No. 22A17

In the Supreme Court of the United States

UNITED STATES, ET AL.,
Applicants,

v.

STATE OF TEXAS, ET AL.,
Respondents.

OPPOSITION TO MOTION FOR A STAY PENDING APPEAL

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

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

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General

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

Counsel for Respondents

Table of Contents

Page

Introduction ... 1

Statement of the Case ... 4

I. Legal Framework ... 4

II. Factual Background ... 9

III. Prior Proceedings ... 11

A. Preliminary injunction and the first appeal ... 11

B. The district court's vacatur following trial ... 12

C. The Fifth Circuit's denial of a stay ... 14

Argument ... 17

I. This Court is Unlikely to Grant Review in This Posture. ... 18

II. Applicants Are Unlikely to Succeed on the Merits. ... 20

A. The lower courts possessed jurisdiction to review DHS's unlawful agency action. ... 20

1. Decades of this Court's precedent establish that the States have standing. ... 21

2. Section 1252(f)(1) did not deprive the district court of jurisdiction to vacate the Final Memorandum. ... 30

B. The Final Memorandum is contrary to law, arbitrary and capricious, and procedurally invalid. ... 33

1. The Final Memorandum is contrary to law. ... 33

2. The Final Memorandum is arbitrary and capricious. ... 40

3. The Final Memorandum is procedurally invalid because it did not go through notice-and-comment procedures. ... 42

C. The District Court Appropriately Vacated the Final Memorandum Under the APA. ... 45

III. The Remaining Factors Do Not Favor a Stay. ... 48

Conclusion ... 49

INTRODUCTION

"Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Agencies lack the "power to revise clear statutory terms" even when the agency believes those terms "turn out not to work in practice." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014). *Id.* Through the Immigration and Nationality Act, Congress has directed the Executive—in mandatory language—to detain specific criminal aliens (*e.g.*, aggravated felons) at a specific time (*i.e.*, upon release from criminal custody) for a specific duration (*i.e.*, during the removal period). It has also required the Executive to detain aliens with final orders of removal while they are removed. Both the federal government and this Court have repeatedly described these provisions as mandatory.

DHS now disagrees. In September 2021, DHS issued a memorandum titled *Guidelines for the Enforcement of Civil Immigration Law* (the "Final Memorandum"), App.136a-42a, that dispenses with Congress's "bright lines or categories" in favor of an "assessment of the individual and the totality of the facts and circumstances" for any alien who might be "a current threat to public safety." App.138a. Applicants have even created a "continuous" review process to "ensure the rigorous review" of "personnel's enforcement decisions" to ensure compliance

with the Final Memorandum—*not* with the categories Congress created. App.141a.

The district court vacated, but refused to enjoin, the Final Memorandum because—among other reasons—DHS's guidelines improperly revised Congress's careful and mandatory commands. App.38a-133a. Applying established precedent, the Fifth Circuit declined to stay that ruling because it was "inclined to agree," App.2a, but that Court has not yet had the opportunity to review full briefing on the merits. This Court should likewise deny applicants' request for the extraordinary remedy of a stay pending appeal of that vacatur.

In support of their request for a stay pending appeal that has been twice denied, applicants raise numerous arguments regarding the States' standing and the scope of available relief that, if accepted, would mark a sea change across constitutional and administrative law. These arguments are foreclosed by existing precedent; even if this Court were inclined to revisit its precedents, "[m]embers of this Court have argued that a determination regarding an applicant's likelihood of success"—and, therefore, their entitlement to a stay pending appeal—"must be made under 'existing law.'" *Netchoice v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting). Likewise, the limited and expedited review possible in response to an emergency application should counsel against granting a stay premised on an undecided question of law, such as applicants' arguments under 8 U.S.C. § 1252(f)(1). Because "[t]he District

Court here did everything right under the law existing today," applicants are not entitled to a stay pending their efforts to rewrite the law of standing and remedies in administrative contexts. *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting); *accord, e.g.*, *id.* (Roberts, C.J., dissenting).

This Court should also deny applicants' alternative request (at 40) to grant certiorari before judgment. "Certiorari before judgment is, of course, 'an extremely rare occurrence.'" Stephen M. Shapiro, et al., Supreme Court Practice 2-17 (11th ed. 2019) quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers)). Because it "may lead to inconvenience, litigation costs, and delay in determining ultimate justice," *id.* at 2-15, *accord United States v. Texas*, 142 S. Ct. 522 (2021) (dismissing certiorari granted before judgment as improvidently granted), such relief is justified "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," S. Ct. R. 11. Applicants have increasingly asked for certiorari before judgment when they face an adverse judgment in the courts of appeals—a trend this Court should not encourage further, especially here, where applicants fail Rule 11's demanding standard.

But if this Court decides that certiorari before judgment is appropriate, it should do so under two conditions. First, it should allow the parties a full briefing schedule and schedule argument for December or

January. And second, it should grant certiorari on another question argued before the district court and presented in this case: whether the Final Memorandum violates the Take Care Clause of the Constitution. While the district court declined to pass on the States' Take Care Clause arguments, App.124a-25a, the States intend to brief and argue before the Fifth Circuit that the Take Care Clause is an alternative basis for affirming the district court's judgment. If this Court grants certiorari before judgment, it should add a question concerning the Take Care Clause so that the States can brief and argue that ground in this Court instead.

STATEMENT OF THE CASE

I. Legal Framework

The Immigration and Nationality Act makes detention of many aliens discretionary. For example, 8 U.S.C. § 1226(a) provides that "[o]n 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."[1] In that circumstance, "the Attorney General" "may

[1] "Although many of the provisions at issue in this case refer to the Attorney General, Congress has also empowered the Secretary of Homeland Security to enforce the Immigration and Nationality Act." *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 & n.1 (2021).

continue to detain the arrested alien" and "may release the alien on" either bond subject to conditions or "conditional parole." *Id.* § 1226(a)(1)-(2).

But Congress made detention of other aliens mandatory. Section 1226(c) expressly constrains the discretion ordinarily available under section 1226(a) by requiring that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes, including (among others) crimes of moral turpitude, drug offenses, aggravated felonies, sex trafficking, human trafficking, money laundering, certain firearm offenses, and particularly serious violations of religious freedom committed by servants of foreign governments. *Id.* § 1226(c)(1); App.20a-21a & n.10. Likewise, section 1231(a)(1)(A) provides that, in general, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days," which is known as the "removal period." And section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2).

Sections 1226 and 1231 also specify *when* detention is mandated: aliens subject to section 1226(c) must be detained "when the alien is released" from criminal custody. *Id.* § 1226(c)(1)(D). And aliens subject to section 1231(a)(2) shall be detained "during the removal period" after entry of a final removal order. *Id.* § 1231(a)(2).

B. "Congress adopted" these mandatory detention provisions "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003). Congress found that "[c]riminal aliens were the fastest growing segment of the federal prison population ... and formed a rapidly rising share of state prison populations as well." *Id.* And "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 deportation proceedings." *Id.* at 519.

To address these longstanding deficiencies, Congress first added mandatory language to a statute that had previously allowed (but not required) the arrest and detention of certain criminal aliens. 8 U.S.C. §1252(a) (1982). The new statute provided that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." § 1252(a)(2) (1988). Later, as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996's wholesale reform of our immigration laws, Pub. L. 04-208, "Congress" expanded mandatory detention past aggravated felons to other criminal aliens and "require[ed] the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 521.

C. Around the same time, DHS's predecessor organization, the Immigration and Naturalization Service, concluded that statutes providing

that INS "shall take into custody" aliens who are aggravated felons meant that "the AG, and thus the INS, is statutorily precluded from exercising discretion either to release the alien upon his or her release from incarceration or to refrain from instituting deportation proceedings." Genco Op. No. 93-80 (INS), 1993 WL 1504027, at *3 (Oct. 8, 1993).

Because the agency had concerns that section 1226(c)'s arrest mandate might overwhelm the agency's detention capacity, "Congress, at the request of the INS, enacted a two-year grace period for application of the criminal detention provisions in" section 1226(c). *Galvez v. Lewis*, 56 F. Supp. 2d 637, 641 (E.D. Va. 1999). If, during the two-year grace period, INS told Congress it had insufficient bed space to carry out mandatory detainers, the agency would be relieved of its mandatory duties under section 1226(c). Pub. L. 104-108, §303, 110 Stat. 3009–586 (1996). At the end of the two-year period, INS asked for another extension, but Congress refused, and the detention mandate took effect. INS Issues Detention Guidelines After Expiration of TPCR, 75 No. 42 Interpreter Releases 1508, 1508 (Westlaw November 2, 1998).[2]

[2] Section 1231(a)(2) was also a part of IIRIRA and was "enacted against the same backdrop" of failures by INS. App.95a. Section 1231(a) "is part of a statute that has as its basic purpose effectuating an alien's removal." *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). It "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528.

D. The federal government has repeatedly reaffirmed its understanding that section 1226(c), in particular, "eliminate[s] all discretion" and imposes a "duty to arrest . . . criminal alien[s]." Pet. Br., *Nielsen v. Preap*, 2018 WL 2554770, at *17, *23 (U.S. Jun. 1, 2018) (quotation omitted); *see also, e.g.*, Oral Arg. Trans., *Nielsen v. Preap*, 2018 WL 4922082, at *6-*7 (U.S. Oct. 10, 2018); Pet. Br., *Demore v. Kim*, 2002 WL 31016560, at *2 (U.S. Aug. 29, 2002); Pet. Br., *Jennings v. Rodriguez*, 2016 WL 5404637, at *11-12, (U.S. Aug. 26, 2016) (citation omitted); *see also id.* at *1, *7, *12, *28, *30, *34.

And this Court has agreed, holding that "[s]ection 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Because "Congress has decided" that the section 1226(a) "procedure is too risky in some instances," Congress "adopted a special rule for aliens who have committed certain dangerous crimes and those with connections to terrorism." *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019). These criminal aliens "must be arrested 'when [they are] released' from custody on criminal charges." *Id.*; *see also Demore*, 538 U.S. at 518-20. Likewise, this Court has confirmed more than once that "[d]uring the removal period, detention is mandatory" under Section 1231(a)(2). *Johnson*, 141 S. Ct. at 2281; *see also Zadvydas*, 533 U.S. at 683.

II. Factual Background

Undeterred, the current Administration has concluded that it possesses the very discretion that this Court has found Congress denied to it through sections 1226(c) and 1231(a)(2). The Final Memorandum is the latest iteration of applicants' efforts to claim that discretion.

First, in January 2021, "then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*." App.46a (the "January Memorandum"). The January Memorandum "announced substantial changes to the enforcement of the Nation's immigration laws," App.46a, prioritizing the detention of aggravated felons determined to be threats to public safety, *id.*, but omitting detention of aliens with final removal orders and many criminal aliens.

Second, "on February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum titled *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*." App.48a (the "February Memorandum"). The February Memorandum contained many of the same defects. App.48a-50a. Like the January Memorandum, it made aliens "who pose[] a threat to public safety and have been convicted of an aggravated felony or are involved with criminal gangs" a "public safety priority" but did not instruct officers to prioritize or otherwise arrest or detain other aliens subject to section 1226(c) or section 1231(a)(2). App.49a-50a (internal quotation marks omitted).

Third, "Secretary Mayorkas issued the Final Memorandum from DHS," which was issued in September but became effective in November 2021. App.50a. It "serve[d] to rescind the January and February Memoranda." App.50a. Like its predecessors, the Final Memorandum "identifies the same three priority enforcement categories as the previous two memoranda: national security, border security, and public safety." App.50a. But "[u]nlike the February Memorandum, the Final Memorandum's priorities are not presumptively subject to enforcement action." App.51. Likewise, "the Final Memorandum's public safety priority no longer presumptively subjects aliens convicted of aggravated felonies to enforcement action, including detention." App.51a. (internal quotation marks omitted).

Instead, per the Final Memorandum, "enforcement, including detention, is not to be determined according to any bright lines or categories." App. 138a. Instead, any arrest or detention decision "requires an assessment of the individual and the totality of the facts and circumstances." App.138a. The Memorandum prohibits immigration personnel from "rely[ing] on the fact of conviction or the result of a database search alone when deciding to enforce the law," instead directing them to, "to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances." App.51a (quoting App.139a) (internal quotation marks omitted). "[T]he Final Memorandum does not

instruct officers to prioritize criminal aliens convicted of" numerous crimes covered by section 1226(c), including those convicted of crimes of moral turpitude, drug offenders, or human traffickers, nor does it require any sort of mandatory arrest or detention obligation for these individuals, instead subjecting them to the same "totality of the facts and circumstances" analysis as other aliens. App.51a-52a.

The Final Memorandum moreover establishes a process to ensure "rigorous review of [DHS] personnel's enforcement decisions" to allow aliens and their representatives "expeditious review of the enforcement actions taken" for compliance with the Final Memorandum. App.52a. This review process provides "those whom the law designates as aliens," including criminal aliens "an entirely new avenue of redress in the event they are removed or detained in a manner that conflicts with the guidance." App.4a.

III. Prior Proceedings

A. Preliminary injunction and the first appeal

The States first challenged the January Memorandum as, among other things, contrary to law, arbitrary and capricious, and procedurally invalid. ECF 1. The States subsequently sought a preliminary injunction to prohibit enforcement of the January and February Memoranda. ECF 18.

Upon receipt of an extensive factual record, the district court preliminarily enjoined enforcement of the relevant portions of the January and February Memoranda. *Texas v. United States*, 555 F. Supp. 3d 351 (S.D. Tex. 2021). A panel of the Fifth Circuit stayed that order, *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021), but the court subsequently vacated that decision en banc, *Texas v. United States*, 24 F.4th 407, 408 (5th Cir. 2021). Applicants' appeal from the district court's preliminary injunction was subsequently voluntarily dismissed following the issuance of the Final Memorandum. *Texas v. United States*, No. 21-40618, 2022 WL 517281, at *1 (5th Cir. Feb. 11, 2022).

B. The district court's vacatur following trial

After the issuance of the Final Memorandum, the States filed an amended complaint asserting that the Final Memorandum was, among other things, contrary to law, arbitrary and capricious, and procedurally unlawful. ECF 109. The States also sought to enjoin the Final Memorandum or to postpone its effective date. *Id.*, ECF 111. The district court "consolidated the hearing on the States' Motion . . . with the trial on the merits" under Federal Rule of Civil Procedure 65(a)(2). App.42a.

After trial, the district court concluded that the States have standing, App.62a-66a, and that no obstacle prevented judicial review of the Final Memorandum, App.67a-102a. It then found the Final Memorandum contrary to law, App.102a-107a, arbitrary and capricious, App.107a-

114a, and procedurally invalid, App.114a-121a. The district court vacated and remanded the Final Memorandum, App.125a-131a, but declined to enter injunctive relief, App.131a-133a. The district court subsequently granted applicants a short stay pending appeal to seek relief in the Fifth Circuit. App.33a-37a.

As part of its analysis, and after a trial on the merits, the district court made numerous findings of fact. It found that "the Final Memorandum and its priorities—particularly when viewed in light of the previous Memoranda and how they were implemented and enforced by DHS supervisors—are perceived by many ICE officers and agents as substantially limiting if not eliminating their discretion to make detention decisions." App.58a. It likewise found that "officers do not have discretion to go outside the enforcement priorities." App.56a. It found that the "Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States." App. 58a.

The district court likewise made extensive findings explaining how that increase imposes costs on the States. App.58a-62a. Most concretely, it explained that the Final Memorandum and its predecessors have caused applicants to rescind immigration detainers— "an administrative notice from DHS to a Federal, state, or local law enforcement agency" that DHS "intends to take custody of a removable alien detained by the jurisdiction upon their release," App.46a—at dramatically higher rates

than before January 2020. App.53a-55a. And the district court found that numerous criminal aliens with rescinded detainers had reoffended, failed to comply with conditions of state parole, or simply disappeared. App.55a.

C. The Fifth Circuit's denial of a stay

Following vacatur, DHS again sought a stay pending appeal. This time, the Fifth Circuit denied a stay in a 32-page published opinion. App.1a-32a.

Reviewing the district court's factual findings for clear error, *accord Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021), the Fifth Circuit concluded that "Texas's injuries as a result of the Final Memo are difficult to deny, specifically its financial injury and harm as *parens patriae*," App.8a. As the Fifth Circuit explained, "the uncontroverted evidence shows that the Final Memo shifted the cost of incarcerating or paroling certain criminal aliens from DHS to Texas," and the "[S]tate incurs substantial costs associated with criminal recidivism, the rate of which is significant among the illegal alien population according to evidence presented in the district court." App.8a. "The district court further found Texas has actually absorbed, or at least will imminently absorb, the costs of providing public education and state-sponsored healthcare to aliens who would otherwise have been removed pursuant to federal statutory law." App.9a. The Fifth Circuit also concluded that the United States was unlikely to show that the district court clearly

erred when it found that the Final Memorandum was a cause of Texas's costs, App. 11a-12a, or that "Texas's costs would be eased if DHS stopped rescinding detainers pursuant to the Final Memo." App.12a.

The Fifth Circuit also determined that 8 U.S.C. 1252(f)(1) did not deprive the district court of jurisdiction to vacate the Final Memorandum, principally because vacatur and injunctive relief are different remedies and vacatur "does nothing but re-establish the status quo absent the unlawful agency action." App.13a-14a.

The Fifth Circuit then concluded that "DHS's three defenses of the Final Memo on its merits are also likely to fail on final appellate consideration." App.20a. *First*, relying extensively on this Court's repeated statements that sections 1226(c) and 1231(a)(2) mandate detention, the Fifth Circuit concluded that the "shall" in both statutes is, in fact, mandatory. App.21a-24a. It rejected DHS's retreat to prosecutorial discretion based on *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005) both because it is "distinguishable on its facts" and because "the . . . principle of law that DHS would have [the Court] draw from *Castle Rock* is both untenable and wholly unsupported." App.24a-25a. As the Fifth Circuit explained, "DHS effectively seeks a reading of *Castle Rock* that would insulate agency action that in any way relates to enforcement duties, despite the plain language of the INA"—and the straightforward holdings of this Court. App.25a.

Second, the Fifth Circuit concluded that DHS was unlikely to show that the Final Memorandum survives arbitrary-and-capricious review for three reasons. As an initial matter, DHS applied the wrong referent in assessing public safety because it considered recidivism among *all* aliens rather than the *criminal* aliens whom Congress required to be detained for public safety. App.27a-28a. Moreover, DHS failed to adequately consider costs to the States, which DHS only determined would be difficult to quantify. App.28a-29a. And rather than considering the States' reliance interests, DHS flatly asserted that the States had no reliance interests. App.29a. As the Fifth Circuit recognized, "[i]n a single paragraph citing no evidence" applicants "concluded that the States" have "no *reliance interests* in the enforcement of federal criminal immigration law according to the governing statutes." App.29a.

Third, the Fifth Circuit determined that DHS was unlikely to succeed on the merits of its appeal that the Final Memorandum was not required to go through notice and comment. App.30a. The court concluded that rather than an informal policy statement, "[b]oth the language found within and the mechanisms of implementing [the Final Memorandum] establish that it is indeed binding." App.30a. Because the Memorandum "remov[ed] DHS personnel's discretion to stray from the guidance or take enforcement action against an alien on the basis of a conviction alone," it "is much more substantive than a general statement

of policy and, as such, it had to undergo notice and comment procedures." App.30a.

Finally, the Fifth Circuit also noted its "skepticism about DHS's allegations of 'confusion and the potential 'waste' of 'resources' that would result from [it] allowing the vacatur [to] go into effect," and concluded that none of the other factors "counsel in favor of granting DHS's stay." App.31a.

DHS's emergency application for a stay from this Court followed.

Argument

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "A lower court judgment, entered by a tribunal that was closer to the facts ... is entitled to a presumption of validity." *Id.* This Court grants such a stay only where the applicant demonstrates (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Yet "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam). Additionally, "in a close case it may be appropriate to balance the equities, to assess the relative

harms to the parties, as well as the interests of the public at large." *Id.* (quotation marks omitted). Applicants fail to meet this standard at every turn.

I. This Court is Unlikely to Grant Review in This Posture.

To establish their entitlement for relief, applicants rely heavily (e.g., at 17-18) on the Fifth Circuit's disagreement with the Sixth Circuit's reversal of a preliminary injunction against the Final Memorandum. Facing competing final judgments from two courts of appeals, perhaps this Court would review one or both decisions—though it by no means does so routinely for 1-1 circuit splits, instead often preferring to allow issues to percolate among the lower courts. *E.g.*, *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 497 (6th Cir. 2017) (holding legislative invocation constitutional); *Lund v. Rowan Cnty., N. Carolina*, 863 F.3d 268, 272 (4th Cir. 2017) (holding legislative invocation unconstitutional).

Here, as in most cases in a preliminary-injunction posture, as well as with most 1-1 splits, this Court's review is premature. Review of the Sixth Circuit's decision, though not squarely presented here, would be premature because, as the Fifth Circuit noted, it arose from a "district court's nationwide preliminary injunction," App.31a, which lacked "the benefit of a complete trial record," App.2a. Specifically, the Sixth Circuit initially stayed that trial court's preliminary injunction because the plaintiff States in that case "ha[d] not offered any concrete evidence of the Guidance's fiscal effects on each of them." App.32a (quoting *Arizona*

v. Biden, 31 F.4th 469, 481-82 (6th Cir. 2022). And it ultimately "remand[ed] for further proceedings." *Arizona v. Biden*, No. ,2022 WL 2437870, at *12 (6th Cir. July 5, 2022). It is the Court's "normal practice" to "deny interlocutory review" of such orders. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stephens, J., dissenting); *see also, e.g.*, *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., dissenting). Indeed, such lack of finality "alone [can] furnish[] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Review is also premature from the Fifth Circuit's ruling, which is on its face tentative. The Fifth Circuit stated that it was "inclined to agree" with the district court because DHS had "fail[ed] to make a strong showing of likelihood of success." App.2a. But it has not yet addressed the merits, and the United States has not asked that court to expedite its review, as it might for a true emergency. It has instead proceeded directly to this Court. Yet this Court "benefit[s]" when courts of appeals "explore a difficult question." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). That, among other reasons, is why this Court typically reserves certiorari before judgment for "cases of great public emergency," Shapiro, *supra* n. 2-17. This is not such a case, and the United States all but admits as much, premising its need for the extraordinary step of certiorari before judgment on, in its view, a "trend" of "novel and contestable holdings" regarding the meaning of the INA. Application 5. No doubt

most parties who suffer adverse judgments view those judgments as "contestable." But the Fifth Circuit's tentative conclusion is far from novel: it conforms with views regarding the INA that the United States itself has previously advocated. *Supra* at 8. Immediate review by way of certiorari before judgment is especially unlikely under such circumstances.

II. Applicants Are Unlikely to Succeed on the Merits.

Even if the Fifth Circuit's indication of preliminary disagreement with the Sixth Circuit justified this Court's immediate intervention, applicants are unlikely to succeed on the merits because the States' standing rests on well-established bases falling comfortably within this Court's standing jurisprudence. Nor did 8 U.S.C. § 1252(f)(1) preclude the district court from vacating the Final Memorandum—and in any event, the undecided and complex nature of that question makes it especially inappropriate for disposition via a stay application. Moreover, the Final Memorandum is contrary to law, arbitrary and capricious, and procedurally invalid for the reasons explained by the district court and the court of appeals.

A. The lower courts possessed jurisdiction to review DHS's unlawful agency action.

To justify immediate review, applicants raise two jurisdictional hurdles that they insist insulate DHS's choices from judicial review: that (at 14-21) the States lack standing, and that (at 28-32) that the district court

lacked jurisdiction to vacate the Final Memorandum under section 1252(f)(1). There is no "fair prospect that a majority of the Court will conclude that the decision below was erroneous" on either ground because both follow from this Court's existing precedent. *Conkright*, 556 U.S. at 1402.

1. Decades of this Court's precedent establish that the States have standing.

As an initial matter, applicants' argument (*e.g.*, at 3) that the States' "increased expenditures" do not establish standing because they are only "an indirect result of enforcement decisions" contradicts decades of this Court's standing precedent. That is not something this Court will—or even should—do in a stay posture. *Netchoice*142 S. Ct. 1716 (Alito, J., dissenting); *Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting); *accord, e.g.*, *id.* (Roberts, C.J., dissenting).

Under well-established precedent, "[t]o establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, (2013). Because a full trial on the merits took place, this Court reviews the district court's findings of fact for clear error. *Brnovich*, 141 S. Ct. at 2349. And only one of the States needs to establish standing, *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007), for which even a modest monetary loss will suffice. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017);

see also Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801-02 (2021) (finding standing based damages alleged to be $1). The States easily meet this standard.

a. Not even Defendants contest that the Final Memorandum has caused Texas monetary losses—though applicants describe these losses as "indirect" ones. Nor could they.

Based on extensive findings of fact, the district court concluded that "Texas has suffered a concrete and particularized, actual injury" both "[a]s to its finances" and "as *parens patriae*." App.64a. For example, the court found "[t]he Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States." App.58a. This increase, the district court found, correspondingly increases the States' costs in numerous ways, including through additional incarceration costs for criminal aliens DHS does not detain, App.58a-59a, through costs associated with the recidivism of criminal aliens, App.59a-60a, education costs, App.60a, and healthcare costs, App.61a-62a.

This is most concretely illustrated by DHS's largely newfound practice of rescinding immigration detainers. An immigration detainer is "an administrative notice from DHS to a Federal, state, or local law enforcement agency" that DHS "intends to take custody of a removable alien detained by the jurisdiction upon their release." App.46a. Consistent

with the Attorney General's mandatory detention obligations, until "fiscal year 2020, detainers" were rarely rescinded, and "no more than a dozen detainers were dropped per year" between 2017 and 2020. App.53a. But "[f]rom January 20, 2021 through February 15, 2022, ICE rescinded detainers on 170 criminal aliens in TDCJ facilities," and only reissued 29. App.54a. "Of the 141 criminal aliens whose detainers remained rescinded, 55 were serving a sentence for . . . serious drug offenses." App.54a. More than two-thirds of that 141 were ultimately paroled, inflicting costs on the State. App.58a-59a. Of even greater concern, "[a]t the time this case was tried," 17 of those paroled "had failed to comply with their parole supervision and four had committed new criminal offenses." App.54a. "At least one remain[ed] at large in Texas with a warrant for his arrest." App.54a. Indeed, the Fifth Circuit described the "detainer data" credited by district court as "uncontroverted." App.10a.

More broadly, "[t]he number of convicted criminal aliens in ICE custody per day has dropped dramatically in the months since the January Memorandum was issued and has continued through today under the subsequent Memoranda." App.55a. And "[t]he same decline is also evident in removals carried out by ICE" which "make clear that the Final Memorandum is dramatically impacting civil immigration enforcement," App.57a, and placing Texans at risk from recidivism by "increas[ing] the number of aliens with criminal convictions and aliens with final orders of

removal released into the United States." App.58a. The Fifth Circuit concluded that "evidence show[ing] the Final Memo shifted the cost of incarcerating or paroling certain criminal aliens from DHS to Texas" as "uncontroverted." App.8a.

b. These injuries are traceable to the Final Memorandum and redressable by its vacatur. The district court found that the Final Memorandum has "led to aliens remaining in TDCJ custody longer than they otherwise would, which imposes additional costs on the State of Texas." App.65a. "It has also caused, and continues to cause, increases in the number of criminal aliens and aliens with final orders of removal released into Texas." App.65a. And "[i]t has caused, and continues to cause, increases in Texas's expenditures on public services such as healthcare and education." App.65a. Some of those not detained because of the Final Memorandum already "have recidivated, and others will recidivate." App.65a.

Vacatur redresses the States' injury because "vacatur of the Final Memorandum would directly contribute to the decrease in the number of criminal aliens in the States' prisons and the number of aliens who are subject to a final order of removal being released into the States," which would "decrease the financial injury and *parens patriae* injury that the States are suffering." App.66a. That is more than constitutionally sufficient. After all, this Court has repeatedly stated that even if a court "can-

not provide full redress," "the ability 'to effectuate a partial remedy' satisfies the redressability requirement.'" *Uzuegbunam*, 141 S. Ct. at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)); *see also, e.g.*, *Larson v. Valente*, 456 U.S. 228, 242-43 (1982).

Were there any doubt, this Court's decision in *Massachusetts*, 549 U.S. 497 at 520, should settle it. There, this Court established that States are entitled to special solicitude in the standing analysis to enable them to protect their own rights, including procedural rights provided by Congress. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). Under this Court's precedent, *Arizona v. United States*, 567 U.S. 387 (2012), "sovereign prerogatives" surrounding immigration enforcement "are now lodged in the Federal Government." *Massachusetts*, 549 U.S. at 519. And "Congress has . . . recognized a concomitant procedural right to challenge" Defendants' rulemaking under the APA. *Id.* at 520. Where these conditions are satisfied, as they are here, "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518.

c. Defendants object to this analysis in several ways, contending that the States are not entitled to special solicitude (at 20-21), the States have not suffered injury in fact (at 18-20), and that the States cannot sue the federal government for the harms they have suffered (at 15-18). None succeed.

First, Defendants contend (at 15-16) that the States have "no judicially cognizable interest in procuring enforcement of the immigration

laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). But this is not the interest that the States asserted or that the district court found. Instead, they assert an interest in avoiding harms caused by the Final Memorandum to their fiscs and residents. *Supra* at 22-23. Indeed, to the extent that applicants criticize the fact that the States routinely challenge unlawful administrative action based on their real-world injuries (at #), that is a complaint about the breadth of the cause of action the APA provides. Such a complaint must be directed to Congress, if anywhere.

Second, Defendants contend essentially (at 20) that the States are not entitled to special solicitude because its opinion in *Massachusetts v. EPA* should be limited to the "uniquely sovereign harm" of loss of territory. But this Court's holding in *Massachusetts* was not so limited. Special solicitude requires a procedural right to challenge the violation of a quasi-sovereign interest. *Massachusetts*, 549 U.S. at 519-520. And this Court has made clear that quasi-sovereign interests include "interest[s] in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

Third—relying almost exclusively on the Sixth Circuit's decision in a similar case brought by Arizona, Montana, and Ohio, *Arizona v. Biden*, 2022 WL 2437870 (6th Cir. July 5, 2022)—applicants assert that the States' theory fails on its own terms. But "[t]he rule that [an appellate

court] review[s] a trial court's factual findings for clear error contains no exception for findings that diverge from those made in another court." *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). And as Fifth Circuit recognized, it reached a different conclusion from the Sixth Circuit "assisted by the district court's fulsome fact-findings based on a comprehensively tried case." App.32a.

Applicants surely disagree with many of the district court's findings of fact, but they hardly even attempt to show—let alone clearly establish—that the district court clearly erred. For example (at 18-19), applicants insist that the lower courts "misunderstood" evidence showing a dramatic decrease in removals in fiscal year 2021. But "the very premise of clear error review is that here are often 'two permissible'—because two 'plausible'—views of the evidence.'" *Cooper*, 137 S. Ct. at 1468. Applicants' assertion of a misunderstanding does not show that the "court below's view is clearly wrong." *Id.*

Tellingly, applicants partially base their challenges to the district court's findings on evidence not presented to the district court until *after* it had entered final judgment. Application 19 (citing App.167a). If applicants wanted to present this evidence regarding the cause of DHS's decline in its detention of criminal aliens—or any other evidence—to the district court, it was incumbent on them to do so before the district court conducted a full trial on the merits and issued judgment. And in no event does applicants' attempt to flyspeck various pieces of evidence show that

the district court committed clear error when it concluded—after conducting a trial and making extensive findings of fact—that the Final Memorandum inflicts harms on the States.

Fourth, Defendants contend (1t 17-19) that the States suffer only indirect, downstream harms from their failure to follow Congress's commands, and that such harms are categorically insufficient to establish standing. That is irreconcilable with this Court's case law. For example, the States in *Massachusetts v. EPA* did not assert the EPA's decision whether to regulate greenhouse gas emissions from motor vehicles would act on them directly; instead, they asserted that the EPA's action might cause individuals to drive less fuel-efficient cars, which could in turn contribute to a rise in sea levels, which might contribute to the erosion of the State's shoreline. *Massachusetts*, 549 U.S. at 522-23. This is exactly the type of downstream effect that Defendants assert (at 17-18) is simply non-cognizable.

Other recent cases illustrate the same result. In *Department of Commerce v. New York*, 139 S.Ct. 2551, 2565 (2019), New York "assert a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count." Like the States here, New York itself was not regulated

by the inclusion of a citizenship question. But this Court nonetheless recognized that the downstream consequences—including loss of federal funds—would be "the predictable effect of Government action on the decisions of third parties." *Id.* at 2566.

Florida v. Mellon does not aid Defendants. 273 U.S. 12 (1927). There, the State of Florida sought to challenge the collection of "inheritance taxes imposed by section 301 of the Revenue Act of 1926" when Florida law barred such taxes. *Id.* at 15. This Court concluded that "[t]he act assailed was passed by Congress in pursuance of its power to lay and collect taxes, and . . . must be held to be constitutional" because "[t]he act is a law of the United States . . . and therefore the supreme law of the land." *Id.* at 17. Only after rejecting Florida's claim on the merits did this Court reject the state's theory of injury as "purely speculative, and, at most, only remote and indirect." *Id.* at 18. That holding has little bearing on this case, where the district court's findings of fact establish that the States have been harmed and the States are seeking to ensure enforcement of, rather than to thwart, federal law.

e. Unable to avoid the plain import of this Court's standing precedents, applicants resort to rhetoric, describing the States' theory of standing (at 17-18) as "startling," or "boundless." Not so. As this Court has recognized, the States "bear[] many of the consequences of unlawful immigration" and "[t]he problems posed to the State[s] by illegal immigration must not be underestimated." *Arizona*, 567 U.S. at 397-98. Those

problems are particularly acute for Texas, which has more than1,200 miles of border with Mexico and thus should be expected to be particularly harmed by illegal immigration. But under Defendants' theory, Texas would be uniquely limited in its ability to seek redress for those consequences in the federal courts. Nothing in this Court's precedent demands such an outcome, and this Court should not adopt such an impediment in a stay posture.

2. Section 1252(f)(1) did not deprive the district court of jurisdiction to vacate the Final Memorandum.

Similarly without merit is applicants' contention (at 28-32) that Section 1252(f)(1) deprived the district court of jurisdiction to vacate the Final Memorandum.

As an initial matter, applicants forfeited this argument in the district court by failing to raise it until after final judgment. While section 1252(f)(1) uses the term "jurisdiction," that "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). Section 1252(f)(1) limits a district court's jurisdiction to enter an injunction. It does not address a court's power to adjudicate a case, and it therefore does not speak to subject-matter jurisdiction. *Biden v. Texas*,

No. 21-954, 2022 WL 2347211, at *7 (U.S. June 30, 2022). It may therefore be forfeited, and applicants did so when they failed to raise the argument before the district court had entered judgment.[3]

In any event, Defendants misread section 1252(f)(1), which states only that "[r]egardless 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"—that is, sections 1221-1232 of the INA. 8 U.S.C. 1252(f)(1). In *Garland v. Aleman Gonzalez*, No. 20-322, 2022 WL 2111346, at *4 (U.S. June 13, 2022), this Court held that "§ 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" the covered provisions. But the district court did not enter an injunction. App.125a-129a. Rather, the district court vacated the Final Memorandum.

Vacatur and injunctive relief are different remedies, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010), with vacatur the

---

[3] At a minimum, that applicants forfeited any reliance on section 1252(f)(1) before the district court counsels against this Court's immediate intervention precisely to allow the Fifth Circuit to determine whether to enforce any forfeiture against applicants before that court.

"less drastic" of the two. *Id.* As this Court has previously described, section 1252(f)(1) is "nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999). And as this Court recently observed, Section 1252(f)(1)'s title "'Limit on injunctive relief'—makes clear the narrowness of its scope." *Biden*, 2022 WL 2347211, at *8. If "Congress had wanted the provision to have th[e] effect" of preventing vacatur, "it could have said so." *Id.* Moreover, Defendants' argument conflicts with the well-recognized "strong presumption favoring judicial review of administrative action." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021).

Applicants' contention (at 30) that the terms "enjoin or restrain" must apply to vacatur under the APA is inapt. Instead, the term "restrain," read in context, most naturally applies to temporary restraining orders under Federal Rule of Civil Procedure 65(b), which section 1252(f)(1) would prohibit as it does preliminary or permanent injunctions by the lower courts.

At a minimum, this Court should grant an exceptional stay of the district court's order based on section 1252(f)(1). This Court has expressly left open whether "declaratory relief and relief under section 706 of the APA" are available where injunctive relief is barred by Section 1252(f)(1). *Biden*, 2022 WL 2347211, at *9 & n.4. Applicants therefore cannot show that there is "a fair prospect that the Court would reverse," *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring), and certainly not

on this Court's currently existing decisions. This Court should not disturb that conclusion in a stay posture, on expedited briefing, and without oral argument. *Biden*, 2022 WL 2347211, at *19-20 (Alito, J., dissenting).[4]

B. The Final Memorandum is contrary to law, arbitrary and capricious, and procedurally invalid.

Applicants have likewise failed to show a fair prospect that this Court will disturb the lower courts' conclusions that the Final Memorandum is contrary to law, arbitrary and capricious, and procedurally invalid.

1. The Final Memorandum is contrary to law.

a. The Final Memorandum is contrary to law because, as both the district court and court of appeals concluded, it ignores Congress's straightforward command that certain aliens "shall" be detained.

Both sections 1226(c) and 1231(a)(2) create mandatory requirements to detain covered aliens. "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S.

---

[4] In the alternative, if the Court concludes that 1252(f)(1) prohibits vacatur, it retains authority to vacate the Final Memorandum in the first instance. *See id.* at *8. It should do so for the reasons articulated by, and based on the record before, the district court.

162, 171-72 (2016)). Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). And section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2). The United States has repeatedly argued that these statutes create mandatory duties. *Supra* 8. And this Court has repeatedly agreed. *E.g.*, *Johnson*, 141 S. Ct. at 2280-81 & n.2 (sections 1226(c) and 1231(a)(2)); *Nielsen*, 139 S. Ct. at 959 (section 1226(c)); *Jennings*, 138 S. Ct. at 846 (section 1226(c)); *Zadvydas*, 533 U.S. at 683 (Section 1231(a)(2)); *Demore*, 538 U.S. at 521 (section 1226(c)).

To the extent there were any doubt, the "mandatory nature" of sections 1226(c) and 1231(a)(2) are "underscore[d] by "adjacent provisions." *Me. Cmty. Health Options*, 140 S. Ct. at 1321. "'When', as is the case here, Congress 'distinguishes between "may" and "shall," it is generally clear that 'shall' imposes a mandatory duty.'" *Id.* (quoting *Kingdomware*, 579 U.S. at 172). The INA generally—and sections 1226 and 1231 specifically—use both "may" and "shall," demonstrating that Congress distinguished between the two. Indeed, as the Fifth Circuit recognized, this Court recently "firmly warned" that "may" and "shall" "should be afforded different meanings, especially where both are used in the same statute." App.23a (quoting *Biden*, 2022 WL 2347211, at *10.).

And, as the district court recognized, the statutory history of these provisions, in particular section 1226(c) confirms that it was intended to impose a mandatory duty. In 1996, Congress included a two-year period where detention was not mandatory known as the Transition Period Custody Rules. App.91a; *see Nielsen*, 139 S. Ct. at 969 (explaining those rules "authorized delays in § 1226(c)'s implementation while the Government expanded its capacities."). "After invoking the Transition Rules for the full two-year period, INS asked Congress to extend the grace period further, but Congress refused." App.92a. At that time, "INS recognized the mandate under 8 U.S.C. § 1226(c) became the law of the land." App.92a (collecting authority).

b. Applicants raise three objections to this straightforward exercise in statutory interpretation. Again, none has merit.

First, (at 25-26) applicants assert that the Final Memorandum controls decisions concerning apprehension and removal—not detention. But this ignores that both provisions expressly state when they are triggered—that is, when aliens must be apprehended. Section 1226(c) mandates detention for a criminal alien "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1)(D). Thus, the phrase "when the alien is released" triggers applicants' mandatory duty to apprehend and

detain an alien. Applicants are not simply free to ignore that command.[5] Likewise, section 1231(a) requires detention during "the removal period," 8 U.S.C. § 1231(a)(2), which starts only *after* "an alien is ordered removed," *Id.* § 1231(a)(1)(A). Thus, the decision to institute removal proceedings has already been made once section 1231(a)(2) is implicated.

Second, (at 26-27) applicants resort to various versions of prosecutorial discretion. In particular, they assert that under *Castle Rock*, 545 U.S. at 761, even seemingly mandatory commands are merely discretionary. But this Court has already rejected the proposition that either section 1226(c) or section 1231(a)(2) is discretionary. "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837. Whatever discretion applicants may ordinarily have, "[t]he Secretary *must* arrest those aliens guilty of the predicate offense[s]" described in section 1226(c). *Nielsen*, 139 S. Ct. at 966; *id.* at 973 (Kavanaugh, J., concurring); *see also id.* at 976 (section 1226(c) "requires the Secretary of Homeland Security to take those aliens into custody 'when . . . released' from prison and to hold them. . . .") (Breyer, J., dissenting). The same is true for section 1232(a)(2). This

[5] Applicants' closely related contention (at 27-28) that section 1226 applies during the pendency of removal proceedings, which they have discretion never to begin, fails for the same reasons. Congress has instructed them to detain certain criminal aliens "when the alien is released" from criminal custody, not when they have determined whether to institute removal proceedings.

Court recently confirmed that "[d]uring the removal period, detention is mandatory." *Johnson*, 141 S. Ct. at 2281.

Even if this Court were writing on a blank slate, as the Fifth Circuit recognized, *Castle Rock* is distinguishable on its facts and would create unbounded discretion for applicants to ignore federal law. App.24a-25a. Rather than a "police department-wide policy of not enforcing restraining orders," *Castle Rock* involved "an individualized instance of nonenforcement. App.25a. "The Final Memo, however, is much more than a singular nonenforcement decision." App.25a. Instead, "DHS effectively seeks a reading of *Castle Rock* that would insulate agency action that in any way relates to enforcement duties, despite the plain language of the INA," App.25a—and the strong presumption of judicial review afforded under the APA, *Salinas*, 141 S. Ct. at 698.

At most, *Castle Rock* requires a clear statement to displace ordinary presumptions of prosecutorial discretion. *Castle Rock*, 545 U.S. at 761. Such a statement is present: as this Court explained in *Demore*, section 1226(c) was enacted "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." 538 U.S. at 518. In response to these laws, Congress removed the Attorney General's previous discretion in an effort to deal with the problem. App.94a-95a. Again, the same is true of section 1231(a)(2). "[P]rotecting the community from dangerous aliens" is a "statutory purpose" of that section, and it "is part of a statute that has as its basic purpose effectuating an

alien's removal. *Zadvydas*, 533 U.S. at 697. Congress has thus provided whatever clear statement of intent *Castle Rock* may require.

As to section 1231, applicants assert that the "shall" is not mandatory because section 1231(a)(2) also provides that "[u]nder no circumstance during the removal period shall the Attorney General release" certain criminal aliens and terrorists. But no "cannon of interpretation . . . forbids interpreting different words used in different parts of the same statute to mean roughly the same thing" where required by context. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013).

And it should come as no surprise that Congress would especially emphasize detention of certain criminal aliens and terrorists, as in this portion of section 1231(a)(2), while simultaneously mandating that all aliens subject to final orders of removal be detained. *Cf. Yates v. United States*, 574 U.S. 528, 562 (2015) ("The presence of" overlapping statutory provisions "may have reflected belt-and-suspenders caution.") (Kagan, J., dissenting); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 344 (7th Cir. 2017) (en banc) ("Congress may certainly choose to use both a belt and suspenders to achieve its objectives."). As this Court has recognized, section 1231 mandates detention in order to "increase[e] the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528.

Third, applicants contend (at 28) that they cannot comply with Congress's mandates because it would be difficult or impractical to do so in

light of their limited budgets. The States do not challenge that applicants "may adopt policies to prioritize [their] expenditures *within the bounds established by Congress*." *Util. Air Regul. Grp.*, 573 U.S. at 327. But applicants have no "power to revise clear statutory terms that turn out not to work in practice." *Id.* "Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary." *In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.). Nor should courts or federal agencies "infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated." *Id.* at 260.

It would be particularly troubling to allow applicants a free pass to ignore Congress's commands under current circumstances because the facts show the problem is, at least in part, self-inflicted. As the lower courts both concluded, DHS was not acting in good faith making this argument: "[w]hile complaining that Congress has not provided sufficient resources to detain aliens as required by law, DHS simultaneously submitted "two budget requests [for 2023] in which it ask[ed] Congress to cut [its] resources and capacity by 26%." App.9a (quoting App.93a). There is no evidence in the record to suggest that had applicants not deliberately sought to cut their budgets, they would still have been unable to detain the subset of criminal aliens at issue in this lawsuit. In light

of the uncontroverted evidence that *is* in the record, applicants are unlikely to convince a majority of this Court to allow them to "cavalierly toss . . . aside" federal law in the manner they currently seek. Add.106a.

2. The Final Memorandum is arbitrary and capricious.

Applicants are also unlikely to prevail on the merits because the Final Memorandum failed to meet the APA's minimum requirement that the action be "reasonable and reasonably explained" as currently interpreted by this Court. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Specifically, the Final Memorandum failed to consider "an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—the high rates of abscondment and recidivism among criminal aliens and aliens with final orders of removal—and it failed to consider the States' important reliance interests, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). *See* App.27a-29a.

Although applicants insist (at 23-24) that they considered rates of abscondment and recidivism, the court of appeals correctly recognized, that is only true if the question is framed at an extremely high level of generality. applicants insist (at 24) that they supported their recidivism analysis with "evidence developed by the United States Sentencing Commission." But that argument is in the nature of a confession. That data concerns criminality "among *all* aliens." App.27a. As the Fifth Circuit noted, what applicants "failed" to do was to consider recidivism

"among the *relevant* population at issue in this case—'aliens who have been convicted of or are implicated in serious crime and aliens who have received a final order of removal.'" App.27a.[6]

Applicants are also wrong (at 24-25) that the unadorned statement that they considered costs to States satisfies their APA obligation to consider the States' reliance interests. The statement "that a factor was considered" is "not a substitute for considering" it. *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (Garland, J.); *Getty v. Fed. Savings & Loan*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (Silberman, J.) (same). Here, applicants' statement functionally "dots 'i's' and crosses 't's' without actually saying anything." App.29a. Far from considering the States' actual interests, it disclaims an ability to "provide an exhaustive analysis of" potential impacts "every time [DHS] adopts a change in immigration policy"; claims that such an analysis would be "uniquely difficult to conclude with certainty"; raises the excuse of "methodological and empirical

[6] The district court made findings of fact concerning the recidivism rates of criminal aliens within one county in Texas. "The Tarrant County Sheriff's Office examined the recidivism rates for inmates with immigration detainers by examining the criminal-history files of every such inmate jailed as of that date. In January 2022, it found a recidivism rate (indicated by prior jail time) of roughly 90% for that population, compared to 69% in October 2021." App.59a. The district court also credited an analysis performed by "DHS itself" which found "an average of *four* criminal arrests/convictions *per alien*" when evaluating "administrative arrests in FY 2019 with criminal convictions or pending criminal charges." App.60a.

challenges"; and claims (without any explanation) that failing to remove criminal aliens subject to the Final Memorandum might somehow "have a net positive effect" on the States. App.156a-57a. None of that is sufficient under basic administrative law principles. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223-24 (2016). Applicants were required to assess the relevant data and actually consider the States' costs and reliance interests. They failed to do so.

3. The Final Memorandum is procedurally invalid because it did not go through notice-and-comment procedures.

Applicants were also obligated, but failed, to perform notice and comment rulemaking on the Final Memorandum. App.30a. It is black-letter law that agency actions that "have the force and effect of law" must generally be promulgated through notice and comment rulemaking. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019). Agency actions have this effect when, *inter alia*, they create a "safe harbor" that prevents the agency from taking enforcement action, *U.S. Army Corps of Engineers v. Hawkes*, 578 U.S. 590, 598-99 (2016); "set forth bright-line tests to shape and channel agency enforcement," *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 447 (D.C. Cir. 1989); or purport to "alter[] the immigration laws" affecting removability on a class-wide basis, *Regents*, 140 S. Ct. at 1927 (Thomas, J., concurring in the judgment in part and dissenting in part).

The Final Memorandum is the type of binding agency rule that must go through notice and comment because it functionally confers a safe harbor for removable aliens by limiting the ability of DHS personnel to enforce the immigration laws against them. Specifically, it uses mandatory language that binds DHS personnel engaged in removal. *See* App.137a ("The fact an individual is a removable noncitizen . . . should not alone be the basis of an enforcement action."). It forbids DHS personnel from "rely[ing] on the fact of conviction" for removal decisions. App.139a.[7] It even creates an appeal process to ensure agency-wide compliance: the Final Memorandum requires "[e]xtensive and continuous training, and the implementation of a rigorous review process of all enforcement decisions." App.4a (internal quotation marks omitted). "In other words, according to the Final Memo, those whom the law designates as aliens are granted an entirely new avenue of redress in the event they are removed or detained in a manner that conflicts with the guidance." App.4a.

---

[7] *See also* App.139a (DHS "personnel *must* evaluate the individual and the totality of the facts and circumstances" (emphasis added)); App.161a (rule "will *require* [DHS personnel] to engage in an assessment of each individual case . . . as to whether the individual poses a public safety threat" (emphasis added)).

None of applicants' three counterarguments change this analysis. *First*, the very existence of an appellate process belies applicants' insistence (at 21-22) that the Final Memorandum is just a "general statement of policy" exempt from notice and comment. That classification is reserved for circumstances where the agency tells the public how it "proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993), but does not create a right on behalf of a party, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1806 (2019) (explaining "statements of policy—and any changes to them—are *not* substantive under the APA by definition"). A policy that does not create rights does not require an appeal process to ensure "fair and equitable" application of those rights. App.4a.

Second, applicants are also wrong (at 21-22) that the Final Memorandum is exempt from notice and comment as a rule of "agency organization, procedure, or practice." As applicants' own authority (at 22) recognizes, that category of rules is "narrowly construed" to include only an agency's internal operating procedures, not rules governing its substantive interactions with third parties. *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). Agency actions like the Final Memorandum that "set forth the agency's enforcement plan" for statutes it administers do not qualify for this exemption from notice and comment. *Id.* at 1024.

Third, that the Secretary himself "retains discretion to modify" the Final Memorandum is irrelevant. *Contra* Appl. at 23. But possibility of

future "revis[ion]" is a "common characteristic of agency action" that does not affect the legal characterization of the action; and it does not affect whether the action is a rule that must go through notice and comment. *Cf. Hawkes*, 578 U.S. at 598.

* * *

In sum, even if the Court were inclined to reach the merits of this case before the Fifth Circuit (and it should not, *supra* Part I), a stay pending that resolution is unwarranted because a majority of this Court is unlikely to uphold applicants' lawless action.

C. The District Court Appropriately Vacated the Final Memorandum Under the APA.

Applicants also are not likely to convince a majority of the Court to adopt their narrower position (at 32-38) that the district court improperly vacated the Final Memorandum "universally." As with standing and the merits, the district court's conclusion that universal vacatur is appropriate aligns with the weight of longstanding precedent.

As this Court has explained, "[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case." *FEC v. Akins*, 524 U.S. 11, 25 (1998). And in *Lujan v. National Wildlife Federation*, this Court explained that agency action "can of course be challenged under the APA by a person adversely affected— and the entire '. . . program,' insofar as the content of that particular action is concerned, would thereby be affected." 497 U.S. 871, 890

& n.2 (1990). There, every member of this Court agreed that in an APA action "if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Id.* at 913 (Blackmun, J., dissenting). "Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court." *Id.*; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2412 n.28 (2020) (explaining the APA "contemplates nationwide relief from invalid agency action") (Ginsburg, J., dissenting).

To avoid this conclusion, applicants contend (at 32) that members of this Court have questioned the validity of universal or nationwide grants of injunctive relief. That is true, but as discussed above (at 31-32) vacatur is a distinct remedy authorized by the APA—which instructs courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)(A).

Perhaps recognizing this distinction that applicants now seek to elide, lower courts have long held that "'[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Engi-*

neers, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989)); *see also Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 66–72 (D.D.C. 2019) (Jackson, J.) (explaining that limited relief under section 706 is inconsistent with text and precedent and reflects "a spirit of defiance of judicial authority").[8] And this Court has routinely "affirmed lower court decisions that have invalidated rules universally" and "itself stayed agency action universally." Mila Sohoni, *The Power to Vacate A Rule*, 88 GEO. WASH. L. REV. 1121, 1138 & n.87, 88 (2020) (collecting authority). It would be a far-reaching step indeed to abandon this practice in a stay posture.

Even if it were not true that universal vacatur were appropriate in every case, the lower courts explained why it is appropriate here. "[T]he States are irreparably harmed when aliens with certain criminal convictions or aliens with final orders of removal inevitably move to Texas and Louisiana after those aliens are released, have detainers rescinded, or are otherwise not detained under the Final Memorandum." App.130a. And whether a nationwide injunction would have been appropriate in this case is irrelevant, precisely because the district court declined to enter any injunctive relief at all. App.131a-33a.

---

[8] Multiple other district courts have reached the same conclusion. *E.g., O.A. v. Trump*, 404 F. Supp. 3d 109, 153-54 (D.D.C. 2019); *New York v. Dep't of Com.*, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019); *D.C. v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 46-47 (D.D.C. 2020).

III. The Remaining Factors Do Not Favor a Stay.

Applicants' failure to show a likelihood of success on the merits is sufficient to deny a stay. *Biden v. Texas*, 142 S. Ct. 926, 926 (2021). Nonetheless, applicants fail to demonstrate the remaining factors.

Applicants first complain (at38-39) that vacatur causes serious harm to the federal government because they cannot enforce the Final Memorandum. But applicants have no "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)). Rather, "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id.* And "[t]here is always a public interest in prompt execution of removal orders." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Neither applicants—nor the public interest—are harmed by obliging them to comply with their statutory duties.

The States' injuries are, on the other hand, definitionally irreparable. The costs imposed on them by the Final Memorandum may never be recovered from the federal government because any such recovery would be barred by sovereign immunity.

CONCLUSION

The Court should deny the motion for a stay pending appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Judd E. Stone II
JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN D. WILSON
Deputy Solicitor General

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

Counsel for Respondents

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

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