3). And, at the same time, Congress has never appropriated anywhere near sufficient funds to permit the detention and removal of every removable noncitizen, Bible Decl. ¶¶ 19-20, R.49-1, Page ID #1184-85, making clear Congress's understanding that the Executive must exercise its discretion regarding how best to use its limited resources to enforce the INA.

Underscoring the extent of the Executive's enforcement discretion, Congress provided that, generally, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to

commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). That provision reflects Congress's desire to "protect[] the Executive's discretion from the courts" in general and from "attempts to impose judicial constraints upon prosecutorial discretion" in particular. *AADC*, 525 U.S. at 485-86, 485 n.9. If a noncitizen may not challenge any such enforcement decision, it follows a fortiori that third parties—including States—may not challenge decisions by DHS regarding when it is appropriate to take, or not take, such enforcement actions.

2. The district court did not dispute those general principles. Instead, it concluded that the guidance at issue here was not committed to agency discretion by law, because in its view §§ 1226(c) and 1231(a) either eliminate the Executive's discretion by using the word "shall" or, at the least, provide judicially manageable standards to permit judicial review. Op. 32-39, R.44, Page ID #1099-106. The first of those conclusions misinterprets the relevant statutory provisions, and the second misunderstands the relevant legal principles.

First, as explained below, *see infra* pp. 34-38, the Supreme Court has repeatedly held that the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands"—including those that use "shall." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). And here, every relevant feature of the INA in general, and of §§ 1226(c) and 1231(a) in particular, confirms that Congress did not intend either provision to constitute a judicially

enforceable limit on the Executive's enforcement discretion, especially in light of resource constraints and other enforcement considerations. Thus, those provisions cannot provide a basis to disregard the general presumption that enforcement decisions are committed to the agency's "absolute discretion" and are unreviewable under the APA. *Heckler*, 470 U.S. at 831.

Second, the district court's conclusion that §§ 1226(c) and 1231(a) provide "'judicially manageable' standard[s] to gauge DHS's exercise of discretion against," Op. 37, R.44, Page ID #1104, mistakenly conflates two distinct doctrines. An action is committed to agency discretion by law "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quotation omitted). This doctrine starts with the presumption that action is reviewable and requires courts to assess whether the relevant statute provides "judicially manageable standards" for "judging how and when an agency should exercise its discretion." *Heckler*, 470 U.S. at 830.

The presumption is reversed, however, with respect to decisions that have "traditionally been 'committed to agency discretion,'" including "an agency's decision not to take enforcement action." *Heckler*, 470 U.S. at 832; *cf. Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993) (cataloguing additional categories of such decisions). In those circumstances, the Supreme Court has explained, *Overton Park*'s standard and

presumptions regarding reviewability do not apply; instead, "the presumption is that judicial review is not available." *Heckler*, 470 U.S. at 831.

C. Plaintiffs' Claims Are Precluded By The INA And Do Not Fall Within The Zone Of Interests Of The Statutes They Seek To Enforce

For similar reasons, judicial review is precluded in this case, *see* 5 U.S.C. § 701(a)(1), and plaintiffs' claims do not fall within the zone of interests of 8 U.S.C. § 1226(c) or § 1231(a).

Nothing in the text, structure, or purpose of the INA generally, or §§ 1226 and 1231 specifically, suggests that Congress intended to permit a State to invoke attenuated effects of immigration enforcement policies on state expenditures to contest those policies. To the contrary, the INA throughout reflects the principle that immigration enforcement is exclusively the province of the National Government and the Executive. *See supra* pp. 18-21, 29-31; *infra* pp. 36-38. And the unavailability of judicial review is confirmed by the general rule that third parties have no cognizable legal interest in compelling the enforcement of immigration laws against others, *see Sure-Tan*, 467 U.S. at 897. In light of those principles, it is unsurprising that Congress has provided in the INA that only a noncitizen against whom the immigration laws are being enforced may challenge application of those laws. *See* 8 U.S.C. § 1252(b)(9). Allowing a State or other third party to challenge the Executive's immigration-enforcement decisions through the APA would circumvent Congress's design. Such claims are therefore precluded.

The zone-of-interests inquiry asks whether Congress intended for the APA's cause of action to encompass the particular plaintiff's attempt to invoke a particular statute to challenge agency action. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Here, as explained, plaintiffs have no right of review because their "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*, 479 U.S. at 399.

III. Plaintiffs Cannot Prevail On The Merits Of Their Claims

A. The Guidance Is Not Contrary To Law

The district court incorrectly concluded that the revised guidance violates the INA. Op. 52, R.44, Page ID #1119. In its view, §§ 1226(c) and 1231(a) constitute unyielding and judicially enforceable mandates to arrest, detain, or remove certain noncitizens. And according to the court, the guidance is contrary to those supposed mandates because it "authorizes" DHS officials to make arrest and removal decisions that do not follow the statute. *Id.* As the stay panel recognized, *see* Stay Op. 12-15, that analysis fails at each step.

1. As an initial matter, §§ 1226(c) and 1231(a) do not create a judicially enforceable mandate to arrest or remove any noncitizen.

Any interpretation of those provisions must begin from the starting point that, as explained, *see supra* pp. 29-31, the decision whether or not to pursue enforcement

action in any case is "generally committed to [the] agency's absolute discretion," *Heckler*, 470 U.S. at 831. That general rule reflects the realities that the Executive usually cannot act against every violation of every statute it is charged with enforcing and that it is the Executive that is best positioned to consider and weigh the many factors required to determine how best to allocate resources across enforcement efforts. *See id.* at 831-32. That principle has particular force in the immigration context, where Congress has constructed an enforcement system that has "considerable discretion already baked into" it. Stay Op. 12.

The district court concluded that §§ 1226(c) and 1231(a) displace the Executive's inherent enforcement discretion, mandating the arrest and removal of particular noncitizens, primarily because each provision uses the word "shall." *See* Op. 34-38, R.44, Page ID #1101-05. In particular, § 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 v. Rodriguez*, 138 S. Ct. 830, 837 (2018), "when the alien is released" from criminal custody. Section 1231 sets a "removal period" of 90 days and states that the government "shall detain" the noncitizen during that period. 8 U.S.C. § 1231(a).

But the Supreme Court has repeatedly rejected similar arguments across a range of enforcement contexts, explaining that the Executive's "deep-rooted" enforcement discretion has "long coexisted with apparently mandatory arrest statutes" and persists "even in the presence of seemingly mandatory legislative commands." *Castle Rock*,

545 U.S. at 760-61; *see also, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 59, 62 n.32 (1999) (rejecting the notion that an ordinance providing that police officers "shall order" people to disperse in certain circumstances "affords the police no discretion" (emphasis and quotation omitted)); *Heckler*, 470 U.S. at 835 (confirming that a statute providing "baldly that any person who violates the Act's substantive prohibitions 'shall be imprisoned . . . or fined'" did not remove the Executive's enforcement discretion (alteration in original)). Instead, a "stronger indication" of congressional intent is required before a court should conclude that Congress meant to circumscribe the Executive's inherent discretion whether to take enforcement action. *Castle Rock*, 545 U.S. at 761.

And in the context of §§ 1226(c) and 1231(a), every relevant tool of statutory interpretation confirms the contrary: Congress did not intend either provision as an unyielding or judicially enforceable constraint on the Executive's actions. First, the INA insulates decisions under both provisions from judicial review. In particular, Congress has explicitly provided that the Secretary's "discretionary judgment regarding the application of [§ 1226] shall not be subject to review" and has prohibited courts from "set[ting] aside any action or decision" by the Secretary "under this section regarding the detention or release of any alien." 8 U.S.C. § 1226(e). And Congress has similarly foreclosed suits to challenge applications of § 1231, providing that "[n]othing" in that 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." *Id.* § 1231(h).

Second, § 1226 only authorizes the detention of noncitizens "pending the outcome of removal proceedings." *Jennings*, 138 S. Ct. at 838. Section 1226 does not address the antecedent decision whether to initiate or continue to pursue removal proceedings against a particular noncitizen, which rests in the sole, unreviewable discretion of the Executive Branch. *See Arizona*, 567 U.S. at 396 (recognizing the Executive's discretion to decide "whether it makes sense to pursue removal at all"). Because detention authority is contingent on a separate, unreviewable exercise of prosecutorial discretion, the decision whether to arrest and detain a particular noncitizen is encompassed within that prosecutorial discretion.

Third, with respect to § 1231, "Congress itself appreciated that removal would not always occur within 90 days." Stay Op. 13-14. Indeed, Congress has enacted provisions to govern the release of noncitizens after the expiration of the removal period. *See* 8 U.S.C. § 1231(a)(3). Thus, as the Supreme Court has explained, there is considerable "doubt" that "when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

Fourth, the INA is a highly reticulated scheme, and DHS is charged with enforcing a wide range of INA provisions affecting many different groups of noncitizens. Congress has vested the Secretary with the responsibility to establish

"national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), reflecting a recognition that the Secretary is in the best position to appropriately determine how best to allocate the agency's limited resources across all aspects of the statutory scheme. By contrast, if the States' view of the statute were correct and any given State could obtain an injunction requiring the Secretary to concentrate enforcement on one aspect of the scheme or another, it would be States and federal courts, rather than the Executive, that would be in the position to determine how the agency uses its limited resources. And the agency could be in an untenable position as different States with different policy preferences sought different injunctions requiring prioritization of different aspects of the scheme.

Finally, Congress has never appropriated anywhere near sufficient funds to permit the detention and removal of every noncitizen potentially covered by §§ 1226(c) and 1231(a). Bible Decl. ¶¶ 19-20, R.49-1, Page ID #1184-85; *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 386(a), 110 Stat. 3009-546, 3009-653 (providing funding only to support "at least 9,000 beds" during fiscal year 1997). And accepting the district court's contrary interpretation of those provisions would mean that every Administration has been violating them since their enactment in 1996.

2. Thus, properly understood, §§ 1226(c) and 1231(a) do not provide judicially enforceable constraints on DHS's judgment regarding which noncitizens to arrest or

remove. That by itself is sufficient to resolve plaintiffs' claim that the guidance is contrary to those provisions. But plaintiffs' claim also fails for two additional reasons.

First, even if § 1226(c) or § 1231(a) imposed some inflexible requirement that third parties could judicially enforce, it would only be with respect to portions of those provisions: § 1226(c)(2), which bars DHS from releasing certain noncitizens who have already been taken into custody and are detained "pending the outcome of removal proceedings," *Jennings*, 138 S. Ct. at 838, and the second sentence of § 1231(a)(2), which bars the release of certain detained noncitizens during the removal period. But as DHS explained in issuing the guidance, it has long "recognize[d]" those "constraints on its authority," and nothing in the guidance "override[s]" those obligations. Considerations Memorandum 18-19, R.27-2, Page ID #460-61. Indeed, the guidance itself applies only to decisions whether to arrest and remove noncitizens; it does not apply by its own terms to the separate decision whether to release noncitizens from detention. *See id.*; Guidance 1, R.1-1, Page ID #24. There accordingly is no justification for an injunction addressing the constraints on release in § 1226(c)(2) and the second sentence of § 1231(a)(2).

Second, the guidance does not require any officer to forbear from arresting or removing a noncitizen in any given case. To reiterate, the guidance preserves individual officers' discretion to exercise their individual judgment—appropriately guided by the INA's provisions—to determine whether enforcement action is warranted in any given case, including in any case involving a noncitizen described in

§ 1226(c) or § 1231(a). *See supra* pp. 26-28. The guidance thus does not violate even the States' incorrect interpretation of §§ 1226(c) and 1231(a) because it does not prohibit any official from taking any of the actions that the States think those provisions require.

B. The Guidance Is Not Arbitrary And Capricious

The district court next concluded that the guidance was arbitrary and capricious because DHS failed to adequately consider the "recidivist risk presented by criminal aliens" and the costs that the guidance would allegedly inflict upon the States, Op. 55-61, R.44, Page ID #1122-28, and failed to properly explain why DHS's resource constraints necessitated the prioritization reflected in the guidance, Op. 61-63, R.44, Page ID #1128-30. That is incorrect. *See* Stay Op. 15-16.

First, DHS addressed in depth both of the issues that the district court identified. With respect to recidivism, the guidance encourages officers to prioritize noncitizens who "pose[] a current threat to public safety, including through a meaningful risk of recidivism." Considerations Memorandum 12, R.27-2, Page ID #454. The guidance reflects DHS's determination that recidivism is best addressed by encouraging officers to engage in a "context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation." *Id.* And DHS specifically explained that, in developing the guidance, it "exercised its expert judgment and experience to identify those factors that make an offender particularly more likely or

less likely to recidivate" and considered substantial additional evidence relevant to that question, including studies on recidivism undertaken by the United States Sentencing Commission. Considerations Memorandum 13, R.27-2, Page ID #455.

Similarly, DHS considered at length the potential impact of the guidance on the States, including on their expenditures. At the outset, DHS recognizes that any empirical assessment of such incidental effects "is uniquely difficult to conclude with certainty," both because expenditures "are driven by policy decisions that state and local governments are themselves making" and because "local and state economic conditions and laws" and local demographic characteristics of noncitizen populations vary. Considerations Memorandum 15, R.27-2, Page ID #457. Nevertheless, DHS relied on its "experience and judgment" to conclude that the guidance was unlikely to have "significant" overall effects on States and might well have a "net positive effect." *Id.* DHS explained that resource constraints mean it will never be able "to arrest, detain, or remove more than a fraction of the overall removable population" and that in light of those constraints, the guidance may alleviate costs to States, both by focusing resources on individuals who threaten public safety and by reducing "fear" and "mistrust between noncitizens and government" that can lead to downstream fiscal impacts. Considerations Memorandum 15-16, R.27-2, Page ID #457-58. And in any event, DHS determined that even if the States were correct that the guidance might lead States to make some additional expenditures, none of those asserted

effects "outweighs the benefits of the" guidance. Considerations Memorandum 14, R.27-2, Page ID #456.

DHS also addressed its own resource constraints and the need for prioritization in depth. *See* Considerations Memorandum 5-8, 17, R.27-2, Page ID #447-50, 459. For example, DHS explained that the number of pending removal proceedings has increased by over 400% since 2010; that over 3 million noncitizens are in such proceedings or have final orders of removal; that DHS has only approximately 6,500 officers and far too few trial attorneys to manage those cases; and that, at the time, ICE had a bedspace capacity limit of approximately 26,800—"less than 1% of the number [of noncitizens] in removal proceedings or subject to orders of removal." Considerations Memorandum 5-7, R.27-2, Page ID #447-49. DHS additionally explained that these resource limitations have long constrained the Executive's enforcement of the immigration laws and that the Executive has for decades relied on prosecutorial discretion to ensure the best use of limited resources. Considerations Memorandum 7-8, R.27-2, Page ID #449-50. Finally, DHS considered evidence gathered during the implementation of the interim priorities that a measure like the guidance is in fact effective at "channeling ICE officers' and agents' efforts toward" prioritized enforcement action—such that, for example, arrests of aggravated felons increased by nearly 70% under the interim priorities. Considerations Memorandum 17, R.27-2, Page ID #459.

DHS thus complied with the APA because it "considered relevant data points and offered a satisfactory explanation for its decision." Stay Op. 15; *see FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). And although the district court attempted to nitpick perceived flaws in the agency's consideration—for example, faulting one of the studies that DHS considered for evaluating "noncitizen crime rates generally" rather than rates among the specific noncitizens described in § 1226(c), Op. 58, R.44, Page ID #1125—those perceived flaws do not provide any basis for relief. Instead, review under the arbitrary-and-capricious "standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Prometheus Radio Project*, 141 S. Ct. at 1158. Here, the agency "reasonably considered the relevant issues and reasonably explained the decision." *Id.* That is all the APA requires.

C. Notice-And-Comment Rulemaking Was Not Required

The district court also incorrectly ruled that the guidance is subject to the APA's notice-and-comment provisions. Op. 64-71, R.44, Page ID #1131-38. Those provisions do not apply to "general statements of policy," 5 U.S.C. § 553(b)(A), that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln*, 508 U.S. at 197 (quotation omitted). They also do not apply to rules of "agency organization, procedure, or practice," 5 U.S.C. § 553(b)(A), that do not alter the rights or interests of parties, *see Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). As the stay panel correctly concluded, *see* Stay Op.

16, these provisions exempt the guidance from the APA's notice-and-comment requirements.

This Court has explained that agency action that does not "narrowly circumscribe[] administrative discretion in all future cases" or otherwise "finally and conclusively determine[] the issues to which it relates" is likely a general statement of policy not subject to notice and comment. *Dyer v. Secretary of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (per curiam). And here, every relevant consideration indicates that the guidance is such a policy statement. As explained, *see supra* pp. 26-28, the guidance "leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel" in any given case. Guidance 3-5, R.1-1, Page ID #26-28. It expressly does not "create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." Guidance 7, R.1-1, Page ID #30. It was issued in a manner consistent with the Executive's decades-long unbroken practice of issuing similar immigration enforcement guidance without notice and comment. And to underscore the point, the guidance was not published in the Federal Register or the Code of Federal Regulations. *See Little Traverse Lake Prop. Owners Ass'n v. National Park Serv.*, 883 F.3d 644, 657 (6th Cir. 2018). Finally, as explained, *see supra* pp. 26-28, the guidance does not impose any rights or obligations—both because it permits substantial discretion in its implementation and because DHS may amend or revoke it at any time.

The district court's contrary conclusion depends on the mistaken premise that the guidance establishes a "binding norm" by "displacing the detention and removal standards" of the INA. Op. 67-68, R.44, Page ID #1134-35. As explained, however, the guidance is fully consistent with the relevant provisions of the INA. And although the court emphasized that DHS expects its officers to consider the guidance when making individualized discretionary decisions, Op. 69, R.44, Page ID #1136, the guidance repeatedly emphasizes that agency officers remain free to exercise their individual judgment—as officers have done for decades—in determining whether enforcement action is warranted in any given case. Moreover, internal agency expectations do not convert guidance into legislative rules because such expectations do not "impose legally binding obligations or prohibitions on regulated parties." *National Mining Ass'n*, 758 F.3d at 250-53.

IV. The Equities Do Not Support Preliminary Injunctive Relief

Even assuming that the States had demonstrated some concrete, certainly impending, and judicially cognizable injury sufficient to satisfy Article III, that injury could not support preliminary injunctive relief. To obtain a preliminary injunction, the States must demonstrate that "the balance of equities tips in [their] favor," outweighing the harm to the defendants, and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These latter two factors "merge" where, as here, the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The States have demonstrated, at most, that they will spend some unspecified additional resources in light of the guidance. But the States have not (and cannot) quantify the magnitude of any such expenditures. By contrast, enjoining the guidance would work grave harm on the Executive. Such an injunction would represent "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), and would "invade" the Executive's prosecutorial discretion, a "special province" that Article II commits to the President, *AADC*, 525 U.S. at 489. It would also "undermine[] the separation of powers," *Texas v. United States*, 14 F.4th 332, 340 (5th Cir.), *vacated*, 24 F.4th 407 (5th Cir. 2021) (en banc), and impair the government's "weighty" "interest in efficient administration of the immigration laws," *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), by undermining the expert judgment of the Secretary.

This injury is not merely theoretical. The "implementation of the enforcement priorities" has allowed DHS to "re-deploy[] assets to meet the current threat and reality." Bible Decl. ¶ 49, R.49-1, Page ID #1198-99. For example, DHS has "re-tasked several field operations teams" and has otherwise deployed hundreds of additional officers to the southwest border, thereby focusing its "resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States." *Id.* Implementing the injunction may require DHS to "realign field teams and other assets to allocate

limited time and resources on non-criminal and other lower priority targets," which would "disrupt" the agency's "ability to have a meaningful impact on important border security efforts" and would "limit resources available to detain recent border-crossers." *Id.* Similarly, the agency's prioritization efforts have enabled the agency to increase enforcement actions against the most pressing public-safety threats. For example, between February 18 and August 31, 2021, while applying the previous interim guidance, ICE arrested 6,046 individuals with aggravated felony convictions, compared to just 3,575 during the same period in 2020. Considerations Memorandum 17, R.27-2, Page ID #459.

More generally, implementing the injunction could destabilize the Nation's immigration-enforcement apparatus. For example, ICE now has fewer than 26,000 "available bedspace[s]" and more than 20,000 detained noncitizens. Bible Decl. ¶ 20, R.49-1, Page ID #1185. Attempting to implement the injunction would also require ICE to devote substantial additional "personnel[] and other resources" to taking enforcement actions against noncitizens who pose lesser public-safety or border-security threats, which "would detract from the agency's ability to meet other pressing operational needs." *Id.* And even in the short time that the district court's injunction was in effect before being stayed, it had already created "operational challenges" for immigration officers, engendering "considerable doubt and uncertainty" about how those officers should exercise their discretion. Bible Decl. ¶ 43, R.49-1, Page ID #1195. These harms dwarf any incidental effect of the guidance on plaintiffs.

V. The District Court's Entry Of A Nationwide Preliminary Injunction Was Improper In Any Event

1. Even if plaintiffs were correct on the merits of their claims, the district court lacked jurisdiction to enter the preliminary injunction under 8 U.S.C. § 1252(f)(1). That provision states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, 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, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1).

This provision plainly precludes entry of the district court's preliminary injunction. By placing "limitations on what the government can and cannot do" under §§ 1226(c) and 1231(a)—both provisions of the specified subchapter—the court imposed a "restraint" forbidden by § 1252(f)(1). *Hamama v. Adducci*, 912 F.3d 869, 879-80 (6th Cir. 2018). And the preliminary injunction did not pertain to "an individual alien" in removal proceedings. 8 U.S.C. § 1252(f)(1); *see AADC*, 525 U.S. at 481. The district court thus lacked jurisdiction to enter the injunction regardless of the merits of plaintiffs' claims.[2]

[2] Although the government did not raise the issue in the district court, § 1252(f)(1) imposes a jurisdictional limitation that is not subject to forfeiture. In addition, the scope of § 1252(f)(1) is an issue in two cases pending before the

2. Even some preliminary injunctive relief were proper, the district court erred in entering a nationwide injunction. Article III "limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Consistent with that limitation, a court may entertain a suit only by a plaintiff who has suffered a concrete injury and may grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (quotation omitted). For the same reason, Article III requires that remedies "operate with respect to specific parties," not with respect to a law "in the abstract." *California*, 141 S. Ct. at 2115 (quotation omitted).

Those constitutional limitations are reinforced by principles of equity. A court's authority to award equitable relief is generally confined to the relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). And it is a longstanding principle of equity that, at most, injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" in a given case. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Nationwide injunctions also create legal and practical problems. They circumvent the procedural rules governing class actions, which permit relief to absent parties only if rigorous safeguards are satisfied. Fed. R. Civ. P. 23. They enable

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Supreme Court. *See Garland v. Aleman Gonzalez*, No. 20-322 (U.S. argued Jan. 11, 2022); *Biden v. Texas*, No. 21-954 (U.S. argued Apr. 26, 2022).

forum shopping and empower a single district judge to effectively nullify the decisions of all other lower courts by barring application of a challenged policy in any district nationwide. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). And they operate asymmetrically. A nationwide injunction anywhere freezes the challenged action everywhere, such that the government must prevail in every suit while any plaintiff can derail agency action nationwide with a single district-court victory. *See id.* The prospect of a single district court decision blocking government policy nationwide while the ordinary appellate process unfolds often leaves the Executive Branch with little choice but to seek emergency relief, which deprives the judicial system of the benefits that accrue when numerous courts are able to grapple with complex legal questions and which "loads more and more carriage on the emergency dockets of the federal courts." Stay Op. 19 (Sutton, C.J., concurring); *see also Department of Homeland Sec.*, 140 S. Ct. at 600-01 (Gorsuch, J., concurring); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 473-74 (6th Cir.), *vacated on other grounds*, 19 F.4th 890 (6th Cir. 2021) (en banc).

The circumstances of this case only reinforce the improper scope of the district court's injunction. The alleged harm identified by plaintiffs is primarily that noncitizens within their borders who are not detained or removed in light of the guidance might commit more crime and consume more State resources. *See supra* pp. 21-25. But the district court failed to cite any evidence demonstrating why an injunction limited to the plaintiff States would not sufficiently ameliorate plaintiffs'

claimed harms—especially in light of the countervailing equities that a court must consider, including those of DHS in implementing its enforcement priorities and those of other States that might conclude the priorities are sound. The district court never considered whether any residual benefit that a nationwide injunction might provide to plaintiffs could outweigh those harms to the government and others.

This case embodies the practical problems created by the availability of nationwide injunctions. Several additional plaintiffs beyond the States here have brought separate lawsuits raising similar claims against the guidance. All of those cases remain pending in district court—and, indeed, one has already proceeded to a bench trial. *See Texas v. United States*, No. 6:21-cv-16 (S.D. Tex.); *Coe v. Biden*, 3:21-cv-168 (S.D. Tex.); *Alabama v. Mayorkas*, No. 4:22-cv-418 (N.D. Ala.). But because of the asymmetric nature of nationwide injunctions, the district court's injunction here could effectively pretermit the other district courts' consideration of similar issues by awarding the plaintiffs in those cases the relief that they seek. And conversely, if the government were to prevail in this lawsuit but one of the district courts hearing those other lawsuits entered nationwide relief, such an injunction would effectively nullify the judgment of this Court. All of that underscores the fundamental unfairness and inefficiency generated by the liberal granting of nationwide relief.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the preliminary injunction should be vacated.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,429 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ San R. Janda
Sean R. Janda

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Sean R. Janda
Sean R. Janda

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	**Description**	**Page ID # Range**
R.1	Complaint	1-23
R.1-1	Guidance	24-30
R.27-2	Considerations Memorandum	443-463
R.44	Opinion and Order	1068-1146
R.48	Notice of Appeal	1156-1158
R.49-1	Bible Declaration	1178-1200

ADDENDUM

TABLE OF CONTENTS

8 U.S.C. § 1226

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

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 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.

(2) Release

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.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

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. § 1231

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

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.

. . .

(h) Statutory Construction

Nothing 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.