No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS AND STATE OF LOUISIANA

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
BRIAN H. FLETCHER
CURTIS E. GANNON
Deputy Solicitors General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
DANIEL TENNY
MICHAEL SHIH
SEAN R. JANDA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the state plaintiffs have Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law.

2. Whether the Guidelines are contrary to 8 U.S.C. 1226(c) or 8 U.S.C. 1231(a), or otherwise violate the Administrative Procedure Act.

3. Whether 8 U.S.C. 1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the Guidelines under 5 U.S.C. 706(2).

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are the United States of America; the U.S. Department of Homeland Security (DHS); U.S. Customs and Border Protection (CBP); U.S. Immigration and Customs Enforcement (ICE); U.S. Citizenship and Immigration Services (USCIS); Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Chris Magnus, in his official capacity as Commissioner of CBP; Tae D. Johnson, in his official capacity as Acting Director of ICE; and Ur Jaddou, in her official capacity as Director of USCIS.

Respondents (plaintiffs-appellees below) are the States of Texas and Louisiana.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Constitutions, statutes, and regulation:

Constitution, statutes, and regulation—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 22-58

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS AND STATE OF LOUISIANA

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals denying a stay (J.A. 451-486) is reported at 40 F.4th 205. The memorandum and order of the district court (J.A. 289-403) is not yet reported but is available at 2022 WL 2109204. An additional order of the district court (J.A. 446-450) is available at 2022 WL 2720155.

JURISDICTION

The district court entered final judgment on June 10, 2022 (J.A. 404-405). The United States filed a notice of appeal on June 13, 2022 (J.A. 406-408). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The United States applied to this Court for a stay on July 8, 2022. On July 21, 2022, the Court treated the application as a petition for a writ of certiorari before judgment and granted the petition (J.A. 487). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2101(e).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

A. Background

A "principal feature" of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "is the broad discretion exercised by immigration officials." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012). "[T]he Executive has discretion to abandon" removal of noncitizens at "each stage" of the process: It "'may decline to institute proceedings, terminate proceedings, or decline to execute a final [removal] order.'" *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999) (citation omitted).[1]

The Department of Homeland Security (DHS) and its predecessor, the Immigration and Naturalization Service (INS), have long adopted policies governing the exercise of that discretion to harmonize their efforts and focus their limited resources. J.A. 124-130 (discussing policies from 1909, 1976, 2000, 2010, 2011, 2014, and 2017). Consistent with that longstanding practice, Congress has made the Secretary of Homeland Security responsible for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5).

In September 2021, the Secretary exercised that authority to issue the Guidelines for the Enforcement of Civil Immigration Law. J.A. 110-120 (Guidelines). The Guidelines apply to Immigration and Customs Enforcement (ICE), a component of DHS responsible for en-

---

[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

forcement operations. A memorandum issued with the Guidelines explained the considerations behind them. J.A. 121-164 (Considerations Memo). The Secretary explained that priorities are essential because "there are more than 11 million undocumented or otherwise removable noncitizens in the United States" and DHS does not "have the resources to apprehend and seek the removal of every one of these noncitizens." J.A. 112.

The Guidelines identify three groups of noncitizens as priorities for "apprehension and removal": (1) those who pose "a danger to national security"—for example, suspected terrorists; (2) those who pose a "threat to public safety, typically because of serious criminal conduct"; and (3) those who pose a "threat to border security"—*i.e.*, noncitizens who arrived in the United States after November 1, 2020. J.A. 113, 116.

The Guidelines also provide a framework for determining whether a noncitizen threatens public safety. J.A. 113-115. Rather than relying on "bright lines or categories," the Guidelines call for an assessment of "the totality of the facts and circumstances." J.A. 113. The Guidelines list "aggravating factors" weighing in favor of enforcement action, including "the gravity of the offense" and the "use of a firearm." J.A. 114. They also list "mitigating factors," such as "tender age" and military service. *Ibid.*

The Guidelines emphasize that they do "not compel an action to be taken or not taken" in any particular case and they leave "the exercise of prosecutorial discretion to the judgment of [ICE] personnel." J.A. 118. And although the Guidelines contemplate supervisory review of line officers' enforcement decisions, they do not "create any right or benefit, substantive or procedural, en-

forceable at law by any party in any administrative, civil, or criminal matter." J.A. 120.

Of particular relevance here, the Guidelines apply only to "apprehension and removal," J.A. 111, and do "not provide guidance pertaining to detention and release determinations" for noncitizens already in DHS custody, J.A. 415. The Considerations Memo thus explained that the Guidelines are "consistent with" and "do not purport to override" two statutory provisions requiring that certain noncitizens remain in detention during removal proceedings or while awaiting removal. J.A. 160.[2]

Under the first statutory provision, DHS "shall take into custody" noncitizens convicted of certain offenses when they are released from criminal custody, 8 U.S.C. 1226(c)(1), and "may release" such noncitizens "only" in limited circumstances, 8 U.S.C. 1226(c)(2). DHS explained that once a noncitizen subject to Section 1226(c) is in custody, "that noncitizen generally must remain in custody during the pendency of removal proceedings" unless release is authorized by Section 1226(c)(2) or a court order. J.A. 160. But DHS added that it and INS have consistently read Section 1226(c) to leave intact the Executive Branch's "general prosecutorial discretion" to "choose not to pursue removal of such an individual in the first place." J.A. 159.

Under the second statutory provision, DHS "shall remove" a noncitizen within 90 days after a final order of removal or other triggering event. 8 U.S.C. 1231(a)(1)(A) and (B). The first sentence of Section

---

[2] Both statutory provisions refer to the Attorney General, but Congress transferred the enforcement of those provisions to the Secretary. *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 n.1 (2021).

1231(a)(2) adds that DHS "shall detain" the noncitizen during that 90-day removal period, and the second sentence provides that "[u]nder no circumstance" shall DHS release a noncitizen who is removable on certain criminal or national-security grounds. DHS explained that noncitizens in its custody who are subject to the second sentence of Section 1231(a)(2) "must remain detained for the duration of the removal period unless release is required to comply with a court order." J.A. 160.

B. Proceedings Below

1. Respondents Texas and Louisiana challenged the Guidelines in the United States District Court for the Southern District of Texas. J.A. 72-109. After a trial, the court entered judgment in their favor and vacated the Guidelines nationwide. J.A. 404-405.

The district court held that Texas has Article III standing (and thus did not address Louisiana's standing). J.A. 325 & n.54. The court concluded that the Guidelines increase the number of noncitizens in Texas, leading it to spend more money on law enforcement and social services. J.A. 326; see J.A. 311-323, 327-329. The court also found that the Guidelines harm Texas's *parens patriae* interest "in protecting its citizens" from "criminal activity." J.A. 327. The court additionally rejected the contentions that respondents' statutory claims were barred by 8 U.S.C. 1226(e), which provides that "[n]o court may set aside any action or decision by the [Secretary] under [Section 1226] regarding the detention or release of any alien," and by 8 U.S.C. 1231(h), which provides that "[n]othing in [Section 1231] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States." See J.A. 341.

On the merits, the district court concluded that the Guidelines violate the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*, in three ways. First, the court determined that certain applications of the Guidelines contravene Sections 1226(c) and 1231(a), which it read to impose judicially enforceable mandates to apprehend and detain the noncitizens described in those provisions. J.A. 345-367, 369-374. The court believed that the Guidelines "contradict[] the detention mandates under Sections 1226(c) and 1231(a)(2)" by granting DHS agents "discretion" to "decide who will be detained and when." J.A. 370. Second, the court found the Guidelines arbitrary and capricious because it concluded that DHS failed to adequately consider the risk of recidivism and abscondment by noncitizens and the effects of the Guidelines on States. J.A. 374-382. Third, the court found that the Guidelines were improperly issued without notice and comment. J.A. 382-389.

The district court "vacat[ed]" the Guidelines nationwide. J.A. 397; see J.A. 393-400. The court invoked 5 U.S.C. 706(2), which directs a reviewing court to "set aside" unlawful agency action. In the court's view, Section 706(2) "contemplates wholesale vacatur of entire rules." J.A. 397. The court further held that vacatur did not violate 8 U.S.C. 1252(f)(1), which provides that lower courts lack jurisdiction to "enjoin or restrain" the operation of statutes governing removal, including Sections 1226 and 1231. The court read that language to encompass only injunctions, not vacatur. J.A. 400 n.79; see J.A. 448-449.

2. The Fifth Circuit denied a stay pending appeal, largely adopting the district court's reasoning. J.A. 451-486. The Fifth Circuit acknowledged that its decision conflicted with a Sixth Circuit decision rejecting a

"nearly identical challenge" to the Guidelines. J.A. 486 (citing *Arizona* v. *Biden*, 31 F.4th 469 (6th Cir. 2022) (Sutton, C.J.)).

SUMMARY OF ARGUMENT

I. Respondents lack Article III standing.

A. Respondents do not claim to have suffered any "*direct* injury" at the hands of the federal government. *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927). They instead assert only that enforcement decisions under the Guidelines will cause more noncitizens to be present within their borders, which will lead them to spend more on law enforcement and social services. But a State may not sue the federal government based on such indirect, derivative effects. Federal policies routinely have incidental effects on States' expenditures, revenues, and other activities. Yet such effects have never been viewed as judicially cognizable injuries. As the recent explosion in state suits vividly illustrates, respondents' contrary view would allow any State to sue the federal government about virtually any policy—sharply undermining Article III's requirements and the separation-of-powers principles they serve.

B. Respondents' suit is also barred because "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). That principle applies equally to immigration-enforcement actions. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984). Here, the States are neither subject to nor threatened with enforcement of the immigration laws. They may not challenge the federal government's policies regarding the enforcement of those laws against third parties. That is especially so when Congress, far from attempting to

create a legally cognizable right to demand such enforcement, has generally limited judicial review under the INA to suits brought by the noncitizens directly regulated by the Act, rather than States or other third parties.

C. The district court's theory of standing also fails on its own terms. The Guidelines simply provide for DHS to prioritize some individuals over others when allocating its limited enforcement resources. That does not necessarily mean that fewer noncitizens will be removed overall or that the States' costs will increase.

II. The Guidelines are consistent with the INA, reasonably explained, and procedurally proper.

A. The Guidelines do not violate Section 1226 or Section 1231. At the outset, Section 1226(e) imposes a jurisdictional bar to respondents' claim based on Section 1226(c). And Section 1231(h) precludes courts from construing Section 1231(a) to create the binding obligation that respondents assert.

In any event, respondents' statutory claims lack merit. Section 1226 provides that DHS "shall take into custody" certain criminal noncitizens. 8 U.S.C. 1226(c)(1). And Section 1231 provides that DHS "shall detain" certain noncitizens with final orders of removal. 8 U.S.C. 1231(a)(2). The district court concluded that the word "shall" imposes a judicially enforceable mandate to apprehend and detain everyone in those groups. But that language does not ordinarily displace background principles of law-enforcement discretion, and the context and history of the relevant provisions confirm that ordinary understanding here. See *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005). Especially given perennial constraints on detention capacity, the Executive retains authority to focus its limited re-

sources on those noncitizens who are higher priorities for apprehension. The court's contrary conclusion runs counter to longstanding practice spanning multiple Administrations.

B. DHS's decision to prioritize threats to national security, public safety, and border security was both reasonable and reasonably explained. The district court faulted DHS for failing to adequately consider the risk of recidivism and for giving too little weight to States' interests, but the Guidelines specifically address both issues and the court had no basis to second-guess DHS's judgments.

C. The Guidelines were exempt from APA notice-and-comment requirements under the exceptions for "general statements of policy" and rules of agency "practice" or "procedure." 5 U.S.C. 553(b)(A). Agencies routinely rely on those exceptions to adopt enforcement priorities. Respondents' contrary view would upend that longstanding practice.

III. This Court's third question presented asks whether 8 U.S.C. 1252(f)(1) prevents an order to "hold unlawful and set aside" agency action under 5 U.S.C. 706(2). The answer depends on the meaning of "set aside," but the district court's remedy here was unauthorized under either interpretation.

The district court read Section 706(2) to authorize universal vacatur of a rule by any district court hearing an APA challenge. Properly interpreted, however, Section 706(2) merely directs a court to disregard an unlawful agency action in resolving the case before it. That understanding is consistent with fundamental principles of judicial review. A court that "sets aside" an unconstitutional statute, for example, denies effect to the statute but does not nullify it or render it void. Of

course, when a court sets aside agency action, as when it sets aside a statute, it may grant relief to the parties before it. But in the absence of a special review statute, 5 U.S.C. 703 remits courts to traditional party-specific remedies like injunctions and declaratory relief. The district court's contrary interpretation would transform the APA from a codification of pre-existing principles into a radical departure from them.

Even if Section 706(2) generally authorized vacatur, Section 1252(f)(1) would prohibit that relief in this context. Section 1252(f)(1) generally precludes lower courts from "order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland* v. *Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022). That is precisely what the district court's vacatur does: It bars DHS from relying on the Guidelines based on the court's view of how the covered provisions should be implemented. The court concluded that Section 1252(f)(1) is limited to injunctions. But the statutory text and this Court's decisions interpreting similar language foreclose that interpretation, which would render Section 1252(f)(1) toothless in many of its core applications.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING

Article III empowers federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. A case or controversy exists only if the plaintiff has standing—that is, only if the plaintiff has suffered an injury in fact that is fairly traceable to the challenged action and would likely be redressed by judicial relief. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). An Article III injury, in turn, requires the inva-

sion of a "legally and judicially cognizable" interest, which means the dispute must be of the sort "'traditionally thought to be capable of resolution through the judicial process.'" *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (citation omitted).

The district court held that Texas has standing based on a chain of possible effects: that the Guidelines will increase the State's population of noncitizens; that some of those noncitizens will commit crimes or use social services; and that Texas will then expend additional sums in response. J.A. 311-327. That theory is erroneous for multiple independent but mutually reinforcing reasons. Such incidental effects on a State do not rank as judicially cognizable injuries. Plaintiffs lack a judicially cognizable interest in the enforcement of the law against third parties. And the district court was in any event wrong to believe that fewer noncitizens overall will be removed or the States' costs will necessarily increase.

A. A Federal Policy's Incidental Effects On A State Do Not Qualify As Judicially Cognizable Injuries

A State may sue the federal government when the State is an object of the challenged action—for example, when the federal government requires it to act or to refrain from acting, determines how much federal funding it receives, or deprives it of a legal right. See *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (relying on federal funding). But a State may not sue the federal government simply because a federal policy has incidental effects on the State. Our Nation's history and tradition show that such peripheral effects do not qualify as "legally and judicially cognizable" injuries. *Raines*, 521 U.S. at 819. A contrary holding would inject the federal courts into all manner of policy

controversies at the behest of States seeking to secure by court order what they could not obtain through the political process.

1. This Court's precedents on state standing distinguish between suits against private defendants to vindicate proprietary interests and suits against the United States to vindicate governmental interests. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-602 (1982). When a State sues a private defendant to vindicate a proprietary interest—say, when it seeks to collect a debt or enforce a contract—it may proceed "on the same ground and to the same extent as a corporation or individual." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 561 (1852). But when a State sues the United States, additional principles come into play. See, *e.g.*, *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) (holding that States may not bring *parens patriae* suits against the United States).

One such principle is that a State may sue the United States only if it has suffered a "*direct* injury" at the hands of the federal government. *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927). In our federal system, the United States and the States share sovereignty over the same territory and people. Unlike the Articles of Confederation, the Constitution empowers the United States to act on those people directly, rather than through the States. *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018). The United States and the States are thus "two orders of government, each with its own direct relationship * * * to the people." *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (citation omitted). The United States' policies regulating the people within a State will inevitably have derivative effects on the State itself. But the

autonomy of the national and state sovereigns, acting directly upon individuals "within their respective spheres," *ibid.* (citation omitted), is inconsistent with the notion that a State has a judicially cognizable interest in avoiding the incidental effects of federal policies—especially where, as here, those effects derive from the independent actions of individuals in the State.

Thus, in *Florida* v. *Mellon*, this Court held that Florida lacked standing to challenge the constitutionality of a federal inheritance tax. 273 U.S. at 18. Florida argued that the tax would cause the State financial harm by prompting the "withdrawal of property" and diminishing its tax base. *Id.* at 16. But the Court rejected that theory, explaining that Florida was required to show a "*direct* injury" and any harm caused by the tax was, "at most, only remote and indirect." *Id.* at 18; cf. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992) ("Courts of Appeals have denied standing to States where the claim was that actions taken by the United States Government agencies had injured a State's economy and thereby caused a decline in general tax revenues.").

2. History and tradition—which "offer a meaningful guide to the types of cases that Article III empowers federal courts to consider," *TransUnion*, 141 S. Ct. at 2204 (citation omitted)—confirm that the indirect and incidental effects of federal policies on States are not judicially cognizable injuries. States have felt the ripple effects of federal policies since the beginning of the Republic, but for most of our history it would have been unthinkable for a State to sue the federal government because of such effects. See Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 Notre Dame L. Rev. 2015, 2017-2020 (2019); Ann Woolhandler

& Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 397-446 (1995).

Consider how Jeffersonian States reacted when a Federalist Congress adopted the Alien and Sedition Acts in 1798. Virginia and Kentucky adopted resolutions condemning the laws as unconstitutional. 4 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 554-555, 566-570 (Jonathan Elliot ed., 1836). Virginia specifically complained that the Acts' restrictions on immigration harmed the State, because its "situation render[ed] the easy admission of artisans and laborers an interest of vast importance." *Id.* at 557. Yet neither State sued the Adams Administration to enjoin it from executing the Acts.

Or consider how Federalist States responded to President Jefferson's embargo of 1807. Massachusetts denounced it as "unjust, oppressive, and unconstitutional" and encouraged affected citizens to "apply for redress" in "the judicial courts." *State Documents on Federal Relations: The States and the United States* 34 (Herman V. Ames ed., 1911). Connecticut and Delaware declared the embargo "incompatible with the constitution" and asserted that it had "brought distress and ruin" for their citizens. *Id.* at 37, 41. Yet none of those States sued the Jefferson Administration.

Our constitutional history would have developed quite differently if States could have sued the federal government any time federal policies had incidental effects on them. Maryland would have sued the Bank of the United States to enjoin its operations. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). New York would have sued the Monroe Administration to enjoin issuance of federal steamboat licenses. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). Georgia would have sued the Jackson

Administration to contest federal assertions of power over Indian lands. Cf. *Worcester* v. *Georgia*, 6 Pet. 515 (1832). And this Court would not have rejected Georgia's attempt to sue the Johnson Administration to challenge Reconstruction. Cf. *Georgia* v. *Stanton*, 6 Wall. 50 (1868). The absence of such suits from the historical record confirms that they were not traditionally regarded as "cases" capable of resolution through the judicial process. See *Raines*, 521 U.S. at 826 (rejecting a theory of legislative standing because "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought").

3. Respondents' contrary theory has startling implications. On their view, which the Fifth Circuit endorsed, any federal action that increases "'the number of aliens'" in a State "establish[es] standing" because it indirectly increases the State's expenditures. J.A. 460 (citation omitted). Other States could use equivalent logic to claim injury from any federal action *reducing* their noncitizen populations, on the theory that noncitizens pay state taxes. If such incidental financial effects satisfied Article III, every immigration-policy dispute between the federal government and the States would end up in federal court.

Nor is the problem limited to immigration. Virtually any federal action—from prosecuting crime to imposing taxes to managing federal property—could be said to have some incidental effect on state finances. Because almost every federal policy will affect the people within the States, almost every federal policy will indirectly affect the States themselves. If such effects satisfy Article III, "what limits on state standing remain?" *Ari-*

zona v. *Biden*, 40 F.4th 375, 386 (6th Cir. 2022) (Sutton, C.J.).

Massachusetts v. *Laird*, 400 U.S. 886 (1970), shows where respondents' theory leads. There, Massachusetts sued the Secretary of Defense to enjoin the Vietnam War. The Court summarily rejected the suit, *id.* at 886, but Justice Douglas argued in dissent that the State had standing, *id.* at 887-891. On respondents' theory, the Court was wrong and Justice Douglas was right. Surely the Vietnam War caused at least one dollar in peripheral harm to Massachusetts—for example, because drafted Bay Staters would earn less taxable income while away or be entitled to state veterans' benefits after returning.

Experience confirms that if States are allowed to challenge every federal policy to which their elected leaders object, they will. In recent years, States (and their political subdivisions) have inundated federal courts with suits challenging federal policies on politically salient issues. Several lawsuits ago, Texas's Attorney General announced "his 11th immigration-related lawsuit against the Biden Administration—the 27th overall against Biden." Press Release, Att'y Gen. of Tex., *AG Paxton Again Sues Biden Over Border* (Apr. 28, 2022). California, for its part, "filed 122 lawsuits against the Trump administration, an average of one every two weeks." Nicole Nixon, *California Attorney General Files Nine Lawsuits In One Day As Trump Leaves Office*, Capital Public Radio (Jan. 19, 2021). To take just one other example, Washington "filed 82 lawsuits against the federal government" during the Trump Administration. David Gutman, *Bob Ferguson sued the Trump administration 82 times.*

What's he going to do now?, The Seattle Times (Nov. 15, 2020).

A regime in which any State could challenge virtually any federal policy "would make a mockery" of Article III's case-or-controversy requirement. Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 89-90. It would enable States to treat the federal courts as "an open forum for the resolution of political or ideological disputes." *United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). It would "open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974). It would distort the separation of powers by turning federal judges into "virtually continuing monitors of the wisdom and soundness of Executive action." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). And it would harm the Judiciary itself by "embroiling the federal courts" in "power contest[s]" "at the height of [their] political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment).

4. Under the principles discussed above, respondents lack standing. The Guidelines do not tell respondents what to do or what not to do, do not operate on respondents directly, and do not deprive respondents of any legal rights. The Guidelines simply tell federal officials how to enforce federal law in a field that the Constitution commits to the federal government. Any indirect, incidental effects that the Guidelines may have on respondents do not qualify as judicially cognizable injuries.

B. A Plaintiff Lacks A Judicially Cognizable Interest In The Enforcement Of The Law Against Third Parties

Respondents lack a judicially cognizable injury for an additional reason: A plaintiff generally lacks standing to challenge the government's policies concerning enforcement actions against third parties.

1. In *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), this Court established that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at 619. There, a mother sued a district attorney who had failed to prosecute the father of her child for not paying child support. *Id.* at 616-619. The district attorney had adopted a policy against prosecuting "fathers of illegitimate children," and the mother challenged the policy as a denial of equal protection. *Id.* at 616. The Court held that she lacked standing, explaining that, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

The same principle applies to immigration enforcement. A plaintiff has "no judicially cognizable interest in procuring enforcement of the immigration laws." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984) (citing *Linda R.S.*, 410 U.S. at 619). And "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985).

Those principles reflect both Article II and Article III constraints. Article II vests the executive power in the President and directs him to take care that the laws are faithfully executed. U.S. Const. Art. II, § 1, Cl. 1;

Art. II, § 3. Decisions about "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law" therefore fall "within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion*, 141 S. Ct. at 2207. Under Article III, meanwhile, federal courts sit to protect against "the exertion of unauthorized administrative power," not to compel agencies to exert power against third parties. *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944).

2. Those principles decide this case. Respondents object that DHS is declining to enforce the immigration laws against noncitizens whom respondents would prefer to see apprehended and removed. But respondents have "no judicially cognizable interest in procuring enforcement of the immigration laws" against third parties. *Sure-Tan*, 467 U.S. at 897.

Respondents cannot evade that rule by arguing that the Executive's enforcement policies indirectly affect them. Enforcement policies routinely have indirect effects on crime victims and others, but such effects are not judicially cognizable. The mother in *Linda R.S.*, for example, had "an interest in the support of her child." 410 U.S. at 619. Even so, she lacked standing to "contest the policies of the prosecuting authority" because she was "neither prosecuted nor threatened with prosecution." *Ibid.* The same logic applies here.

3. Nor can respondents claim that Congress has granted them a cognizable interest in having noncitizens within their territory apprehended and removed by the federal government. Just the opposite: The INA contemplates judicial review in suits by the noncitizens

directly regulated by the Act—not by States or other third parties. 8 U.S.C. 1252.[3]

C. The District Court's Standing Analysis Was Flawed

Even putting aside the fundamental problems discussed above, the district court's standing analysis was flawed on its own terms.

1. Neither the record nor common sense supports the assertion that the Guidelines will increase "the number of criminal aliens and aliens with final orders of removal released into Texas," resulting in "increased state costs." J.A. 311, 318 (capitalization omitted). The Guidelines do not limit the number of noncitizens DHS may detain. Nor do they prohibit DHS from detaining any particular noncitizen. They simply establish priorities for using DHS's limited resources. "That the National Government decides to remove or detain person A over person B does not establish that it will pursue fewer people." *Arizona*, 40 F.4th at 383.

It is also pure speculation that the Guidelines will lead Texas to spend more money. Although the district court believed that some noncitizens who would otherwise have been removed will remain in the country be-

---

[3] In other contexts, this Court has held that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *TransUnion*, 141 S. Ct. at 2204-2205 (citation omitted); see *id.* at 2216-2218 (Thomas, J., dissenting). Because Congress has not purported to grant any such right here, this case presents no occasion to decide whether Congress could allow States to sue the United States based on the incidental effects of federal policies, or whether it could grant States a right to the enforcement of federal immigration law. Compare *FEC* v. *Akins*, 524 U.S. 11, 26 (1998) (suggesting that Congress may in some circumstances grant a right to enforcement of the law against others), with *id.* at 36-37 (Scalia, J., dissenting) (arguing that the Take Care Clause precludes such a right).

cause of the Guidelines, J.A. 311-317, other noncitizens who would have remained in the country will instead be prioritized for removal. Indeed, the Guidelines prioritize the very population about which Texas appears to be most concerned: "noncitizens who pose the greatest risks to public safety." *Arizona*, 40 F.4th at 383. The Guidelines thus may well "*decrease* burdens on the States." *Ibid.* (emphasis added).

In concluding otherwise, the district court asserted that the relatively low number of removals carried out in Fiscal Year (FY) 2021 "make[s] clear that the [Guidelines are] dramatically impacting civil immigration enforcement." J.A. 316. But FY2021 ended in September 2021, before the Guidelines even took effect. And removals under Title 8 were down in FY2021 (and FY2020) because DHS was expelling hundreds of thousands of noncitizens encountered at the southwest border under a Title 42 public-health order that took effect in March 2020 (the middle of FY2020). U.S. Customs & Border Prot., *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021* (last modified Dec. 2, 2021) (showing more than one million expulsions in FY2021).

Similarly, the district court stated that the Guidelines have decreased the number of criminal noncitizens in DHS custody. J.A. 315. But the court's own statistics show that the number has been essentially unchanged since the Guidelines took effect. J.A. 316. And the decrease earlier in 2021 is explained by the fact that DHS's "detention population is increasingly occupied by recent border crossers." J.A. 413.

The district court emphasized that DHS has rescinded detainers for some noncitizens in Texas's cus-

tody. J.A. 311-313.[4] But the record contains evidence of just 15 rescissions for noncitizens in Texas's custody and no rescissions for those in Louisiana's custody after the Guidelines took effect. J.A. 312. DHS's choice to focus its limited resources on people other than those 15 individuals does not show that the Guidelines have increased the total number of criminal noncitizens in Texas. And the small number of rescissions underscores the attenuated nature of respondents' asserted injury.

Finally, the district court overlooked the principle that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006). Texas has raised claims under two INA provisions: Section 1226(c), which addresses the detention of "criminal aliens," 8 U.S.C. 1226(c), and Section 1231(a)(2), which addresses the detention of "aliens ordered removed," 8 U.S.C. 1231(a). J.A. 98-102. Yet the court's analysis of financial harm to Texas focused entirely on the population covered by Section 1226(c), citing "Increased State Costs" from "Increased Numbers Of Criminal Aliens," J.A. 318. The court made no comparable findings for the population covered by Section 1231(a)(2), noncitizens with final orders of removal. At a minimum, therefore, respondents lack standing to bring their Section 1231(a)(2) claim.

2. Although the district court relied primarily on a theory of financial harm, it also held that Texas would suffer harm as *parens patriae* because noncitizens not prioritized under the Guidelines could commit crimes against Texans. J.A. 326. Respondents and the Fifth

---

[4] A detainer is a request that a law-enforcement agency notify DHS before releasing a noncitizen and hold the noncitizen for up to 48 hours to facilitate a transfer to DHS custody. J.A. 299.

Circuit have made no serious effort to defend that holding. Stay Opp. 22; J.A. 459. Understandably so. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Snapp*, 458 U.S. at 610 n.16; see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *Florida* v. *Mellon*, 273 U.S. at 18; *Massachusetts* v. *Mellon*, 262 U.S. at 485-486.

3. Finally, the district court stated that, under *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), Texas is entitled to "special solicitude" in assessing Article III standing. J.A. 325 n.54. That is incorrect: In affording the State "special solicitude" in *Massachusetts*, this Court explicitly relied on two features of that case that are absent here. 549 U.S. at 520.

First, *Massachusetts* involved the threatened loss of territory owned by and subject to the sovereignty of the State—a harm that this Court has long treated as distinctive and legally cognizable. See *State Standing*, 81 Va. L. Rev. at 415-416 (discussing 19th-century cases). This case, in contrast, involves "indirect fiscal burdens" that allegedly flow from the Guidelines—a "humdrum feature" of federal policies. *Arizona*, 40 F.4th at 386.

Second, *Massachusetts* attached "critical importance" to the State's "procedural right" under the Clean Air Act to challenge the denial of a petition for rulemaking on emissions standards. 549 U.S. at 516, 518. "[A] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). But the INA creates no procedural right for any third party to challenge immigration-enforcement and related policies.

The district court thus erred in extending *Massachusetts* to create a new doctrine that States are favored litigants for purposes of Article III. This Court has never endorsed that proposition and has not afforded States "special solicitude" in any other case. To the contrary, the Court's decisions since *Massachusetts* have consistently analyzed state standing without granting States favorable treatment simply because they are States. See, *e.g.*, *California* v. *Texas*, 141 S. Ct. 2104, 2116-2120 (2021); *Trump* v. *New York*, 141 S. Ct. 530, 534-537 (2020) (per curiam); *Department of Commerce*, 139 S. Ct. at 2565.

II. THE GUIDELINES ARE LAWFUL

The district court concluded that some applications of the Guidelines contravene Sections 1226(c) and 1231(a)(2), that the Guidelines are arbitrary and capricious, and that their issuance required notice-and-comment rulemaking. Each of those holdings is wrong, and each is a stark rejection of longstanding practice spanning multiple Administrations.

A. The Guidelines Do Not Violate Sections 1226 And 1231

The Guidelines' focus is narrow. By their terms, the Guidelines govern only "the apprehension and removal of noncitizens." J.A. 111. They do "not provide guidance pertaining to detention and release determinations." J.A. 415. The Guidelines are thus "fully consistent with" and "do not purport to override" statutory requirements that DHS continue to detain noncitizens already in its custody. J.A. 160. This suit is instead a dispute about the Guidelines' policies for apprehension of noncitizens not yet in DHS's custody, an area in which the Executive Branch has traditionally enjoyed significant discretion. Respondents' claims that those

policies violate Sections 1226(c) and 1231(a)(2) are meritless.

1. As a threshold matter, Section 1226(e) precludes respondents' Section 1226(c) claim concerning criminal noncitizens, and Section 1231(h) precludes their Section 1231(a)(2) claim concerning noncitizens with final orders of removal.[5]

a. Section 1226(e) states:

> The [Secretary'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 [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. 1226(e). The second sentence, the portion at issue here, uses broad language: "*No* court may set aside *any* action or decision by the [Secretary] under this section *regarding* the detention or release of *any* alien." *Ibid.* (emphases added); see *Patel* v. *Garland*, 142 S. Ct. 1614, 1622 (2022) (noting the breadth of "any" and "regarding"). That expansive language encompasses decisions to apprehend as well as decisions to forgo apprehension. The aspects of the Guidelines that implicate Section 1226(c) therefore qualify as "any action or decision by the [Secretary] under this section regarding the detention or release of any alien." 8 U.S.C.

---

[5] The contention that Section 1226(e) precludes review is properly before this Court because it is jurisdictional. *Demore* v. *Kim*, 538 U.S. 510, 516 (2003). And because Section 1231(h) sets forth a rule of construction for interpreting Section 1231, the contention that Section 1231(h) precludes respondents' suit is fairly included within the question whether the Guidelines violate Section 1231(a)(2). See Stay Appl. 27 (invoking Section 1231(h)). Both contentions were pressed and passed upon below. J.A. 341.

1226(e). "No court may set aside" those aspects of the Guidelines. *Ibid.*

In finding Section 1226(e) inapplicable, the district court relied on opinions in which this Court or a plurality concluded that, despite Section 1226(e), noncitizens detained under Section 1226 could file habeas petitions challenging the legislative or regulatory framework governing their detention. J.A. 343; see *Nielsen* v. *Preap*, 139 S. Ct. 954, 961-962 (2019) (opinion of Alito, J.); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 841 (2018) (opinion of Alito, J.); *Demore* v. *Kim*, 538 U.S. 510, 516-517 (2003). But that line of opinions rests at bottom on the premise that Section 1226(e) lacks the "particularly clear statement" required to "bar habeas review." *Demore*, 538 U.S. at 517. Because this is not a habeas case, that clear-statement rule does not apply. And other Members of the Court have concluded that Section 1226(e) bars review even in the habeas context, a conclusion that applies *a fortiori* here. See *Preap*, 139 S. Ct. at 974-975 (Thomas, J., concurring in part and concurring in the judgment).

b. Section 1231(h) states:

> 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.

8 U.S.C. 1231(h). That provision's plain terms preclude a court from reading Section 1231(a)(2) to grant a State a legally enforceable entitlement to the apprehension, detention, or removal of noncitizens.

The district court found Section 1231(h) inapplicable on the ground that it "applies only to aliens," not to States. 524 F. Supp. 3d 598, 637 (emphasis omitted); see J.A. 342 (referring to that earlier decision). But Section

1231(h) precludes enforcement "by *any* party." 8 U.S.C. 1231(h) (emphasis added). If Congress meant to limit Section 1231(h) to claims brought by noncitizens, it would have said so. Cf. 8 U.S.C. 1252(g) (precluding judicial review of certain claims brought by "any alien").

2. Respondents' statutory claims in any event lack merit.

a. Section 1226 governs apprehension and detention of noncitizens pending removal proceedings. Subsection (a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Subsection (c)(1) then provides that the Secretary "shall take into custody any alien who" is removable on specified criminal or national-security grounds "when the alien is released" from criminal custody. 8 U.S.C. 1226(c)(1). Finally, subsection (c)(2) provides that the Secretary "may release an alien described in" Section 1226(c)(1) "only" as part of a witness-protection program. 8 U.S.C. 1226(c)(2).

In the Considerations Memo, DHS acknowledged that subsection (c)(2) limits its discretion to release criminal noncitizens already in its custody, but adhered to its longstanding view that subsection (c)(1) leaves intact its discretion as to the apprehension of those not yet in its custody. J.A. 159-160; see J.A. 420-428 (explaining DHS's practices). The district court concluded, however, that because subsection (c)(1) provides that the Secretary "shall" take criminal noncitizens into custody, it displaces any discretion that the Secretary may have had. J.A. 346-353. That is incorrect.

First, Section 1226 applies only during the pendency of removal proceedings. 8 U.S.C. 1226(a). It follows that subsection (c)(1)'s "shall take into custody" lan-

guage comes into play only if DHS decides to institute or maintain removal proceedings in the first place. See *Arizona*, 40 F.4th at 390-391. But that threshold decision to institute proceedings is committed to DHS's "absolute discretion." *Chaney*, 470 U.S. at 831; see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). So whatever duties subsection (c)(1) may impose, it does not require DHS to arrest someone DHS is not proceeding against at all.

Second, even when DHS does decide to initiate proceedings against a particular noncitizen, Section 1226(c) does not displace the Executive's traditional discretion over decisions to apprehend individuals not yet in its custody. This Court has explained that "law-enforcement discretion" is so "deep-rooted" that it remains intact "even in the presence of seemingly mandatory legislative commands." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 761 (2005). Thus, in *Castle Rock*, the Court declined to find "a true mandate of police action" in a state law that provided that police officers "'shall enforce'" restraining orders and "'shall arrest'" violators. *Id.* at 759, 761 (citation and emphases omitted). In another case, the Court rejected the notion that "mandatory language" in a city ordinance left the police with "*no* discretion" over enforcement, observing that, as a matter of "common sense," "all police officers must use some discretion in deciding when and where to enforce city ordinances." *City of Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999). In a third case, the Court held that the government retained "complete discretion" over enforcement, even though the applicable statute provided that violators "'shall'" be fined or imprisoned. *Chaney*, 470 U.S. at 835. And in a fourth case, the Court affirmed that "the Executive has discretion to abandon" removal

at any stage—even after a removal order, *AADC*, 525 U.S. at 483—despite the INA's directive that the Secretary "shall remove" a noncitizen who has been ordered removed, 8 U.S.C. 1231(a)(1)(A).

Likewise for Section 1226(c)(1). It is "hard to imagine" that Congress denied DHS discretion to consider "the circumstances of the violation" or "the competing duties" of the agency when deciding whether to expend scarce law-enforcement resources to pursue and apprehend a particular noncitizen. *Castle Rock*, 545 U.S. at 761. And it is implausible to read subsection (c)(1) to impose a duty to apprehend that is "open-ended as to priority, duration and intensity" of law-enforcement efforts. *Id.* at 762 (citation omitted).

Third, the district court's interpretation of Section 1226(c)(1) is both unprecedented and infeasible. Congress has not appropriated "the resources to apprehend and seek the removal" of every removable criminal noncitizen, J.A. 112; see J.A. 432, reflecting its understanding that the provision does not require DHS to apprehend, detain, and remove every covered individual. Requiring DHS "to arrest, take into custody, and detain all known noncitizens described in § 1226(c)" "would completely overwhelm [DHS's] current capacity." J.A. 432. Devoting all available detention space to those noncitizens would also compromise DHS's ability to protect the public from more serious threats. For example, "a noncitizen with two petty theft offenses could be subject" to Section 1226(c), but one "with pending charges for sex offenses or other violent felonies may not." *Ibid.* The court erred in reading the INA to require such counterintuitive and unprecedented results.

Finally, Congress has vested the Secretary with the responsibility to establish "national immigration en-

forcement policies and priorities." 6 U.S.C. 202(5). That reflects Congress's recognition that the Secretary is best positioned to determine how to allocate DHS's limited resources across different aspects of the INA's reticulated scheme. If respondents' view were to prevail and any State could obtain an order requiring the Secretary to concentrate enforcement on one aspect of the scheme rather than another, it would be States and federal courts, rather than the Executive, that would determine how the agency uses its limited resources.

The district court's contrary rationales lack merit. The court reasoned that the word "shall" in Section 1226(c)(1) connotes a judicially enforceable command because the statute elsewhere uses the word "may." J.A. 352. But this Court has read "shall" as accommodating background principles of law-enforcement discretion even when the legislature has elsewhere used "may." See *Castle Rock*, 545 U.S. at 764 n.11. The district court also quoted cases in which this Court described Section 1226(c) as providing for "mandatory detention." See J.A. 353; *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 n.2 (2021). But those cases involved noncitizens' efforts to obtain release from custody. DHS has acknowledged that Section 1226(c)(2) requires it to continue to detain covered noncitizens who are already in its custody, see J.A. 160, but the Guidelines do not conflict with that detention mandate because they address only apprehension and removal, not detention and release. See p. 4, *supra*.

b. The Guidelines also comply with Section 1231(a)(2). Section 1231(a) governs the detention and removal of noncitizens who have already been ordered removed. It directs DHS to remove a noncitizen within

a 90-day removal period. 8 U.S.C. 1231(a)(1). It then provides:

> During the removal period, the [Secretary] shall detain the alien. Under no circumstance during the removal period shall the [Secretary] release an alien who has been found [removable on certain criminal and national-security grounds].

8 U.S.C. 1231(a)(2). In the Considerations Memo, DHS acknowledged that Section 1231(a)(2)'s second sentence constrains its discretion to release criminal noncitizens already in its custody. J.A. 160. But the district court concluded that, because the first sentence provides that DHS "shall detain" noncitizens with final orders of removal, 8 U.S.C. 1231(a)(2), it "mandate[s] detention" of such noncitizens, J.A. 334.

In considering whether the first sentence requires "detention," J.A. 334, the district court focused on the wrong issue. To repeat: The Guidelines govern only "the apprehension and removal of noncitizens" and do "not provide guidance pertaining to detention and release determinations." J.A. 111, 415. Regardless of whether the first sentence of Section 1231(a)(2) requires continued detention—an issue that this Court need not resolve here—it does not require the apprehension of noncitizens not yet in DHS's custody. Section 1231(a)(2) refers only to detention and, unlike other provisions of the INA, does not speak to apprehension at all. See, *e.g.*, 8 U.S.C. 1330(b)(3)(A)(i) ("apprehension, detention, and removal"); 8 U.S.C. 1357(g)(1) ("investigation, apprehension, or detention"); 8 U.S.C. 1357(g)(10)(B) ("apprehension, detention, or removal"); 8 U.S.C. 1536(a)(3)(B) ("arrest and detention").

In addition, the arguments made above in the context of Section 1226(c)(1) also apply to Section 1231(a)(2). See

pp. 27-30, *supra*. Both provisions operate in an area, removal of noncitizens, in which the Executive retains significant discretion. Indeed, this Court has recognized that "the Executive has discretion to abandon" removal of noncitizens at "each stage" of the process, including by "'declin[ing] to execute a final [removal] order,'" *AADC*, 525 U.S. at 483-484 (citation omitted)—notwithstanding Section 1231(a)(2)'s "shall remove" language. That principle reflects that the word "shall" does not ordinarily displace law-enforcement discretion. And if DHS "were required to arrest, take into custody, and detain all known noncitizens described in * * * § 1231(a)(2), it would completely overwhelm [DHS's] current capacity." J.A. 432.

In any event, the district court's interpretation is wrong on its own terms. Although the first sentence of Section 1231(a)(2) provides that DHS "shall detain" noncitizens with final removal orders, the second sentence adds that "[u]nder no circumstance" may DHS release noncitizens with final removal orders who have committed certain crimes. 8 U.S.C. 1231(a)(2). If the first sentence mandated detention of all noncitizens with final removal orders, leaving no room for discretion, the second sentence would be superfluous. *Arizona* v. *Biden*, 31 F.4th 469, 481 (6th Cir. 2022). Across administrations, the Executive has therefore long read the first sentence not to impose a detention mandate. See, *e.g.*, *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001); Memorandum from Bo Cooper, Gen. Counsel, INS, to Reg'l Counsel, *Detention and Release of Aliens with Final Orders of Removal* 1 (Mar. 16, 2000).

B. The Guidelines Are Not Arbitrary And Capricious

The APA authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although "the available data" often "do not settle a regulatory issue," *id.* at 52, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). Instead, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

1. The Guidelines easily satisfy that standard because they are both "reasonable and reasonably explained." *Prometheus*, 141 S. Ct. at 1158. The Guidelines reasonably focus DHS's limited resources on threats to public safety, national security, and border security. J.A. 113-116. And the Secretary offered far more extensive explanation for the Guidelines than is customary for agency enforcement memoranda. See J.A. 189-212; Administrative Record 43-64 (Nov. 4, 2021) (prioritization memoranda issued in previous administrations). The accompanying Considerations Memo, for example, explains the necessity for prioritization in light of resource limitations and discusses the "key considerations" underlying the Guidelines, including public safety, coordination of law-enforcement efforts, the potential impact on States, the effect of statu-

tory mandates, and the virtues and vices of alternative approaches. J.A. 144 (capitalization omitted); see J.A. 130-137, 144-164.

2. The district court determined that DHS "did not substantively consider recidivism" "among criminal aliens." J.A. 376. But DHS *did* consider that issue, which the court had viewed as "a central concern" in enjoining an earlier, interim priorities memorandum. J.A. 145. The Guidelines expressly address "the district court's concern by calling for 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" to determine whether a noncitizen poses "a meaningful risk of recidivism." J.A. 146. In identifying "those factors that make an offender particularly more likely or less likely to recidivate," DHS relied on "its expert judgment and experience" as well as relevant empirical literature. J.A. 146-147 & n.43.

The district court did not dispute the data on which DHS relied. See J.A. 377 ("The studies cited may indeed be correct."). Instead, it faulted DHS for invoking (in part) "studies about criminality among all aliens," rather than "studies about aliens who have already been convicted of a serious crime." J.A. 376. The court pointed to data purportedly showing that "criminal aliens recidivate" at "alarmingly high rates." J.A. 377-378.

Even accepting the district court's characterization, the data it cited do not conflict with the Guidelines, which recognize criminality as a critical public-safety consideration and set priorities that account for greater risk factors. J.A. 113-114, 146-148. The court thus failed to show that the agency "offered an explanation

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

The district court's analysis of data regarding abscondment, J.A. 378-379, fares no better. Those data do not identify the factors that make a particular noncitizen likely to abscond, and thus have no bearing on whether the agency's prioritization scheme is reasonable.

3. The district court also determined that DHS failed to consider "the costs its decision imposes on the States" or "their reliance interests." J.A. 380. To the contrary, the Considerations Memo includes an entire section entitled "Impact on States." J.A. 149-155. The Memo discusses the Guidelines' potential "negative effects" "on States," in the form of both "costs" and the "undermining [of] reliance interests." J.A. 150. Although DHS found it difficult to quantify any "indirect, downstream impacts" on States, it observed that the "net" effects could be positive. J.A. 150-151 & n.49, 153. And DHS was unaware of any State that had "materially changed its position to its detriment" on the basis of prior enforcement policies. J.A. 155.

The district court discounted the agency's analysis as "lip service." J.A. 380. But the court identified neither any empirical literature computing costs to the States nor any actions that individual States have taken in reliance on prior policies. And the "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *Prometheus*, 141 S. Ct. at 1160.

In any event, DHS ultimately concluded that "none of the asserted negative effects on States" outweighs

the "benefits" of the Guidelines. J.A. 150. The States' purported financial costs and "reliance interests * * * are but one factor to consider," and an agency is entitled to "determine, in the particular context before it, that other interests and policy concerns outweigh" those considerations. *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020). "Making that difficult decision [i]s the agency's job." *Ibid.* DHS did that job here. This Court should decline to "second-guess[]" the Secretary's "value-laden decisionmaking and * * * weighing of incommensurables under conditions of uncertainty." *Department of Commerce*, 139 S. Ct. at 2571.

C. The Guidelines Did Not Require Notice And Comment

The APA generally requires notice and comment for legislative rules. 5 U.S.C. 553(b). Like previous enforcement priorities issued by DHS and INS without notice and comment, see J.A. 125-130, the Guidelines are exempt from that requirement as a "general statement[] of policy" or a "rule[] of agency organization, procedure, or practice," 5 U.S.C. 553(b)(A).

1. A statement of policy "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) (citation omitted); see U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947) (*Attorney General's Manual*). That is precisely what the Guidelines do. The INA confers enforcement discretion on DHS, see p. 2, *supra*; *AADC*, 525 U.S. at 483-484, and the Guidelines "explain[] how the agency * * * will exercise [that] broad enforcement discretion," *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.).

Unlike legislative rules, the Guidelines do not "impose legally binding obligations or prohibitions on regulated parties." *National Mining Ass'n*, 758 F.3d at 251; see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). The Guidelines do not "create any right or benefit, substantive or procedural, enforceable at law by any party." J.A. 120. Indeed, the Guidelines themselves —as opposed to individual enforcement decisions made by ICE officers—do not regulate private parties at all. And to the extent noncitizens may seek internal review if they believe they do not fall within the priorities identified in the Guidelines, J.A. 384; see J.A. 119, that review process is simply an avenue to petition the agency to exercise enforcement discretion—a request that any noncitizen could make even in the Guidelines' absence.

The district court concluded that the Guidelines do not qualify as a general statement of policy because they "bind[ ] DHS personnel." J.A. 384. At the outset, the court misapprehended the discretion the Guidelines reserve to individual ICE officers. The Guidelines do "not compel an action to be taken or not taken," and instead leave "the exercise of prosecutorial discretion to the judgment of [ICE] personnel." J.A. 118. The Guidelines' aggravating and mitigating factors also "are not exhaustive," allowing personnel to "evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." J.A. 115.

In any event, the fact that the Guidelines instruct ICE officers "to consider and apply certain priorities and factors," J.A. 384, is irrelevant. A uniform "policy" is still a "policy." 5 U.S.C. 553(b)(A); see *Webster's New International Dictionary of the English Language* 1908 (2d ed. 1958) (*Webster's*) (defining "policy" as "[a] settled or definite course or method adopted and fol-

lowed by a government") (emphasis omitted). And a central virtue of policy statements is that they allow senior officials to guide lower-level personnel in a public way, thereby promoting predictability and transparency. See *National Mining Ass'n*, 758 F.3d at 250 (deeming an "instruction to [agency] staff" a statement of policy). Here, Congress has vested the Secretary with the authority to enforce the INA and exercise prosecutorial discretion. 8 U.S.C. 1103(a); 6 U.S.C. 202(5). Statements of policy like the Guidelines allow the Secretary to guide the exercise of that discretion even after he has delegated it. See 8 U.S.C. 1103(a)(2) (authorizing the Secretary to "control, direct[ ], and supervis[e]" his subordinates); see also 6 U.S.C. 112(a) and (b)(1); 8 C.F.R. 2.1. The district court's contrary approach would hamstring the Secretary's ability to supervise his agents.

2. In the alternative, the Guidelines qualify as a rule of "agency organization, procedure, or practice." 5 U.S.C. 553(b)(A); see *Vietnam Veterans of Am.* v. *Secretary of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988) (observing that this exception "is quite independent of whether the procedures will be binding"). A rule of procedure or practice regulates the agency's own behavior without changing the substantive rights of parties outside the agency. See *Mendoza* v. *Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). Consistent with that principle, the Guidelines merely "urg[e]" ICE's "enforcement agents to concentrate their limited resources on particular areas where" the agency "believes [their] attention will prove most fruitful." *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1050 (D.C. Cir. 1987).

The district court's contrary conclusion rested on its view that the Guidelines have a "substantial impact" on

noncitizens and States. J.A. 386. That analysis is untethered from the APA's text, which focuses on the nature of the rule, not the scope of the impact. The Guidelines do not modify the substantive rights or obligations of States or noncitizens under the INA; instead, they regulate only DHS's internal "practice" and "procedure." 5 U.S.C. 553(b)(A).

3. Finally, it bears emphasis that agencies routinely adopt important enforcement policies without notice and comment. See 1 Richard J. Pierce, *Administrative Law Treatise* § 6.3, at 424 (5th ed. 2010); see also, *e.g.*, Memorandum from Attorney General Jefferson B. Sessions, III, *Re: Marijuana Enforcement* (Jan. 4, 2018); Memorandum from Attorney General Eric H. Holder, Jr., *Re: Department Policy on Charging and Sentencing* (May 19, 2010); Memorandum from Deputy Attorney General Paul J. McNulty, *Re: Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006). Requiring public comment for such policies would upend long-settled practices across the Executive Branch. The APA does not require that disruptive result.

III. THE DISTRICT COURT'S REMEDY WAS UNLAWFUL

This Court also granted certiorari on the question whether "8 U.S.C. §1252(f)(1) prevents the entry of an order to 'hold unlawful and set aside' the Guidelines under 5 U.S.C. §706(2)." J.A. 487. The answer to that question depends on what the term "set aside" means. Properly interpreted, Section 706(2) simply directs a court to decline to give effect to an unlawful agency action in deciding the case at hand and granting relief to the parties before it. A decision that "sets aside" agency action in that sense would not violate Section 1252(f)(1) (though certain accompanying relief, such as an injunction, could). The district court, however, read Section

706(2) to authorize it to "vacat[e]," rather than merely disregard, the Guidelines. J.A. 397. That remedy was doubly flawed: Section 706(2) does not authorize vacatur in the first place, and even if it did, Section 1252(f)(1) would bar that relief in this context.

A. Section 706(2) Does Not Authorize Vacatur

Section 706(2) provides that a "reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary [and] capricious," "without observance of procedure required by law," or "otherwise not in accordance with law." 5 U.S.C. 706(2). The district court interpreted that language as authorization to vacate the Guidelines. J.A. 393-394. And under Fifth Circuit precedent, vacatur renders an agency decision "void." *Texas* v. *Biden*, 20 F.4th 928, 957 (2021), rev'd and remanded on other grounds, 142 S. Ct. 2528 (2022). But Section 706(2) does not authorize such relief; indeed, it does not pertain to remedies at all, which are instead governed by Section 703. Rather, Section 706(2) is a rule of decision directing the reviewing court to disregard unlawful "agency action, findings, and conclusions" in resolving the case before it.

1. When used in the context of judicial review, "set aside" can refer to vacating an order—one might say, for example, that an appellate court "sets aside" a lower-court judgment. See John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Reg. Bull. 37, 42 (2020) (Harrison). But "[t]hose words can also refer to a court's decision to regard a purportedly valid juridical act as ineffective." *Id.* at 43; see *Webster's* 2291 (defining "set aside" as a: "To

put to one side; discard; dismiss" and b: "To reject from consideration; overrule") (emphasis omitted).

Statutes and judicial opinions often use the phrase in the latter sense when they refer to courts' "setting aside" unconstitutional legislation. See, *e.g.*, Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752-753; *Mallinckrodt Chem. Works* v. *Missouri ex rel. Jones*, 238 U.S. 41, 54 (1915); see also Harrison 43-45 (discussing other examples). The phrasing in that context means that courts disregard unconstitutional statutes when deciding the cases before them, not that they vacate the statutes. Courts "have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Massachusetts* v. *Mellon*, 262 U.S. at 488. Instead, judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment." *Ibid.*

Treating Section 706(2) as an instruction to disregard unlawful agency action thus aligns ordinary judicial review of agency action with judicial review of legislation. And it is also the only interpretation consistent with the statutory context. Section 706(2) requires a court to "hold unlawful and set aside agency action, findings, and conclusions." It would make no sense for a court to vacate an agency's "findings" and "conclusions." But it is entirely sensible for a court to disregard unfounded agency findings and conclusions in resolving the case before it.

In addition, because Section 706 provides the substantive standard for finding agency action "unlawful," 5 U.S.C. 706(2), it must be capable of application in all forms of action where Section 706 applies. See Harrison 45-46. The APA expressly permits challenges to agency action to be raised in "actions for declaratory judg-

ments or [on] writs of prohibitory or mandatory injunction or habeas corpus," as well as "in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703. No one would suggest that a court hearing a habeas petition or an enforcement action could vacate a regulation. But Section 706(2) fits naturally in those contexts if it is understood as an instruction to disregard unlawful agency actions, conclusions, and findings.

2. Properly understood, therefore, Section 706(2)'s instruction to "set aside" unlawful agency action does not dictate any particular remedy. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 452 (2017) (Bray). Of course, when a court declines to apply an agency action to the case before it on the ground that the action is unlawful, it may issue relief to give effect to that decision. But a different provision, Section 703, points *outside* the APA for the available remedies. As Section 703 recognizes, some cases are governed by a "special statutory review proceeding," 5 U.S.C. 703, which may authorize a court of appeals to vacate an order or rule, see Harrison 39-40; see also, *e.g.*, 28 U.S.C. 2342. Where no such proceeding is available, Section 703 provides that "[t]he form of proceeding" under the APA is a traditional "form of legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction."

3. The historical record confirms that Congress expected APA litigants to obtain traditional remedies under Section 703 and did not intend to create a novel remedy of universal vacatur in Section 706. The legislative history repeatedly refers to Section 703 as governing remedies. See, *e.g.*, *Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 36-37 (1946); 92

Cong. Rec. 2159 (1946). And both committee reports paraphrase Section 706(2) as authorizing a court to hold agency action unlawful, without mentioning the phrase "set aside," see S. Rep. No. 752, 79th Cong., 1st Sess. 27 (1945) (Senate Report); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 44 (1946)—an unlikely choice if that language was intended to establish a new and far-reaching remedy.

Moreover, Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Consistent with that principle, the legislative history explains that the APA "declares the existing law concerning the scope of judicial review." Senate Report 44. And the Attorney General similarly observed shortly after the APA's enactment that the statute "constitute[s] a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." *Attorney General's Manual* 93.

Interpreting Section 706 to require universal vacatur would bring about the kind of remedial innovation that Congress disclaimed. Remedies "ordinarily 'operate with respect to specific parties,'" rather than "'on legal rules in the abstract,'" *California*, 141 S. Ct. at 2115 (citation omitted), but vacatur does the opposite, see J.A. 449-451. In addition, the district court concluded that "by necessity, vacating a rule applies universally," J.A. 398, but universal relief "upset[s] the bedrock practice of case-by-case judgments with respect to the parties in each case," *Arizona*, 31 F.4th at 484 (Sutton, C.J., concurring); see Bray 438 n.121. And reading Section 706(2) to authorize hundreds of district judges around the Nation to grant universal relief in

every APA case would perpetuate all of the now-familiar problems with nationwide injunctions. See, *e.g.*, *DHS* v. *New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2425-2433 (2019) (Thomas, J., concurring).[6]

B. Section 1252(f) Bars Vacatur Of The Guidelines

Even if Section 706(2) authorized vacatur, Section 1252(f)(1) would nevertheless bar lower courts (but not this Court) from granting that relief in this context.

1. Section 1252(f)(1) states 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 specified provisions, with one exception not relevant here. 8 U.S.C. 1252(f)(1). Section 1252(f)(1) applies here by its plain terms. It is undisputed that Sections 1226(c) and 1231(a) are among the specified provisions. As this Court recently explained, Section 1252(f)(1)'s reference to "the 'operation of' the relevant statutes is best understood to refer to the Government's efforts to enforce or implement them." *Garland* v. *Aleman Gonzalez*, 142 S. Ct. 2057, 2064 (2022). Accordingly, Section 1252(f)(1) generally prohibits lower courts from "order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 2065.

---

[6] The government has argued that even if vacatur were an available remedy under the APA—either under Section 706(2) or because vacatur could in some circumstances be an appropriate remedy under Section 703—background principles of equity would ordinarily dictate that such orders be limited to vacating the challenged action as applied to the parties before the court, not universally. Stay Appl. 37-38.

That is exactly what the district court did when it vacated the Guidelines. That remedy rendered the Guidelines "void," *Texas* v. *Biden*, 20 F.4th at 957, based on the court's view of how the government is required to implement Sections 1226(c) and 1231(a). The court's order thus "enjoin[ed] or restrain[ed]" the "operation," 8 U.S.C. 1252(f)(1), of those provisions. As the court explained, its vacatur means that DHS "no longer ha[s] nationwide immigration enforcement guidance." J.A. 395; see J.A. 394. DHS has been forced to halt all implementation of the Guidelines, and thousands of ICE officers around the country have been told that they may not rely on the Secretary's instructions. Just as in *Aleman Gonzalez*, therefore, the court's order "require[s] officials to * * * refrain from actions that," "in the Government's view," "are allowed by" Sections 1226(c) and 1231(a). 142 S. Ct. at 2065.

2. The district court concluded that Section 1252(f)(1) is limited to injunctions and therefore does not bar vacatur. J.A. 400 n.79, 448-449. The court also objected on policy grounds to the government's position. J.A. 449-450. The court's analysis was mistaken in multiple independent respects.

a. Like an injunction, vacatur "restrict[s] or stop[s] official action," *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 13 (2015), by prohibiting officials from relying on the agency action under review. Vacatur is a "less drastic remedy," *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 165 (2010), than an injunction prohibiting the agency from re-adopting the challenged policy in the future. But a vacatur is practically equivalent to an injunction compelling the agency to rescind or stop implementing the challenged action. Vacatur thus possesses the hallmark of the relief barred by Section 1252(f)(1):

It "order[s] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" the law. *Aleman Gonzalez*, 142 S. Ct. at 2065.

Consistent with that view, courts routinely treat vacatur as functionally equivalent to an injunction. In *Regents*, this Court observed that its affirmance of the district court's "order vacating the rescission ma[de] it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by" the lower courts. 140 S. Ct. at 1916 n.7. Similarly here, the district court denied respondents' request for an injunction in part on the ground that "vacatur is sufficient to address the injury." J.A. 400.

This Court, moreover, has repeatedly given a broad interpretation to terms such as "injunction" in other statutes. For example, the Court interpreted a statute conferring jurisdiction over an appeal from an "*injunction* in any civil action * * * required * * * to be heard and determined by a district court of three judges," 28 U.S.C. 1253 (emphasis added), to apply to orders with a "coercive * * * effect." *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 307 (1975). In reaching that conclusion, the Court commented that it had "repeatedly exercised jurisdiction under [the provision] over appeals from orders * * * not cast in injunctive language but which by their terms simply 'set aside' or declined to 'set aside' orders of the [agency]." *Id.* at 308 n.11 (citation omitted). Here, too, the district court's order vacating the Guidelines qualifies as an injunction barred by Section 1252(f)(1).

b. In any event, Section 1252(f)(1), on its face, is not limited to injunctions. Instead, it prohibits lower-court orders that "enjoin *or restrain*" the Executive Branch's

operation of the covered provisions. 8 U.S.C. 1252(f)(1) (emphasis added). The common denominator of the terms "enjoin" and "restrain," *ibid.*, is that they involve coercion. See *Black's Law Dictionary* 529 (6th ed. 1990) ("[e]njoin" means to "require," "command," or "positively direct") (emphasis omitted); *id.* at 1314 ("[r]estrain" means to "limit" or "put compulsion upon") (emphasis omitted). Together, they indicate that a court may not impose coercive relief that "interfere[s] with the Government's efforts to operate" the covered provisions in a particular way. *Aleman Gonzalez*, 142 S. Ct. at 2065. That meaning easily encompasses judicial vacatur. The district court's contrary interpretation would read the word "restrain" out of the statute.

The district court pointed to Section 1252(f)(1)'s title—"Limit on injunctive relief," 8 U.S.C. 1252(f)—in support of its narrow reading. J.A. 448-449. But a "title or heading should never be allowed to override the plain words of a text." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (citation omitted). And Section 1252(f)(1)'s text—it bears repeating—uses not only "enjoin" but also "restrain."

Respondents have contended (Stay Opp. 32) that the term "restrain," 8 U.S.C. 1252(f)(1), encompasses only temporary restraining orders. That approach does not eliminate the superfluity, because temporary restraining orders are a species of injunctive relief and thus already covered by the term "enjoin." *Ibid.*; see *Sampson* v. *Murray*, 415 U.S. 61, 87 (1974); 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2941, at 33 (2013) (describing "three types of injunctions," including a "temporary-restraining order"). And respondents' position creates interpretive problems for the adjoining subsection, which states that "no court

shall enjoin the removal of any alien pursuant to a final order" except on a certain showing. 8 U.S.C. 1252(f)(2). On respondents' view, that prohibition would allow courts to grant temporary restraining orders even when they could not grant preliminary or permanent injunctions—an implausible result that respondents do not attempt to defend.

c. Lastly, the district court reasoned that the government's interpretation "would likely insulate virtually every rule related to the INA from judicial review." J.A. 449. But such "policy concerns cannot trump the best interpretation of the statutory text." *Patel*, 142 S. Ct. at 1627. As this Court recently explained in addressing another provision of Section 1252, "the text and context of [the provision]—which is, after all, a jurisdiction-stripping statute—clearly indicate" that the lower courts lack jurisdiction. *Ibid.*

In any event, the district court's criticism is misplaced. Section 1252(f)(1) "does not deprive the lower courts of all subject matter jurisdiction" over claims involving the covered provisions. *Biden* v. *Texas*, 142 S. Ct. 2528, 2539 (2022). It does not preclude respondents from obtaining declaratory relief, see *Preap*, 139 S. Ct. at 962 (opinion of Alito, J.), or an individual noncitizen in removal proceedings from obtaining coercive relief, see 8 U.S.C. 1252(f)(1), or any party from obtaining any relief in this Court, see *Biden* v. *Texas*, 142 S. Ct. at 2539.

Instead, Section 1252(f)(1) simply prohibits lower courts from granting coercive remedies based on Congress's considered judgment that only this Court should have the authority to grant programmatic relief against the Executive Branch's implementation of the INA. Interpreting Section 1252(f)(1) to exclude vacatur would

open a gaping loophole in that provision's coverage and thwart Congress's fundamental purpose. It would allow any district court to forbid the Executive Branch's chosen means of "operati[ng]" the specified provisions nationwide, 8 U.S.C. 1252(f)(1), forcing the government either to seek emergency relief or to abandon enforcement of the challenged policy pending appeal. That outcome conflicts with Congress's expectation that Section 1252(f)(1) would ensure that—to the extent removal procedures could be challenged in court—those procedures would "remain in force while such lawsuits are pending" (*i.e.*, until this Court ruled). H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996). Section 1252(f)(1)'s purpose, like its text and context, thus provides no basis for drawing an artificial distinction between injunctions and vacatur.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
BRIAN H. FLETCHER
CURTIS E. GANNON
Deputy Solicitors General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
DANIEL TENNY
MICHAEL SHIH
SEAN R. JANDA
Attorneys

SEPTEMBER 2022

APPENDIX

1. 5 U.S.C. 553 provides:

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. 8 U.S.C. 1226 provides:

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[1] 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.

---

[1] So in original. Probably should be "sentenced".

(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 as-

sistance 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.

5. 8 U.S.C. 1231 provides in pertinent part:

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.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment.

---

[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request

[3] So in original. Probably should be followed by a closing parenthesis.

to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with

the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

* * * * *

(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.

* * * * *

6. 8 U.S.C. 1252(f) provides:

Judicial review of orders of removal

(f) Limit on injunctive relief

(1) In general

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.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.