

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

STATE OF TEXAS, STATE OF LOUISIANA))))
	Plaintiffs,)))
v.)))
UNITED STATES OF AMERICA, <i>et al.</i>)))
	Defendants.))
)))

**DEFENDANTS' PRE-TRIAL PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. Findings of Fact.

A. Immigration Enforcement Background.

1. United States Executive Agencies tasked with enforcing U.S. immigration laws (“Immigration Enforcement Authorities”—including the former Immigration and Naturalization Service (“INS”), and the current Department of Homeland Security (“DHS”)—have historically exercised discretion over immigration enforcement decisions, including arrests and removals. *See, e.g.*, Sam Bernsen, *INS General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (“Bernsen Mem.”) (July 15, 1976), AR_DHSP_00000022.

2. DHS does not have sufficient resources to identify, apprehend, and remove all noncitizens unlawfully present in or otherwise removable from the United States (roughly 11 million in total). *See* Guidelines for the Enforcement of Civil Immigration Law, Secretary of the Department of Homeland Security (Sept. 30, 2021), ECF No. 122-1; *Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil*

Immigration Law (“Considerations Memo”), AR_DHSP_00000001, at AR0005-AR0006, AR0010; *see also* Bernsen Mem. at AR0028.

3. In light of resources constraints, Immigration Enforcement Authorities have always had to exercise discretion in deciding—with or without the help of express agency-wide guidance—when, and against whom, they would pursue enforcement actions. *See Considerations Memo* at AR0005-AR0006, AR0017; Bernsen Mem. at AR0022; Memorandum from Doris Meissner, Comm’r, INS, *Exercising Prosecutorial Discretion* (“Meissner Mem.”) (Nov. 17, 2000), AR_DHSP_00000030, at AR0033.

4. Since as early as 1909, and at various points thereafter, Immigration Enforcement Authorities have issued guidance memoranda for how immigration officials should exercise their discretion over immigration enforcement decisions. Considerations Memo at AR0002-AR0005; Bernsen Mem., at AR0025 (citing Department of Justice Circular Letter Number 107 (Sept. 20, 1909)); Meissner Mem., AR0030; Memorandum from John Morton, ICE Dir., *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (“Morton 2010 Mem.”) (Jun 30, 2010, as updated March 2, 2011), AR_DHSP_00000043; Memorandum from John Morton, ICE Dir., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (“Morton 2011 Mem.”) (June 17, 2011), AR_DHSP_00000047; Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (“J. Johnson 2014 Mem.”) (Nov. 20, 2014), AR_DHSP_00000053; Memorandum from John Kelly, Sec’y of Homeland Sec., *Enforcement of the Immigration*

Laws to Serve the National Interest (“Kelly Mem.”) (Feb. 20, 2017), AR_DHSP_00000059.

5. DHS has exercised, and continues to exercise, discretion over a number of immigration enforcement actions, including those facilitated by the use of immigration detainees. *See, e.g.*, Meissner Mem. at AR0031 (identifying enforcement actions where discretion is exercised); Morton 2011 Mem. at AR0047 (similar); September Guidance at 2. Through a detainer, DHS notifies a State or locality that DHS intends to take custody of a removable noncitizen detained by the State or locality upon his or her release, and asks the State or locality to (1) notify DHS of the noncitizen’s release date; and (2) hold the noncitizen for up to 48 hours, until DHS can take custody. *See* 8 C.F.R. § 287.7(a) (describing notification of release), *id.* § 287.7(d) (describing temporary detention request); Defs.’ Opp’n to Pls.’ Mot. for Prelim. Inj. (“Defs PI Opp’n Interim Guidance”) (May 18, 2021) (ECF No. 42-42-7), AR_DHSP_00005685, at AR5702 (citing ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers ¶ 2.7, <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>). ICE detainees must be accompanied by a signed administrative warrant of arrest issued under 8 U.S.C. §§ 1226 or 1231(a), and may be issued only for those arrested for criminal offenses and for whom immigration officers have probable cause to believe are removable. *See* ICE Policy No. 10074.2 ¶¶ 2.4-2.6. Should ICE officers determine not to take custody of a noncitizen, the officers must immediately rescind the detainer.¹ *Id.* ¶ 2.8.

6. Immigration Enforcement Authorities have historically considered a number of factors when deciding whether to exercise their discretion to take an enforcement action

¹ CBP also issues immigration detainees that are not governed by ICE policies.

against a particular noncitizen, including (i) the existence and severity of the noncitizen’s criminal history, (ii) the noncitizen’s length of residence in the United States, (iii) the noncitizen’s education and employment history, (iv) foreign affairs considerations that may be implicated, and (v) humanitarian considerations. Considerations Memo at AR002-AR007; *see also* Bernsen Mem. at AR0022 (“The reasons for the exercise of prosecutorial discretion are both practical and humanitarian.”); Meissner Mem. at AR0036-AR0037 (listing factors to consider in exercising enforcement discretion); Morton 2011 Mem. at AR0049-AR0050 (similar).

7. In 1909, the Department of Justice had a prosecutorial-discretion policy directing that officers generally would not have good cause to initiate proceedings to cancel a fraudulent or illegally procured naturalization certificate “unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country.” Considerations Memo at AR0002-AR0003 (citation omitted); *see* Bernsen Mem. at AR0025.

8. In 2000, then-INS Commissioner Doris Meissner issued a guidance memorandum stating that “service officers are . . . expected to exercise discretion in a judicious manner at all stages of the enforcement process,” and that in so doing, they should follow a “totality of the circumstances” approach and consider a variety of factors, including criminal history and length of residence in the United States. Considerations Memo at AR0003 (citation omitted); Meissner Mem. at AR0030, AR0037.

9. Immigration Enforcement Authorities have delegated enforcement discretion to different levels of authority at different times. For example, INS once delegated discretionary enforcement decisions to the “District Director” or “Chief Patrol Agent”

level, who could subdelegate to others. Meissner Mem. at AR0034. The exercise of those officers’ prosecutorial discretion was not “normally” reviewed by higher supervisors, but officials remained “subject to [their] chains of command” and were “supervised as necessary in the exercise of [their] prosecutorial discretion.” *Id.* Later policies delegated discretion—to be guided by agency-wide goals—directly to “officers, agents, and their respective supervisors . . . who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement,” among others. Morton 2011 Mem. at AR0049. And in the immediately prior Administration, discretion was exercised “on a case-by-case basis in consultation with the head of the field office component.” Kelly Mem. at AR0062.

10. Due to resource constraints, DHS has never apprehended and removed all removable noncitizens. *See* Considerations Memo at AR0017; Meissner Mem. at AR0033 (“[I]t is not possible to investigate and prosecute all immigration violations.”); Morton 2010 Mem. at AR0043 (noting that ICE has resources to remove “less than 4 percent” of the estimated removable population); J. Johnson 2014 Mem. at AR0054 (“Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States.”); Kelly Mem. at AR0060 (prioritizing certain categories “to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation”).

11. Due to resource constraints, DHS, during the immediately prior Administration, still had to prioritize enforcement actions against certain removable noncitizens over others. Kelly Mem. at AR0060. Due to the lack of meaningful, centralized DHS guidance on prioritization, DHS, during the Trump Administration, “effectively delegated

prioritization decisions to individual line agents, without necessary training or guidance to steer the exercise of this discretion, raising the potential for contradictory and unfair enforcement of the immigration laws across the system and undermining the Executive’s ability to focus resources on a systemwide level on pursuing enforcement against the noncitizens who pose the greatest threats to safety and security.” Considerations Memo at AR0005.

12. Immigration Enforcement Authorities have long exercised discretion in deciding whether to apprehend or remove noncitizens who fall under 8 U.S.C. § 1231(a)(2) or 8 U.S.C. § 1226(c)(1) in particular. *See* Considerations Memo at AR0018-AR0019; Meissner Mem. at AR0032; J. Johnson 2014 Mem. at AR0056.

13. As DHS has concluded, it would be impossible to initiate removal proceedings against and to detain *all* noncitizens described in § 1226(c) or detain *all* noncitizens described in § 1231(a)(2). Decl. of Peter Berg (“Berg Decl.”) ¶¶ 9-19, AR_DHSP_00006029. ICE currently—like all the Immigration Enforcement Authorities before it—lacks the resources, including appropriated funds and detention capacity, to detain all who are covered by those statutory provisions, much less to do so while also protecting the public by detaining and removing those other individuals that DHS has already identified as presenting safety threats and as deemed necessary for maintaining border security. *Id.*; Decl. of Monica Burke (“Burke Decl.”), AR_DHSP_00006074; Decl. of Thomas Decker (“Decker Decl.”) ¶¶ 7-11, AR_DHSP_00005780, Requiring DHS to detain all noncitizens currently in the removal period, for example, would eliminate capacity to detain other noncitizens who present serious public safety threats and to detain new arrivals. Berg Decl. ¶¶ 11-16, AR6029; Burke Decl. ¶¶ 6-11, AR6074. Further, it is

“exceedingly burdensome or, in some instances, impossible” for ICE “to determine whether a noncitizen is covered by or is subject to § 1226(c) prior to a decision whether to take the noncitizen into custody.” Berg Decl. ¶ 22, AR6029.

B. DHS Immigration Priorities Memoranda during the Biden Administration.

i. Pekoske Memorandum.

14. On January 20, 2020, then-Acting Secretary of Homeland Security, David Pekoske, issued a memorandum titled “*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*” (the “Pekoske Memorandum”). AR_DHSP_00000065.

15. The Pekoske Memorandum noted that “[t]he United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century,” and that the “Department must surge resources to the border.” Pekoske Memo. at AR0065.

16. The Pekoske Memorandum called for a “Department-wide review of policies and practices concerning immigration enforcement,” where “each component” was asked to “develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel” and “policies governing the exercise of prosecutorial discretion.” Pekoske Memo. at AR0065. The Pekoske Memorandum underscored that the “recommendations shall ensure that the Department carries out our duties to enforce the law.” *Id.*

17. The Pekoske Memorandum reiterated that, “[d]ue to limited resources, DHS cannot respond to all immigration violations,” and identified three categories of noncitizens against whom DHS officials should prioritize enforcement actions: (i) those posing a threat

to national security, (ii) those “apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020,” and (iii) those incarcerated following “aggravated felony” convictions and who “pose a threat to public safety.” Pekoske Memo. at AR0065. The Pekoske Memorandum clarified, however, that, it did not “prohibit[] the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities” in the memorandum. *Id.* at AR0067.

18. The Pekoske Memorandum called on “the Acting Director of [U.S. Immigration and Customs Enforcement (‘ICE’)]” to “issue operational guidance on the implementation of” the priority framework identified therein. Pekoske Memo. at AR0065.

ii. Johnson Memorandum.

19. As required by the Pekoske Memorandum, on February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum titled “*Interim Guidance: Civil Immigration Enforcement and Removal Priorities*” (the “Johnson Memorandum”). *See* AR_DHSP_00000070.

20. The Johnson Memorandum noted that it provided only “interim guidance,” and that it would “remain in effect until Secretary Mayorkas issue[d] new enforcement guidelines.” Johnson Memo. at AR0070.

21. The Johnson Memorandum acknowledged that the Pekoske Memorandum “established interim civil immigration enforcement priorities,” and it reiterated those priority categories. Johnson Memo. at AR0071.

22. The Johnson Memorandum further confirmed that, consistent with the Pekoske Memorandum, it did “not require or prohibit the arrest, detention, or removal of any

noncitizen” and that “officers and agents are expected to exercise their discretion thoughtfully” on a case-by-case basis. Johnson Memo. at AR0072.

23. The Johnson Memorandum also stated that it would not require “[o]fficers and agents . . . [to] obtain preapproval for enforcement or removal actions” against those who fall within the three “presumed priority” categories identified therein, but required “preapproval from the [Field Office Director] or [Special Agent in Charge]” for enforcement actions against other noncitizens. Johnson Memo. at AR0074-AR0075. However, the Johnson Memorandum noted that, “[i]f preapproval is impractical, an officer or agent should conduct the enforcement action” and then seek approval at a later time. *Id.* at AR0075.

24. To allow for an assessment of “the effectiveness of” its priority framework, the Johnson Memorandum “require[d] . . . field offices” to “collect data on the nature and type of enforcement and removal actions they perform.” Johnson Memo. at AR0074.

iii. September Guidance.

25. On September 30, 2021, Secretary Mayorkas issued a memorandum titled “Guidelines for the Enforcement of Civil Immigration Law” (the “September Guidance”). *See* ECF No. 122-1.

26. The Secretary provided that the September Guidance would “become effective . . . on November 29, 2021,” and that, “[u]pon [its] effective date,” it would “serve to rescind” the Pekoske Memorandum and the Johnson Memorandum. September Guidance at 7.

27. In the September Guidance, the Secretary set out “guidance for the apprehension and removal of noncitizens.” September Guidance at 2.

28. The Secretary observed that “the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years” and “include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways.” September Guidance at 3. The Secretary sought to allocate DHS’s limited “enforcement resources in a more targeted way,” focusing on “those who pose a threat to national security, public safety, and border security and thus threaten America’s well-being.” *Id.*

29. The Secretary emphasized that DHS’s enforcement priorities “focus [the agency’s] efforts on those who . . . threaten America’s well-being” and are not intended to “lessen [DHS’s] commitment to enforce immigration law to the best of [its] ability.” September Guidance at 3.

30. The Secretary “prioritize[d] for apprehension and removal noncitizens” who fall into one or more of the three categories: (i) a “noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security,” (ii) a “noncitizen who poses a current threat to public safety, typically because of serious criminal conduct,” and (iii) a “noncitizen who poses a threat to border security,” which is defined to include, among other things, any noncitizen “apprehended at the border or port of entry while attempting to unlawfully enter the United States.” September Guidance at 3-5.

31. The Secretary emphasized that this priority framework “does not compel an action to be taken or not taken,” but “[i]nstead . . . leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel.” September Guidance at 6. Rather, the Secretary

instructed personnel to “evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly.” September Guidance at 5.

32. In the September Guidance, the Secretary stated that the “guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” September Guidance at 8.

iv. Administrative Record.

33. Defendants have served and docketed the administrative record for the *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021). ECF No. 117; ECF Nos. 146-153.

34. The administrative record contains 120 entries, totaling over 6,300 pages. *See* Corrected Administrative Record Index, ECF No. 145-1. The entries include, *inter alia*, a memorandum describing the agency’s significant considerations in adopting the September Guidance; historical guidance on the exercise of discretion in immigration enforcement; memoranda summarizing internal and external stakeholder listening sessions; data summaries and outputs; letters from various interested parties, including members of Congress; executive orders; academic literature; and litigation documents related to challenges to the Pekoske and Johnson Memoranda. *Id.*

35. In developing the September Guidance, the Secretary and DHS received input from a wide range of individuals and groups. *See* Corrected Administrative Record Index. In particular, “Department officials engaged in multiple discussions with leadership from ICE, USCIS, and CBP, as well as ICE personnel in the multiple field locations;” and “with external stakeholders, including law enforcement groups, state and local government

representatives, and non-governmental entities, including immigrant advocacy organizations.” *See* Considerations Memo at AR0010; Memorandum regarding Stakeholder Outreach in Furtherance of Department Civil Immigration Enforcement Guidance (Sept. 17, 2021), AR_DHSP_00000090 (identifying approximately 30 groups, including the National Sheriffs’ Association and the Southwest Border Sheriffs’ Coalition, and noting the Secretary’s personal engagement with ICE personnel; ICE Field Office Directors, Special Agents in Charge, and Assistant Directors; members of the academic community; immigrant advocacy organizations; and domestic violence advocates and specialists); Memorandum from Cammilla Wamsley, Principal Policy Advisor, *Listening Sessions for Final Priorities*, AR_DHSP_00000095 (Field Office Directors and Special Agents in Charge); Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 6-9, 2021, AR_DHSP_00000097 (Local Government and Law Enforcement Groups); Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 14-May 20, 2021, AR_DHSP_00000102 (Governmental and Non-Governmental Organizations).

36. “These conversations helped the Department evaluate its interim immigration enforcement and removal priorities and properly understand and consider the various interests of both internal and external stakeholders, thereby ensuring that the Department’s development of new priorities was informed by all of the relevant evidence and interests.” *See* Considerations Memo at AR0010. The Secretary also considered the views of numerous members of Congress, state and local officials, and the issues raised by numerous entities in litigation over the Pekoske and Johnson Memoranda. *See, e.g.*, Letter from Andy Biggs, U.S. Rep. to Alejandro N. Mayorkas, Sec’y of Homeland Sec. (July 6, 2021),

AR_DHSP_00002261; Letter from Alexandria Ocasio-Cortez, U.S. Rep., et al. to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (May 14, 2021), AR_DHSP_00002290; Letter from Kwame Raul, Atty Gen. of State of Illinois, to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (May 28, 2021), AR_DHSP_00002258; Letter fromo Ron DeSantis, Gov. of Fla., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Aug. 26, 2021), AR_DHSP_0002270; Letter from Kevin J. Rambosk, Sheriff, Collier County, Fla. to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (Feb. 3, 2021), AR_DHSP_00002281; Corrected AR Index at 4-7, item nos. 64-120 (listing litigation documents, including briefs and declarations filed by states and other plaintiffs, that were considered in developing the September Guidance).

37. DHS summarized the key aspects informing the Secretary's guidance in a 20-page memorandum issued contemporaneously with the September Guidance. Considerations Memo, AR0001. Besides emphasizing the various inputs the Secretary and the Department received from "internal and external stakeholders," the experiences in "the implementation of the [Pekoske and Johnson Memoranda]," and "the Secretary's own experience," DHS also addressed other key "considerations informing the guidelines." *Id.* at AR0002. DHS also cited to "academic literature . . . point[ing] to a negative relationship between immigration and crime (i.e., that as immigration increases, crime rates decrease)," and "micro-level research that generally finds lower criminal involvement by foreign-born individuals, relative to their native-born counterparts." *Id.* at AR0013 (citing Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, *Ann. Rev. of Criminology*, 63–84 (2018), AR_DHSP_00002469; Jacob Stowell and Stephanie DiPietro, *Ethnicity, Crime, and Immigration in the United States Crimes By and Against*

Immigrants, The Oxford Handbook of Ethnicity, Crime, and Immigration, 2014, AR_DHSP_00002723)).

38. In the Considerations Memo, DHS explained the role of prosecutorial and enforcement discretion in the immigration context (including its history and resource limitations necessitating enforcement discretion), Considerations Memo at AR0002-AR0008; the Administration’s approach to immigration-enforcement priorities (including the Interim Guidance (i.e., the Pekoske and Johnson Memoranda), the litigation challenging that guidance, and the listening sessions both to evaluate that Interim Guidance and to develop the September Guidance), *id.* at AR0008-AR0011; and the key factors considered in developing the September Guidance (including public safety, deconfliction, impact on states, resources, statutory mandates, and alternative approaches), *id.* at AR0011-AR0021.

39. In the Considerations Memo, DHS noted that the September Guidance addresses the potential concern of recidivism among non-detained non-citizens “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,” and underscoring that “[t]hese factors are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism.” Considerations Memo at AR0012; *see also id.* at AR0013 (describing factors related to recidivism). DHS also assessed academic research indicating that undocumented noncitizens were generally less likely to recidivate than others, and noted that likelihood of recidivism alone is a poor indicator of risk to public safety, since some crimes, even if repeated, are less of a danger than others. *Id.* at AR0013; *see also*

Michael T. Light, et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, Proceedings of the Nat'l Acad. of Sciences of the USA (Dec. 12, 2020), AR_DHSP_00002494.

40. DHS also considered whether only aggravated felons should be considered presumptively public safety threats. *See* Considerations Memo at AR0012. In the Considerations Memo, DHS explained that “[i]n the Department’s engagements with internal and external stakeholders, including with the ICE workforce, concerns were raised about whether the focus on individuals convicted of ‘aggravated felonies’ was both over- and under-inclusive.” *Id.* (finding that “[t]he aggravated felony definition can be challenging to administer in many instances” and it “is an imperfect proxy for severity of offense”).

41. In its Considerations Memo, DHS stated that the goal of “enhancing public safety . . . is furthered by a prioritization scheme that directs civil immigration enforcement resources towards apprehending and removing those individuals who are likely to present the greatest risks to public safety.” Considerations Memo at AR0012-AR0013: Those include “individuals who are convicted of particularly grave offenses that cause significant harm, individuals who commit an offense while using or threatening to use a firearm or other dangerous weapon, individuals who have a serious prior criminal record, and individuals who, in light of their actions and circumstances, are unlikely to rehabilitate.” *Id.*; *see also id.* at AR0017 (“[A]s the Johnson Memorandum defined the ‘public safety’ category to include, in part, noncitizens convicted of aggravated felony offenses, ICE during this period arrested 6,046 individuals with such convictions compared to just 3,575

in the same period in 2020.”); Memorandum regarding Conclusions Drawn from “AART” Data (Sept. 24, 2021), AR_DHSP_00000108.

42. In the Considerations Memo, DHS also noted that enforcement prioritization allows DHS to prioritize border security cases. *See* Considerations Memo at AR0017; Memorandum regarding Conclusions Drawn from “AART” Data, AR0108 (noting that, under the Interim Guidance, 45% of enforcement actions in the El Paso Field Office and 42% of cases in the Houston Field Office were border security cases). DHS determined that “consistent with the Johnson Memorandum’s border security prioritization of any noncitizen who entered the United States on or after November 1, 2020” or who “was not physically present” in the United States before that date, ICE allocated enforcement resources to the Southwest border to assist CBP in transporting, processing, transferring, and removing recently-arrived migrants, particularly through June, July, and August of 2021. Considerations Memo at AR0017; Berg Decl. ¶ 18, AR6029 (noting that ICE “detailed” approximately 300 ICE officers “to the Southwest Border to support CBP operations”).

43. In its Considerations Memo, DHS considered relevant foreign affairs implications. Considerations Memo at AR0006. In particular, DHS noted that “immigration enforcement often touches upon foreign affairs, which must be taken into account in certain enforcement contexts” and that “[t]his consideration is especially salient in the context of executing removal orders, where there is a need to work with foreign countries to accept the return of individuals ordered removed.” *Id.* DHS further stated that “[f]oreign-affairs concerns often necessitate expending significant resources when trying to remove certain noncitizens who pose serious threats to public safety and national security.” *Id.*

44. In its Consideration Memo, DHS also addressed the concern, raised by this Court, that “enforcement prioritization scheme” may “actually increase costs by delaying deportations of individuals who may not be deemed a priority.” *See* Considerations Memo at AR0017. DHS noted that “[t]his criticism is based on the misconception that if the Department did not prioritize its enforcement efforts—or if it prioritized enforcement in some different way—a significantly greater number of people could be arrested, detained, moved through removal proceedings, and processed for removal.” *See id.* Rather, the agency explained, “[r]esource limitations make that an impossibility, as has been the case since the Department was formed (and before that as well),” and described how “such an approach ignores the reality that the Department’s overall safety and security mission is not best served by simply pursuing the greatest overall number of enforcement actions but is rather best advanced by directing resources to prioritize enforcement against those noncitizens who most threaten the safety and security of the Nation.” *Id.* In this context, DHS considered an external analysis of DHS operating under previous priority regimes, including under the policies during the previous Administration, which largely did away with centralized priorities. *See Memo.* From Peter Markowitz, *History and Analysis of Post-1996 Immigration Enforcement Agency Guidance* (June 4, 2021) (“Markowitz Historical Guidance Analysis Mem.”), AR_DHSP_00002294, at AR2301-AR2302. The experience of operating without specific priorities from 2017-2020 resulted in a large increase in total monthly interior removals, but a reduction in “interior removals for individuals with the most serious convictions.” *Id.* at AR2302. DHS also noted that the Court’s concern “ignores the reality that the Department’s overall safety and security mission is not best served by simply pursuing the greatest overall number of enforcement

actions but is rather best advanced by directing resources to prioritize enforcement against those noncitizens who most threaten the safety and security of the Nation.” Considerations Memo at AR0017.

45. The Considerations Memo also discussed at length the September Guidance’s potential impact on the States and devoted an entire subsection to the subject: “Impact on States.” *See* Considerations Memo at AR0014-AR0017. In considering the assertion that states “would incur additional criminal incarceration costs,” “health care costs,” and “educational costs,” DHS noted that “an assessment of any potential impacts on State governments is uniquely difficult to conclude with certainty,” in part because “fiscal impacts . . . would vary based on a range of factors, such as the demographic characteristics of the affected population,” “local economic conditions,” and “the local rules governing eligibility for public benefits, detention costs, and other laws and practices.” *Id.* at AR0014-AR0015. DHS concluded that “none of the asserted negative effects on States . . . from adopting a prioritization scheme outweighs the benefits of the scheme.” *Id.* at AR0014. With respect to “whether any States or other third parties may have valid reliance interests invested in the previous Administration’s priorities scheme or in the scheme developed by the interim guidance,” DHS concluded that “no such reasonable reliance interests exist, both because [it was] unaware of any State that has materially changed its position to its detriment as a result of those previous policies and because any such change by any party would be unreasonable in light of the long history of the Executive’s use of evolving enforcement priority schemes in this area.” *Id.* at AR0016. Moreover, as the guidelines were anticipated to enhance DHS’s ability to better focus resources on threats to public safety, national security, and border security, it concluded that “to the extent that any

marginal reliance interests do exist, . . . the benefits of the prioritization scheme outweigh those interests.” *Id.*

46. In its Considerations Memo, DHS also examined the statutory relationship between the exercise of prosecutorial and enforcement discretion and various statutory mandates: “Relationship Between Enforcement Priorities and Statutory Mandates.” *See* Considerations Memo at AR0017-AR0019. DHS made note of the “deep-rooted tradition of enforcement discretion when it comes to . . . who should be subject to arrest, detainees, and removal proceedings,” and emphasized that “Supreme Court has never required law enforcement officers to bring charges against an individual or group of individuals.” *Id.* at AR0018.

47. In its Considerations Memo, DHS also devoted an entire section to potential alternative approaches: “Consideration of Alternative Approaches.” *See* Considerations Memo at AR0019-AR0021.

48. DHS emphasized that the new guidelines “mark a significant shift” in how DHS’s priorities are “operationalized” compared to the previous interim guidance. Considerations Memo at AR0019. Specifically, DHS stated that these guidelines “reflect[] lessons learned from numerous engagements and internal reviews [by] reject[ing] a categorical approach to the definition of public safety threat.” *Id.* For example, DHS stated that it will not focus simply on whether a noncitizen has committed an “aggravated offense” to decide whether that citizen is a public safety priority. *Id.* DHS rejected that approach as “as both under- and over-inclusive” and concluded instead that it “will require the workforce to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and

mitigating factors.” *Id.* Likewise, DHS noted that “[t]he guidelines also will differ from the interim priorities by dispensing with the pre-approval process in the exercise of this discretion.” *Id.* at AR0020. It reached this decision “based largely on feedback from members of the workforce, who sought additional flexibility in the exercise of their judgment.” *Id.* DHS has coupled the guidelines “with extensive and continuous training program on the new guidelines, the creation of short- and long-term processes to review enforcement decisions to achieve quality and consistency, and comprehensive data collection and analysis.” *Id.*

49. Finally, DHS considered other options but ultimately concluded the approach in its new guidelines struck the correct balance. *See Considerations Memo at AR0020-AR0021.* DHS considered a “‘checklist’ approach, in which officers’ and agents’ discretion would have been more tightly controlled by strict lists of what types of actions to pursue,” but found “this approach has the disadvantage of foreclosing a nuanced, individualized assessment of each noncitizen’s aggravating and mitigating attributes, and therefore risks overinclusive and underinclusive decisionmaking, which yield unjust or unwise outcomes.” *Id.* at AR0020. Another option DHS considered was “delineati[ng] . . . certain categories for which no discretion should be exercised,” but rejected this alternative because doing so “would undermine the Department’s ability to effectively prioritize its limited resources to focus on the particular noncitizens who pose the greatest threat to safety and security.” *Id.*

C. The States’ alleged injuries.

50. The State of Texas has not established that it has suffered, or certainly will suffer, any material injury—financial or otherwise—due to the September Guidance.

51. The State of Texas has not established that it has experienced an increase in criminal activity within the State of Texas due to noncitizens who were spared from enforcement actions due to the September Guidance.

52. The State of Texas has not established that the noncitizens spared from enforcement actions due to the September Guidance have committed, or will commit, more crimes (or crimes of a greater severity) than those noncitizens who have been, or will be, subject to enforcement actions due to the prioritization framework in the September Guidance.

53. The State of Texas has not established that the noncitizens spared from enforcement actions due to the September Guidance will utilize more public health resources than those noncitizens who have been, or will be, subject to enforcement actions due to the prioritization framework in the September Guidance.

54. The State of Texas has not established that the noncitizens spared from enforcement actions due to the September Guidance will utilize more public education resources than those noncitizens who have been, or will be, subject to enforcement actions due to the prioritization framework in the September Guidance.

55. The State of Louisiana has not established that it has suffered, or certainly will suffer, any material injury—financial or otherwise—due to the September Guidance.

56. The State of Louisiana has not established that it has experienced an increase in criminal activity within the State of Louisiana due to noncitizens who were spared from enforcement actions due to the September Guidance.

57. The State of Louisiana has not established that the noncitizens spared from enforcement actions due to the September Guidance have committed, or will commit, more crimes (or crimes of a greater severity) than those noncitizens who have been, or will be,

subject to enforcement actions due to the prioritization framework in the September Guidance.

58. The State of Louisiana has not established that the noncitizens spared from enforcement actions due to the September Guidance will utilize more public health resources than those noncitizens who have been, or will be, subject to enforcement actions due to the prioritization framework in the September Guidance.

59. The State of Louisiana has not established that the noncitizens spared from enforcement actions due to the September Guidance will utilize more public education resources than those noncitizens who have been, or will be, subject to enforcement actions due to the prioritization framework in the September Guidance.

D. Judicial relief.

60. If the Court enjoins or vacates the priority framework in the September Guidance, then, in light of resource constraints, DHS will have to take immigration enforcement actions pursuant to a new priority framework. *See Considerations Memo at AR0005-AR0008; id. at AR0005* (“in light of available resources,” the lack of clear, centralized guidance on enforcement priorities during the lack Administration “effectively delegated prioritization decisions to individual line agents”).

61. If the Court enjoins or vacates the priority framework in the September Guidance, it is uncertain what new prioritization scheme DHS will utilize as a result, and thus it is uncertain whether that new prioritization scheme will redress the States’ alleged injuries.

See Decker Decl. ¶ 12, AR_DHSP_00005780.

62. An injunction against or vacatur of the priority framework could “cause . . . confusion among the nearly 6,000 immigration officers employed by [the Enforcement and

Removal Operations component of ICE]” concerning how they are to exercise their enforcement discretion, possibly “result[ing] in an undesirable shift in enforcement away from those that present the greatest risk to public safety and further undermine public confidence in the nation’s immigration enforcement efforts.” Decker Decl. ¶ 12, AR5780.

63. Additionally, a Court order requiring DHS to apprehend and detain all noncitizens who are currently in their “removal period[s],” 8 U.S.C. § 1231(a)(2), or all noncitizens that fall into one or more of the categories identified in 8 U.S.C. § 1226(c)(1)(A)-(D), “would require significant ICE bedspace and personnel which does not currently exist.” Decker Decl. ¶ 7, AR5780.

64. If the Court requires DHS to apprehend and detain all noncitizens who are currently in their “removal period[s],” 8 U.S.C. § 1231(a)(2), or all noncitizens that fall into one or more of the categories identified in 8 U.S.C. § 1226(c)(1)(A)-(D), “ICE would have to first determine the immigration and criminal history status, or lack thereof, of each noncitizen it encounters; second, ICE would have to determine whether these noncitizens [are] subject to detention under either section 1226(c) or section 1231(a)(2); and then, ICE would have to execute the appropriate enforcement action” and “[e]ach step would require a massive influx of investigative and operational resources.” Decker Decl. ¶ 8, AR5780.

65. If the Court requires DHS to apprehend and detain all noncitizens who are currently in their “removal period[s],” 8 U.S.C. § 1231(a)(2), or all noncitizens that fall into one or more of the categories identified in 8 U.S.C. § 1226(c)(1)(A)-(D), DHS also would have “to initiate enforcement actions indiscriminately among this population,” thus “prevent[ing] ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.” Decker Decl. ¶ 9, AR5780.

E. DHS's Purported Agreements with Texas and Louisiana.

66. Just twelve days before President Biden's inauguration, on January 8, 2021, a subordinate political official in DHS, Ken Cuccinelli, signed purported agreements with the States of Texas and Louisiana. App. in Supp. of Mot. for Prelim. Inj., Ex. J, Texas Agreement, AR_DHSP_00005491; Ex. K, Louisiana Agreement, AR_DHSP_00005501, (ECF No. 18). These purported agreements sought to give individual states oversight over nationwide immigration policy by providing individual states 180-days' notice before DHS took "any action or [made] any decision that could reduce immigration enforcement, increase the number of removable or inadmissible aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens." Texas Agreement at 3, AR5494; *see* Louisiana Agreement at 3, AR5504.

67. In letters dated February 2, 2021, signed by Acting Secretary Pekoske and addressed to Texas and Louisiana, DHS stated that the purported agreements were unenforceable and non-binding, as DHS had noted in litigation filings. Ex. C, AR_DHSP_00005763; Ex. D, AR_DHSP_00005766. In addition, in each of those letters, Acting Secretary Pekoske stated that, "[n]otwithstanding that the [purported agreement] is void, not binding, and unenforceable—and preserving all rights, authorities, remedies, and defenses under the law—this letter also provides notice, on behalf of DHS, U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS), that DHS, CBP, ICE and USCIS rescinds, withdraws, and terminates the Document, effective immediately." AR5763; AR5766. Defendants attached those letters to their opposition to Plaintiffs' motion for preliminary injunction challenging the Pekoske and Johnson Memoranda. AR5763; AR5766.

68. Each of those agreements had a clause stating that termination of those purported agreements would take effect “180 days after the written termination request was submitted or upon a date agreed upon by all parties, whichever is earlier.” Texas Agreement, at 7, AR5498; Louisiana Agreement, at 7, AR5508. Texas admits that its purported agreement with DHS was terminated at least as of August 1, 2021. Am. Compl. ¶ 76 (ECF No. 109). Louisiana alleges that it never received the termination letter “to the best of its knowledge,” but that termination letter was attached to previous filings that would have given Louisiana at least constructive knowledge of a termination dated February 2, 2021. *Id.* The September Guidance did not become effective until November 29, 2021—more than 180 days after either the termination letter was signed on February 2, 2021, or when it was served on Louisiana’s counsel, on May 18, 2021, *see* Ex. D, AR5766.

69. In the Considerations Memo for the September Guidance, DHS stated: “The Department is aware that several states purported to enter into ‘agreements’ with the Department at the end of the previous Administration. As the Department has explained in litigation, those documents were void ab initio and unenforceable. Any reliance on those documents is therefore unreasonable. To the extent those documents were ever valid, the Department has since terminated them.” Considerations Memo at AR0016 n.52.

II. Conclusions of Law.

A. Interim Guidance

70. Plaintiffs’ challenge to the Pekoske and Johnson Memoranda, and corresponding claims, are moot. *See Hayre v. Glickman*, 71 F.3d 875 (5th Cir. 1995) (“After the [plaintiffs] challenged the [agency action] and before the district court could address the merits of that challenge, the circumstances changed: The [new agency action] superseded

and replaced the [original agency action]. As a result, the [challenged agency action] evaporated, rendering the [plaintiffs'] complaint moot.”).

B. Standing

71. The States fail to establish standing because they fail to show that they have suffered, or will certainly and imminently suffer, an injury due to the September Guidance that may be redressed by any relief the Court may enter for the Plaintiffs. *See* Defs.’ PI Opp’n, at 14-18 (ECF No. 122).

72. The State of Texas lacks standing because it has failed to show that the September Guidance is inflicting, or will certainly inflict, a material injury on the State of Texas. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

73. To the extent that the State of Texas has established that it has experienced, or will experience, any injury following the effective date of the September Guidance, it lacks standing because it has failed to show that that injury was caused by the September Guidance. *See Summers*, 555 U.S. at 493; *Whitmore*, 495 U.S. at 158.

74. Any injury that the State of Texas has experienced due to choices it has made in response to the September Guidance is insufficient to establish standing. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013).

75. Even if the State of Texas has shown that it has suffered any non-self-inflicted injury due to the September Guidance, the State of Texas lacks standing because it has failed to show that an injunction against the September Guidance will redress that injury. *See Friends of the Earth, Inc. v. Laidlaw Env'l. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

76. The State of Louisiana has failed to show that the September Guidance is inflicting, or will certainly inflict, a material injury on the State of Louisiana. *Whitmore*, 495 U.S. at 158.

77. To the extent that the State of Louisiana has established that it has experienced, or will experience, any injury following the effective date of the September Guidance, it has failed to show that that injury was caused by the September Guidance. *Whitmore*, 495 U.S. at 158.

78. Any injury that the State of Louisiana has experienced due to choices it has made in response to the September Guidance is insufficient to establish standing. *See Clapper*, 568 U.S. at 416.

79. Even if the State of Louisiana has shown that it has suffered any non-self-inflicted injury due to the September Guidance, the State of Louisiana has failed to show that an injunction against the September Guidance will redress that injury. *See Friends of the Earth*, 528 U.S. at 181.

C. The September Guidance is not reviewable under the Administrative Procedure Act (“APA”).

i. Committed to agency discretion.

80. The immigration priority framework in the September Guidance concerns agency practices that are committed to DHS’s discretion, and thus that priority framework is not reviewable under the APA. *See* Defs.’ PI Opp’n at 18-22 (ECF No. 122).

81. Law enforcement decisions—including decisions over whether to apprehend and remove noncitizens unlawfully present in or otherwise removable from the United States—are traditionally committed to the discretion of federal law enforcement officials. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Wayte v. United States*, 470 U.S. 598, 607

(1985); *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“A principal feature” of the Nation’s immigration laws “is the broad discretion exercised by immigration officials”); *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 483 (1999) (“At each stage” of this removal process, “the Executive has discretion to abandon the endeavor”); *Texas v. United States*, 14 F.4th 332, 340 (5th Cir. 2021) (“Texas Stay Op.”) (recognizing the “deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainees, and removal proceedings”), *opinion vacated on reh’g en banc*, 24 F. 4th 407 (5th Cir. Nov. 30, 2021); 6 U.S.C. § 202(5) (“The Secretary shall be responsible” for “[e]stablishing national immigration enforcement policies and priorities”).

82. The Fifth Circuit’s statement that class-wide, category-based determinations are not subject to *Heckler*’s presumptions against reviewability, *see Texas v. Biden*, 20 F.4th 928, 985, 987 (5th Cir. 2021), docketing petition for cert. No. 21-954 (S. Ct. Dec. 29, 2021), is inapplicable to the September Guidance, which calls for line officers to engage in case-by-case determinations about whether any noncitizen should be subject to an enforcement action. *See* Defs.’ Resp. at 2-3 (ECF No. 167).

83. Although Congress may override traditional law enforcement discretion and impose an unconditional, judicially enforceable obligation on law enforcement officials to take particular enforcement actions, to do so requires more than providing that law enforcement officials “shall” take the particular enforcement actions. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

84. 8 U.S.C. § 1231(a)(2) does not displace DHS’s discretion over immigration enforcement apprehension and removal decisions addressed by the September Guidance;

it imposes no unconditional, judicially enforceable obligation on DHS officials to apprehend or remove any particular noncitizen. *Texas Stay Op.*, 14 F.4th at 340.

85. 5 U.S.C. § 701(a)(2) provides that the APA does not apply to “agency action . . . committed to agency discretion by law.” DHS’s enforcement prioritization embodied in the September Guidance is committed to agency discretion and not reviewable under the APA, notwithstanding 8 U.S.C. § 1231(a)(2). *See* 5 U.S.C. § 701(a)(2); *Chaney*, 470 U.S. at 831.

86. 8 U.S.C. § 1226(c)(1) does not displace DHS’s discretion over immigration enforcement apprehension and removal decisions addressed by the September Guidance; it imposes no unconditional, judicially enforceable obligation on DHS officials to apprehend or remove any particular noncitizen. *Texas Stay Op.*, 14 F.4th at 340.

87. 5 U.S.C. § 701(a)(2) provides that the APA does not apply to “agency action . . . committed to agency discretion by law.” DHS’s enforcement prioritization embodied in the September Guidance is committed to agency discretion and not reviewable under the APA, notwithstanding 8 U.S.C. § 1226(c)(1). *See* 5 U.S.C. § 701(a)(2); *Chaney*, 470 U.S. at 831.

ii. Final agency action.

88. The September Guidance does not constitute “final agency action” under the APA, and thus it is not subject to review under the APA. *See* Defs.’ PI Opp’n at 22-25 (ECF No. 122).

89. Agency action is “final” only if (in addition to being the consummation of agency decisionmaking) it creates or modifies the legal “rights or obligations” of a person or entity. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

90. “Most agency memos are not final agency action under 5 U.S.C. § 704.” *Texas v. Biden*, 20 F.4th 928, 986 (5th Cir. 2021). In particular, “nonbinding priority memo[s]” are unreviewable on that basis. *Id.*; *see* Defs.’ Resp. at 1-2 (ECF No. 167).

91. The September Guidance is a nonbinding prioritization memo to guide line officers in the exercise of enforcement discretion. The September does not create or modify the legal rights or obligations of any particular noncitizen. The September Guidance does not grant any noncitizen the right to remain in the United States, or the right to be free from or otherwise challenge any DHS enforcement action. The September Guidance therefore does not constitute “final agency action.” *Bennett*, 520 U.S. at 178; *Texas*, 20 F.4th at 986.

92. The September Guidance does not create or modify the legal rights or obligations of any State. The September Guidance does not require the States to provide health, education, or other public services to any noncitizen. Any such obligations derive from sources other than the September Guidance, and to the extent that such obligations become more burdensome as a result of the September Guidance, that change is only a practical consequence, not a legal consequence. The September Guidance therefore does not constitute “final agency action.” *Bennett*, 520 U.S. at 178.

93. The September Guidance does not constitute “final agency action” and is thus not subject to judicial review under the APA. 5 U.S.C. § 704.

iii. Preclusion of Judicial Review.

94. Congress precluded judicial review of the DHS determinations at issue in the September Guidance, and so the Court cannot review the States’ challenge to the September Guidance. *See* Defs.’ PI Opp’n, at 25-30 (ECF No. 122).

95. 8 U.S.C. § 1252 provides the sole mechanism for review of all “decisions and actions leading up to or consequent upon final orders of deportation[.]” *AADC*, 525 U.S. at 483-85; *see also United States v. Fausto*, 484 U.S. 439, 448 (1988) (A detailed mechanism for review of some claims by some plaintiffs is “strong evidence that Congress intended to preclude [other types of plaintiffs] from obtaining judicial review.”).

96. The priority framework in the September Guidance speaks to “decisions and actions leading up to or consequent upon final orders of deportation,” *AADC*, 525 U.S. at 483-85—*e.g.*, arrests and removals—and so § 1252 precludes the Court’s jurisdiction over challenges to that priority framework.

97. 8 U.S.C. § 1226(e) precludes judicial review over “discretionary judgment[s] regarding application of [section 1226].”

98. Arrests pursuant to 8 U.S.C. § 1226(c) are discretionary because those arrests may only occur “pending a decision on whether the [noncitizen at issue] is to be removed,” 8 U.S.C. § 1226(a), and a decision to commence removal proceedings is committed to agency discretion, *see* 8 U.S.C. § 1229(a); *id.* § 1229(d); *Crane v. Johnson*, 783 F.3d 244, 249 (5th Cir. 2015).

99. Section 1226(e) precludes any claim regarding DHS decisions concerning arrests under section 1226(c).

100. Congress provided that “nothing in [§ 1231] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States.” 8 U.S.C. § 1231(h).

101. The term “any party” in section 1231(h) means *any party*, and thus encompasses the States. *See Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995) (explaining

that § 1231(h)'s statutory ancestor "makes clear that Congress intended that *no one* be able to bring suit to enforce" it); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008) (Thomas, J.) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976))). Section 1231(h) thus precludes any claim by the States based on section 1231.

102. The States fall outside the zone of interests for sections 1226(c) and 1231(a)(2). *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011).

D. The Adequacy of the Administrative Record.

103. Under the APA, an agency's actions must generally "stand or fall" on the "propriety of [the agency's] finding" that is "sustainable on the administrative record." *See Camp v. Pitts*, 411 U.S. 138, 143 (1973). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

104. "When an agency action has been challenged under the APA, the district court sits as an appellate court," and the "entire case on review is a question of law." *MRC Energy Co. v. USCIS*, No. 3:19-CV-2003-K, 2021 WL 1209188, at *3 (N.D. Tex. Mar. 31, 2021) (citing *Redeemed Christian Church of God v. USCIS*, 331 F. Supp. 3d 684, 694 (S.D. Tex. 2018)). The Supreme Court elaborated that "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record," a principle that "reflects the recognition that further judicial inquiry into executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided." *Dep't of*

Com. v. New York, 139 S. Ct. 2551, 2573-74 (2019) (quotation omitted); *see also Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (in a lawsuit against a federal agency, the “general presumption” is “that review is limited to the record compiled by the agency”). This limitation generally applies even when a plaintiff asserts a constitutional claim against an agency. *See, e.g., Chang v. USCIS*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017); *Malone Mortg. Co. Am., Ltd. v. Martinez*, No. 3:02-cv-1870-P, 2003 WL 23272381, at *2 (N.D. Tex. Jan. 6, 2003).

105. “Where an agency has presented a certified copy of the complete administrative record, ‘the court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.’” *Knight v. U.S. Army Corps of Eng’rs*, No. 4:18-CV-352, 2019 WL 3413423, at *1 (E.D. Tex. July 29, 2019) (quoting *City of Dallas v. Hall*, No. 3:07-cv-60, 2007 WL 3257188, at *8 (N.D. Tex. Oct. 29, 2007)); *Bar MK Ranches v. Yuettter*, 994 F.2d 735, 740 (10th Cir. 1993).

106. Plaintiffs have not established the high standard for review of extra-record evidence. *Dep’t of Com.*, 139 S. Ct. at 2573-74; *see also Medina Cnty. Envtl. Action Ass’n*, 602 F.3d at 706.

107. In evaluating the administrative record, the Court is to consider the entire administrative record and contemporaneous explanations by the agency, including the Considerations Memo. *Camp*, 411 U.S. at 143; *Fla. Power & Light Co.*, 470 U.S. at 743; *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004).

E. The Merits of Plaintiffs’ Claims.

108. Even if the September Guidance were properly subject to judicial review, the States’ claims would fail.

i. Statutory Provisions: 8 U.S.C. § 1231(a)(2) and 8 U.S.C. § 1226(c)(1).

109. 8 U.S.C. § 1231(a)(2) does not establish a judicially enforceable mandate that DHS arrest and detain all noncitizens who are within their removal periods. *See* Defs.’ PI Opp’n at 30-32 (ECF No. 122).

110. The September Guidance does not conflict with 8 U.S.C. § 1231(a)(2), even if that provision did set forth some sort of enforceable mandate. *See* Defs.’ PI Opp’n at 35-36 (ECF No. 122).

111. 8 U.S.C. § 1226(c)(1) does not establish a judicially enforceable mandate that DHS arrest and detain all noncitizens who fall under that provision. *See* Defs.’ PI Opp’n at 30-32 (ECF No. 122).

112. The September Guidance does not conflict with 8 U.S.C. § 1226(c)(1), even if that provision did set forth some sort of enforceable mandate. *See* Defs.’ PI Opp’n at 32-34 (ECF No. 122).

i. The States’ Arbitrary and Capricious Claim.

113. The September Guidance is not arbitrary and capricious. Defs.’ PI Opp’n at 36-40 (ECF No. 122). The Secretary reached a reasonable decision based on the consideration of the relevant factors. *Id.*

114. “The arbitrary and capricious standard is highly deferential.” *Knapp v. U.S. Dep’t of Agric.*, 796 F.3d 445, 453 (5th Cir. 2015); *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004). “[T]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Or. Nat. Res. Council*, 490

U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

115. Under the arbitrary and capricious standard, courts must especially defer to agency actions that “call[] for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty.” *Dep’t of Com.*, 139 S. Ct. at 2571; *id.* at 2570 (“the choice between reasonable policy alternatives in the face of uncertainty [is] the Secretary’s to make”).

116. “[T]he role of courts in reviewing arbitrary and capricious challenges is to ‘simply ensur[e] that the agency has acted within a zone of reasonableness.’” *Biden v. Missouri*, No. 21A240, 2022 WL 120950, at *4 (U.S. Jan. 13, 2022) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

117. In assessing whether an agency action is arbitrary and capricious, “courts are encouraged to uphold a decision of less than ideal clarity if the agency’s path may be reasonably discerned.” *Handley v. Chapman*, 587 F.3d 273, 281 (5th Cir. 2009) (internal quotation marks omitted); *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. Unit A Nov. 1981) (an agency need only give “minimal consideration to the relevant facts as contained in the record”).

118. The factors that the States contend the Secretary failed to consider are in fact addressed in the administrative record, including in the Considerations Memo. *See* Defs.’ PI Opp’n at 39-40 (ECF No. 122).

119. In light of the administrative record, DHS “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action,” including a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

ii. The States' Notice-and-Comment Claim.

120. The September Guidance is exempt from notice-and-comment. Defs.' PI Opp'n at 41-45 (ECF No. 122).

121. The APA's notice-and-comment requirement does not apply to "general statements of policy." 5 U.S.C. § 553(b)(A).

122. General statements of policy are those that "advise 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) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)). By contrast, rules that must generally be adopted through notice and comment are those that have the force and effect of law and create legally enforceable rights or obligations. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). "As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596-97 (5th Cir. 1995).

123. The September Guidance is a general statement of policy exempt from notice-and-comment. *Lincoln*, 508 U.S. at 197; *Pros. & Patients for Customized Care*, 56 F.3d at 596-97 (5th Cir. 1995) (footnote omitted).

124. A procedural rule—a rule related to "agency organization, procedure or practice"—is not required to undergo notice-and-comment. 5 U.S.C. § 553(b)(A).

125. A procedural rule is not required to undergo notice-and comment even if it is binding. *Texas v. United States*, 809 F.3d 134, 176 (5th Cir. 2014).

126. In the Fifth Circuit, “the substantial impact test is the primary means by which [a court would] look beyond the label ‘procedural’ to determine whether a rule is of the type Congress thought appropriate for public participation.” *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984). In other words, the question is whether the agency action “modifies substantive rights and interests” of the public. *Kast Metals*, 744 F.2d at 1153.

127. Guidance on the exercise of prosecutorial discretion over immigration enforcement actions—including arrests and removals—does not prevent any official from complying with any statutory obligation or confer any right, benefit, or obligation on any person or entity. *See Kast Metals*, 744 F.2d at 1153.

128. Even if the September Guidance is considered binding, it is a procedural rule exempt from notice-and-comment. *Kast Metals*, 744 F.2d at 1153.

iii. The States’ Take Care Clause Claim.

129. Plaintiffs’ Take Care Clause claim fails. Defs.’ PI Opp’n at 45-47 (ECF No. 122).

130. The Take Care Clause does not furnish a basis for affirmative relief in an Article III court. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Claims that the Executive exceeded statutory authority are not constitutional claims. *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

131. Even if challenges brought pursuant to the Take Care Clause were actionable, discretionary agency actions do not violate the Take Care Clause of the Constitution. *Chaney*, 470 U.S. at 832. The September Guidance is consistent with the exercise of

enforcement discretion. *Arizona v. United States*, 567 U.S. 387, 396 (2012); *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *see also Texas Stay Op.*, 14 F.4th at 338.

iv. Louisiana’s Purported Breach of Contract Claim.

132. Texas acknowledges that it has no valid breach of contract claim because to the extent the purported agreement was ever valid it was terminated, at the latest, by August 1, 2021. Am. Compl. ¶ 76 (ECF No. 109); *see Texas v. Biden*, No. --- F. Supp. 3d ---, 2:21-CV-067-Z, 2021 WL 3603341, at *23 (N.D. Tex. Aug. 13, 2021) (finding claim based on since-terminated contract moot), *enforcement granted in part*, No. 2:21-CV-067-Z, 2021 WL 5399844 (N.D. Tex. Nov. 18, 2021), and *aff’d*, 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021).

133. Louisiana’s purported breach of contract claim also fails, because that agreement was terminated, at the latest, on November 14, 2021—180 days after Louisiana indisputably had notice of the termination, and before the September Guidance became effective. *See Texas v. Biden*, 2021 WL 3603341, at *23.

134. Even if the purported agreement had not been terminated, this Court lacks jurisdiction to void the September Guidance on the basis of these purported agreements. Defs.’ PI Opp’n Interim Guidance at 36-38, AR5734-AR5736; *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Ala. Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1229-30 (5th Cir. 1976); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep’t of Homeland Sec.*, 490 F.3d 940, 945 (Fed. Cir. 2007); *United States v. Jones*, 131 U.S. 1, 18 (1889). To the extent the purported agreements are enforceable at all, the Tucker Act provides the proper remedy—in the Court of Federal Claims. Defs.’ PI Opp’n Interim Guidance at 37, AR5735; *Suburban Mortg. Assocs., Inc. v. U.S. Dep’t of Hous. & Urb. Dev.*, 480 F.3d 1116, 1128

(Fed. Cir. 2007); *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646-47 (9th Cir. 1998); *see also* *United States v. King*, 395 U.S. 1, 3 (1969).

135. And even if this Court did have jurisdiction, and the purported agreement had not been terminated, the document is not enforceable. The subordinate DHS official who purportedly entered this agreement did not have authority to contract away DHS's sovereign right to exercise discretion over immigration enforcement. Defs.' PI Opp'n Interim Guidance at 28, AR5736; *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977); *Bowen v. Pub. Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172 (10th Cir. 2004); *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 846 (1967).

136. This subordinate DHS official also lacked statutory authority to enter into these purported agreements. Defs.' PI Opp'n Interim Guidance at 38-39, AR5736-AR5737; *The Floyd Acceptances*, 74 U.S. 666, 680 (1868); *CACI, Inc. v. Stone*, 990 F.2d 1233, 1237 (Fed. Cir. 1993); *U.S. Tr. Co.*, 431 U.S. at 23; *Stone v. Mississippi*, 101 U.S. (11 Otto) 814, 817 (1879).

137. These purported agreements also run afoul of the subdelegation doctrine. Defs.' PI Opp'n Interim Guidance at 38-39, AR5736-AR5737; *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

b. An immediate vacatur of the September Guidance would be improper.

138. "Remand, not vacatur," is "generally appropriate" relief in an APA suit. *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021).

139. An injunction is inappropriate relief in this APA suit. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). To the extent any injunction is issued, it would properly be limited to the States of Texas and Louisiana. *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (mem.) (Gorsuch, J. concurring), *denying modification*, 140 S. Ct. 2709 (2020); *see also Texas Stay Op.*, 14 F.4th at 341 (noting that Fifth Circuit law does not require nationwide injunctions and the recent skepticism expressed over nationwide injunctions).

140. Remand without vacatur is particularly appropriate where vacatur or injunctive relief “would be disruptive.” *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

141. To the extent relief for the States is appropriate, the appropriate relief in this case is remand without vacatur. *Cent. & S.W. Servs., Inc.*, 220 F.3d at 692. At the very least, any injunctive relief must be limited to what is necessary to effectuate relief from the legal injury. *O’Donnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (a “district court abuses its discretion if it does not narrowly tailor an injunction to remedy the specific action which gives rise to the order”) (internal quotations omitted), *overruled on other grounds by Daves v. Dallas County*, --- F.4th ---, No. 18-11368, 2022 WL 72201, (5th Cir. Jan. 7, 2022).

142. To the extent the States are entitled to any injunction against the September Guidance, it should be limited to the Plaintiff States. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy” is “sufficient to redress respondents’ injury, no recourse” to “additional and extraordinary relief” is “warranted.”). A nationwide injunction would be improper and unjustified. *See Dep’t of Homeland Sec.*

v. New York, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J. concurring) (“If a single successful challenge is enough to stay the challenged rule across the country, the government’s hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal.”).

143. To the extent the States are entitled to a vacatur of, or an injunction against, the September Guidance, it is appropriate to stay this relief “until a further order of this Court, the Fifth Circuit Court of Appeals, or the United States Supreme Court.” *Texas v. United States*, --- F. Supp. 3d ---, No. 1:18-CV-00068, 2021 WL 3025857, at *42 (S.D. Tex. July 16, 2021), *appeal filed* No. 21-40680 (5th Cir. Sept. 16, 2021); *Texas v. United States*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), *aff’d in part, vacated in part, remanded*, 945 F.3d 355 (5th Cir. 2019), *as revised* (Dec. 20, 2019), *as revised* (Jan. 9, 2020), *rev’d and remanded sub nom. California v. Texas*, 141 S. Ct. 2104 (2021).

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on February 17, 2022.

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