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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DEFENDANTS' RESPONSE TO PLAINTIFFS' POST-TRIAL BRIEF

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Defendants hereby provide the following brief in response to the States' post-trial brief, ECF No. 224 (Pls.' Post Trial Br.). For the reasons stated herein and previously, this Court should enter judgment for Defendants in the States' challenge to the Secretary of Homeland Security's *Guidelines for the Enforcement of Civil Immigration Law* ("September Guidance"), ECF No. 122-1.

I. The States Are Incorrect to Assert that the September Guidance is Final Agency Action.

Contrary to the States' assertions, the September Guidance is a nonbinding priority memo that leaves discretion with Department of Homeland Security ("DHS") staff to take, or not take, enforcement actions. This set of enforcement guidelines does not alter the rights or obligations of DHS personnel, of noncitizens, or of the States. In short, the September Guidance is not final agency action.

A. The September Guidance does not bind DHS personnel.

In *Texas v. Biden*, the Fifth Circuit expressly recognized that nonbinding priority memoranda are not final agency action. *See Texas v. Biden*, 20 F.4th 928, 986 (5th Cir. 2021) ("*MPP*"), *as revised* (Dec. 21, 2021*), cert. granted*, 142 S. Ct. 1098 (2022) (mem.). Nevertheless, the States argue—citing *Texas v. Equal Employment Opportunity Commission*—that the September Guidance is final agency action because it changes the rights or obligations of DHS staff. *See* Pls.' Post Trial Br. at 1-4 (citing *EEOC*, 933 F.3d 433 (5th Cir. 2019)). *EEOC*, however, addressed a different context, and does not supplant the Fifth Circuit's more closely applicable commentary in *Texas v. Biden*. In *EEOC*, the Fifth Circuit addressed whether a multi-factor test for determining the lawfulness of a regulated party's conduct—with a corresponding *mandate* on agency personnel to take action if the conduct, under that analysis, is unlawful—constitutes final agency action. *See* 933 F.3d at 443. The guidance at issue there is in stark contrast with the internal

guidance on the exercise of enforcement discretion at issue here, which confers no rights on any noncitizen, and which does not mandate any action (or non-action). And unlike the multifactor analysis in the EEOC guidance, which the agency used to assess the lawfulness of third parties' actions, the multifactor analysis here only guides the use of the agency's own resources.

In particular, in *EEOC*, the challenged policy bound "EEOC staff to an analytical method in conducting Title VII investigations *and* direct[ed] their decisions about which employers to refer for enforcement actions." 933 F.3d at 443 (emphasis added). That direction was binding: "the Guidance leaves no room for EEOC staff *not* to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban." *Id.* The September Guidance lacks both of the features that made the EEOC guidance final agency action. First, the September Guidance governs the agency's internal prioritization efforts, rather than evaluating the lawfulness of third parties' conduct. Unlike the policy in *EEOC*, which provided a "playbook for employers to use to avoid liability," the September Guidance provides no safe harbors to noncitizens, all of whom remain subject to the same range of discretionary enforcement actions as they were previously. *Id.* Second, the September Guidance leaves the ultimate decision of whether to take an enforcement action to the discretion of agency personnel. *See* September Guidance at 5 (the Guidance "does not compel an action to be taken or not taken;" the Guidance "leaves the exercise of prosecutorial discretion to the judgment of our personnel"). The Guidance does not contain bright line rules that require action or forbearance, unlike the direction in the EEOC guidance that mandated referrals to the Department of Justice, in certain circumstances. *See EEOC*, 933 F.3d at 443 ("[T]he Guidance leaves no room for EEOC staff not to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban.").

Further, the States' theory here is inconsistent with their concession that the priority memoranda issued by Secretaries Kelly and Johnson, and Director Morton, are lawful general statements of policy, *i.e*., they do not create any rights or obligations. *See* Pls.' Post Trial Br. at 28 ("The Defendants themselves furnished examples of [sic] in the administrative record" of "an interpretive rule or statement of policy stating how agents should prioritize their efforts," examples that include the memoranda issued by Secretaries John Kelly and Jeh Johnson and Director John Morton). The States argue that the September Guidance constitutes final agency action because it directs officers to weigh certain factors when deciding whether to take enforcement actions. But the same was true of the prior memoranda that the States acknowledge were lawful:

- Secretary Kelly's guidance provided that "the Department shall prioritize aliens described in the Department's Enforcement Priorities (Section A) for arrest and removal," and that "Department personnel should prioritize removable aliens" who fit within certain criminal categories." John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* ("Kelly Memo") (Feb. 20, 2017), AR_DHSP_00000059, at AR0060, AR0062.
- Secretary Johnson underscored that his guidance memorandum "shall constitute the Department's civil immigration enforcement priorities," and instructed that noncitizens who presented "threats to national security, border security, and public safety" "represent the highest priority to which enforcement resources should be directed," and that "resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above." Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec*., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), AR_DHSP_00000053, at AR0055, AR0057.
- Director Morton told "ICE officers, agents, and attorneys [that they] should consider all relevant factors, including, but not limited to" a non-exhaustive list when exercising discretion, that "decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities," and that "[t]he memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and

what factors should be considered." Memorandum from John Morton, ICE Director, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), AR_DHSP_00000047, at AR0047, AR0050; *see id.*at AR0050 (listing possible aggravating and mitigating factors).

To be sure, the non-exhaustive list of factors identified in the September Guidance differs from those in the memoranda from Secretaries Kelly and Johnson and Director Morton, but they all exhort agency personnel to prioritize enforcement against certain noncitizens, while not prohibiting—that is, still permitting—actions against others who are not explicitly prioritized. Just as those earlier memoranda are lawful means for DHS to prioritize its limited resources, as the States concede, Pls.' Post Trial Br. at 28, so too is the September Guidance.

Other features of the September Guidance that the States complain of are comparable to features contained in prior guidance memoranda the States concede were lawful. For instance, the September Guidance uses a totality-of-circumstances review comparable to prior guidance memoranda that the States concede were lawful. Kelly Memo at AR0062 ("The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis . . ."); J. Johnson Memo at AR 0057 ("requir[ing] DHS personnel to exercise discretion based on individual circumstances"); Morton Memo at AR0050 ("decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities"). Nor does normal and appropriate "supervisory control," *i.e.*, review by an Assistant Field Office Director to confirm that officers are considering the full picture when taking enforcement actions, alter the landscape. *See* 2/24 AM Trial Tr. at 2-90:13-16 (counsel for Texas clarifying that "we're not saying that there's some sort of right of the lowest level decisionmaker within DHS to do what they want. We're saying—you know, there could be supervisory control"); *see also, e.g.*, Kelly Memo at AR0062 (referring to

"consultation with the head of the field office component"). Documenting the decisions that are made does not transform the nature of those decisions so as to render the September Guidance final agency action.

The Fifth Circuit's *MPP* decision likewise does not support the States' argument. The September Guidance *retains* discretion for line officers. *See* Pls.' Post Trial Br. at 1, 4.[1] The Secretary's decision to terminate the Migrant Protection Protocols (MPP) was deemed final agency action by the Fifth Circuit Court of Appeals because the court determined that the June 1, 2021 termination memorandum eliminated officers' preexisting discretion to process noncitizens into MPP. *See MPP*, 20 F.4th at 986. Here, however, the September Guidance is the latest in a string of DHS and ICE memoranda that direct officers to consider the totality of the circumstances in deciding against which noncitizens to bring enforcement actions, while not prohibiting actions against any subset of them. The September Guidance thus retains officers' discretion and the *MPP* decision is inapposite.

B. The September Guidance is not a substantive rule.

The States also unpersuasively repackage their earlier arguments about the allegedly binding nature of the policy to contend that the September Guidance is a substantive rule. Pls.' Post Trial Br. at 4-5 (arguing that the policy is final agency action because it is a substantive rule). For similar reasons, the States' argument fails. First, as Defendants have previously explained, the September Guidance does not alter the rights or obligations of noncitizens or the States. Defs.' Post Trial Mem. at 7-8, ECF No. 223. The States' attempt to compare the September Guidance to Deferred Action for Childhood Arrivals ("DACA") or Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") misses the mark, because DHS's prioritization efforts

[1] As the Court is aware, the Supreme Court granted the government's petition for certiorari in that case and is expected to issue a decision this term.

do not confer any *legal* benefit on noncitizens. *Contra* Pls.' Post Trial Br. at 4-5 (implying that the September Guidance provides noncitizen with legal benefits). Some courts have held that the DAPA and DACA policies were final agency action on the basis that noncitizens who enrolled in DACA or DAPA were generally eligible for work authorization and were considered lawfully present for certain purposes—which those courts determined were legal benefits that noncitizens previously lacked. *See, e.g.*, *Texas v. United States*, 549 F. Supp. 3d 572, 600 (S.D. Tex. 2021), *appeal filed*, No. 21-40680 (5th Cir. Sept. 6, 2021). The September Guidance, by contrast, does not allow noncitizens to seek work authorization, does not render them lawfully present for any purpose, or convey any other legal rights. Of course, DHS's prioritization may have *practical* effects, but those impacts do not trigger finality. *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016); *see also Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003). Any practical effect of the agency focusing on public safety threats does not change the legal status of an individual who is otherwise not apprehended.

Second, the States are wrong as a matter of fact and law that the September Guidance is a substantive rule that alters Defendants' detention obligations. *Contra* Pls.' Post Trial Br. at 4-5. Most obviously, the September Guidance does not affect the agency's interpretation of the mandatory detention components of §§ 1226(c) or 1231(a); the guidelines do not even control detention or release decisions. *See* September Guidance at 1 ("This memorandum provides guidance for the apprehension and removal of noncitizens."); *see also Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law* ("Considerations Memo"), AR_DHSP_00000001, at AR0019 (the September Guidance does "not purport to override" statutory provisions related to detention). Additionally, as Defendants have previously explained, it is error to assess the merits of an Administrative Procedure Act ("APA") challenge

to determine whether agency action was final. Defs.' Mem. of P. & A. in Opp'n to Plaintiffs' Mot. To Postpone the Effective Date of Agency Action or, in the Alternative, For Prelim. Inj., (Defs.' PI Opp'n) at 22-25, ECF No. 122 (citing, *e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (EPA's issuing a notice of violation to a company, after over ten years of investigation, was not "final" such that it was subject to judicial review, notwithstanding that the notice represented EPA's interpretation of the relevant law, because the "notice does not itself determine [the company's] rights or obligations, and no legal consequences flow from the issuance of the notice.")).

Third, the States repeat their argument that the September Guidance is binding on DHS personnel and, therefore, is a substantive rule. *See* Pls.' Post Trial Br. at 5. Again, as explained above, the Guidance is non-binding; agency personnel retain discretion to make enforcement decisions. *See* September Guidance at 5 (the Guidance "does not compel an action to be taken or not taken;" the Guidance "leaves the exercise of prosecutorial discretion to the judgment of our personnel").

For these reasons, and as explained in Defendants' prior briefing, *see* Defs.*'* PI Opp'n at 22-25, 41-45; Defs.' Post Trial Mem. at 1-4, the September Guidance is not a substantive rule and is not final agency action. The Court therefore lacks jurisdiction to hear the States' challenge and judgment should enter for Defendants.

II. The September Guidance is Consistent with 8 U.S.C. §§ 1226(c) and 1231(a)(2).

In their post-trial briefing, the States once again incorrectly argue that September Guidance violates 8 U.S.C. §§ 1226(c) and 1231(a)(2). *See* Pls.' Post Trial Br. at 6-18. Neither of those two statutory provisions imposes a judicially enforceable mandate to arrest all individuals described therein. Whether they do is, of course, a question of statutory interpretation—one to be answered in light of the Supreme Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

And for the reasons Defendants have previously set out, *see* Defs.' PI Opp'n at 30-36; Defs.' Post Trial Mem. at 8-17, neither 8 U.S.C. §§ 1226(c) nor 1231(a)(2) can be properly interpreted to impose a judicially enforceable mandate on the Secretary. Further, even if the States were correct that there were some judicial enforceable mandate, the Secretary's September Guidance is wholly consistent with any such mandate. Nothing in the Secretary's Guidance compels non-enforcement and, in fact, the Secretary explicitly underscores in his guidance that agency personnel are to exercise their discretion as they deem appropriate. And, if this Court were to look beyond the administrative record, the evidence at trial established that (1) the States themselves recognize the appropriateness of non-enforcement in certain circumstances, without regard to any statutory mandate; and (2) since the effective date of the September Guidance, ICE has been executing almost all previously placed detainers for those being released by the Texas Department of Criminal Justice ("TDCJ"). This Court should reject the States' statutory argument.

A. The States' interpretation of the scope of 8 U.S.C. §§ 1226(c) and 1231(a)(2) is wrong as a matter of law.

In their post-trial briefing, the States make several misguided arguments for why 8 U.S.C. §§ 1226(c) and 1231(a)(2) impose judicially enforceable mandates that require ICE to arrest all individuals potentially covered by those provisions. *See* Pls.' Post Trial Br. at 6-13. First, they try to distinguish *Castle Rock* by repeatedly conflating the distinct question of the statutes' meaning with the separate question of whether 5 U.S.C. § 701(a)(1) precludes review under *Heckler v. Chaney*, 470 U.S. 821 (1985). *See* Pls.' Post Trial Br. at 6-7. Second, they argue that *Castle Rock*'s recognition of prosecutorial discretion in the face of seemingly mandatory statutory commands does not apply to general enforcement guidance, *id*. at 7, notwithstanding that *Castle Rock* itself was about an alleged policy or practice of non-enforcement. Third, the States once again rely on stray lines from precedents arising in meaningfully different contexts, *id*. at 8-9, failing to

recognize that those cases do not purport to override the Executive's Article II power to make enforcement determinations and, if anything, are entirely consistent with that recognition. Fourth, the States emphasize the Fifth Circuit's *MPP* decision now pending before the Supreme Court, *id*. at 9-10, ignoring that the Fifth Circuit there recognized the Executive's inherent discretion to make the enforcement and non-enforcement decisions contemplated by the September Guidance, such as whether to arrest or remove individuals. And, fifth, the States once again fail to demonstrate that 8 U.S.C. §§ 1226(c) and 1231(a)(2) contain any "stronger indication" necessary to displace the Executive's deep-rooted enforcement discretion. *Compare* Pls.' Post Trial Br. at 10-13 *with Castle Rock*, 545 U.S. at 761 (emphasizing that "some stronger indication" is needed to displace such discretion, which persists "even in the presence of seemingly mandatory legislative commands"). In the end, the States' arguments all fail.

First, the States' contention that *Heckler* is the "equivalent of *Castle Rock*" for "federal agency actions," Pls.' Post Trial Br. at 6, is categorically mistaken. *Castle Rock* instructs courts how they should interpret a statute directed at law enforcement officials that uses the word "shall." *See* 545 U.S. at 759. *Heckler* answers a completely different, though admittedly related, antecedent question: whether courts have jurisdiction under the APA to review an agency's nonenforcement decisions. *See* 470 U.S. at 831. Nonenforcement decisions are committed to agency discretion—that is, they are exempt from judicial review—because they inherently require "a complicated balancing of a number of factors which are peculiarly within [the Executive's] expertise," including "whether agency resources are best spent on this violation or another," "whether the particular enforcement action requested best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all." *Id.*; *see also Wayte v. United States*, 470 U.S. 598, 607 (1985) (the Executive's "broad discretion" in enforcement decisions is

"particularly ill-suited to judicial review"). Even if the Court determines that, under the Fifth Circuit's holding in *MPP*, it has jurisdiction under the APA because *Heckler*'s presumption of nonreviewability does not apply to the Guidance—a finding that Defendants separately argued would be inappropriate here, *see* Defs.' PI Opp'n at 18-22—the Court must answer the distinct question, guided by *Castle Rock*, whether a statute imposes a judicially enforceable mandate on the Executive.

Second, the States "distinguish" *Castle Rock* in a manner that is both factually and legally wrong. The States assert that *Castle Rock* "involved a request that the courts review the nonenforcement of a law against a particular individual," whereas their lawsuit challenges "a generally applicable policy as a whole." Pls.' Post Trial Br. at 7. This purported contrast between their lawsuit and the challenge in *Castle Rock* is factually incorrect. *Castle Rock* involved a claim that the locality had a generally applicable policy of not enforcing restraining orders, in violation of Colorado statutes and the Due Process Clause. *See* 545 U.S. at 754 (describing the claims as being "that the town violated the Due Process Clause because its police department had 'an official policy or custom of failing to respond properly to complaints of restraining order violations' and 'tolerate[d] the non-enforcement of restraining orders by its police officers.'" (alteration in original)). But the States' argument is also wrong as a legal matter. The *meaning* of a statute—as opposed to the nature of judicial review, if any—does not change depending on the nature of the lawsuit that implicates it. Thus, it would not matter if *Castle Rock* did concern a challenge only to an individual decision or a challenge also to the town's policy. The meaning of the statute—the question the Supreme Court first addressed before turning to the due process question—would be the same in either case.

Similarly, and contrary to the States' suggestion, *see* Pls.' Post Trial Br. at 6, *Castle Rock* is just as applicable in the context of interpreting a federal statute as in the context of interpreting a state statute. The Supreme Court in *Castle Rock* gave no indication that its analysis varied in any way from its ordinary approach to interpreting federal statutes, and the States' efforts to now invent such a distinction fails. For one, the States' insinuation that the Executive is beholden to the laws of Congress while the Castle Rock police department was free to ignore its state legislature's commands is entirely misplaced. Localities such as the eponymous Town of Castle Rock, "never were and never have been considered as sovereign entities." *Reynolds v. Sims,* 377 U.S. 533, 575 (1964). Rather, they are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009) (quoting *Reynolds*, 377 U.S. at 575). Moreover, the federal Executive's own law enforcement discretion is firmly established. The Executive—vested with "the executive power"—possesses "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause." (footnote omitted)). There is no meaningful difference between the nature of federal law enforcement and the nature of state law enforcement that affects the application of *Castle Rock* to this case.

Third, the States invoke a number of cases that describe either § 1226(c) or § 1231(a)(2) in seemingly mandatory terms to suggest that § 1226(c) or § 1231(a)(2) are judicial enforceable mandates. In each of these cases, the issue, however, was whether a detained noncitizen could obtain release. *See generally Demore v. Kim*, 538 U.S. 510 (2003); *Nielsen v. Preap*, 139 S. Ct.

954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021); *see also Texas v. United States*, 14 F.4th 332, 338-39 (5th Cir. 2021) (finding that "[t]hose cases do not consider whether the statutes eliminate the government's traditional prerogative to decide who to charge in enforcement proceedings (and thus who ends up being detained)," because the cases "are ones in which detainees subject to enforcement action were seeking their release"), *vacated*, 24 F.4th 407 (5th Cir. 2021).

As Defendants have explained, immigration officials have long understood both § 1226(c)(2) and § 1231(a)(2) to curtail their discretion to release certain noncitizens from custody. *See* Defs' Post Trial Mem. at 17-18; Considerations Memo at AR0018-19 (discussing DHS's longstanding application of those provisions and how the September Guidance is fully consistent with this approach); *see also, e.g.,* Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* ("Meissner Memo") (Nov. 17, 2000), AR_DHSP_00000030, at AR0032 (explaining that the use of "shall" does not displace prosecutorial discretion but recognizing limits on releasing certain noncitizens from ICE custody pursuant to 8 U.S.C. § 1226(c)(2)). Those provisions do, as Defendants have long maintained, impose certain important obligations on the agencies with respect to releases from custody. *See, e.g.*, *Demore*, 538 U.S. at 521 (describing limits on immigration officials' discretion to release certain noncitizens).

Indeed, the quotations the States rely on from that series of Supreme Court cases underscore that those cases addressed different issues from those before this Court. From *Demore*, for example, the States quote the Supreme Court's description of Congress limiting agencies' "discretion over custody determinations." 538 U.S. at 521. "Custody determinations" are decisions whether to release someone already in custody. *See, e.g.*, 8 C.F.R. § 236.1(c)(1)(ii) (referring to "custody determinations" made in, *inter alia*, paragraph (c)(8) of the section"); *id.* § 236.1(c)(8)

(authorizing the release from the custody other than those covered by 8 U.S.C. § 1226(c)); *see also Demore*, 538 U.S. at 514 n.2 (addressing the "absolute prohibition" on *release* from custody in § 1226(c)). And from *Jennings*, the States emphasize that § 1226(c) describes "a statutory category of aliens who may not be *released*." 138 S. Ct. at 837. And in *Guzman Chavez*, the Supreme Court explained that while noncitizens detained under § 1226 "may generally apply for release on bond or conditional parole," for those described in § 1226(c), "detention is mandatory" and they therefore may not apply for release. 141 S. Ct. at 2280 & n.2. And in *Preap*, as Defendants have explained, the Supreme Court *rejected* the contention that § 1226(c)(1)—the "shall take into custody" provision—imposes a judicially enforceable mandate on the Executive. 139 S. Ct. at 969 n.6.

Further, in none of these cases did the Supreme Court confront the question presented by this case: whether the statutes impose a judicially enforceable duty on the Executive to *arrest* certain categories of noncitizens. To evaluate such statutes, courts must consider not only statutory text, but also, as in *Castle Rock*, the practical consequences and operational feasibility of interpreting the statute to impose a judicially enforceable mandate. To answer *that* question, the Supreme Court would have needed to wrestle with, among other considerations, delicate questions of separations of powers; the interplay between "seemingly mandatory legislative commands" and "the deep-rooted nature of law-enforcement discretion," *Castle Rock*, 545 U.S. at 761; the interplay between Congress's contemporaneous appropriations and the legislative text, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 386(a), 110 Stat. 3009-653 (provided funding only to support an increase in detention "to at least 9,000 beds" during Fiscal year 1997); and the heightened foreign affairs implications for the scope of

Executive power in the immigration context, *see Jama v. ICE*, 543 U.S. 335, 348 (2005). But in none of those cases were these issues raised or decided.

To give force in *this* context to the Supreme Court's incidental descriptions of the statutes as "mandatory" in *those* contexts would run afoul of the Supreme Court's own admonitions that even *it* "sometimes" does "not paraphrase complex statutory language as well as we might" and that "[w]hat matters . . . is not a one-line description, but a pages-long analysis." *Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021); *see also Illinois v. Lidster*, 540 U.S. 419, 424 (2004) ("We must read this and related general language in [a previous case] as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). The questions whether and by what means a noncitizen currently in detention can secure his release, or other relief, raise entirely separate questions from whether and how the Executive can continue to exercise its discretion in the face of "seemingly mandatory legislative commands." *Castle Rock*, 545 U.S. at 761.

Fourth, the States rely heavily on the Fifth Circuit's decision last year in litigation over the termination of MPP. *See* Pls.' Post Trial Br. at 9-10. In that litigation, as here, the government invoked *Castle Rock* in the context of an immigration statute. But the Fifth Circuit rejected that argument, explaining that "*Castle Rock* is relevant only where an official makes a nonenforcement decision" and that it did not permit the government to release into the interior noncitizens apprehended at the border when the statute provided that the government "shall" detain them, but also provided that the government "may" instead return them to Mexico. *MPP*, 20 F.4th at 997-98. Releasing them into the United States, the Court explained, was not among the options Congress provided.

Whatever the ultimate merits of that decision, it does not help the States' case here. The September Guidance applies (as most directly relevant to the States' claims) to a classic enforcement or nonenforcement decision—whether or not to make an arrest. The States contend that declining to make an arrest, because it has downstream consequences for benefits eligibility, is "more than nonenforcement." *See* Pls.' Post Trial Br. at 9 (quoting *MPP*, 20 F.4th at 987). But that is not so. In the *MPP* decision, the Fifth Circuit found that when the agency released noncitizens on "parole" it conferred a legal status that "remov[ed] a categorical bar on receipt of [public] benefits." *MPP*, 20 F.4th at 987-88. Here, the decision not to make an arrest confers no legal status—it is simply the absence of action. Thus, if a noncitizen who has been released from state custody is eligible for benefits, it is because of the rules governing those benefits, not because of anything DHS has or has not done. Eligibility is the status quo, and ICE making an arrest disturbs that status quo; the not making an arrest changes nothing.

Moreover, in *MPP* the Fifth Circuit recognized the unavoidable resource constraints on DHS, but concluded that the contiguous return provision enumerated a "safety valve" to those constraints, and so DHS could not rely on an alternative safety valve of its own making. *Id*. at 942. Here, neither § 1226 nor § 1231 has a safety valve to allow DHS to resolve the problems of limited detention capacity; DHS's only recourse is not to make the arrests in the first instance.

Fifth, as Defendants have explained at some length, the statutes at issue in this case do not displace the Executive's deep-rooted and retained discretion to decline to make an arrest. In *Castle Rock*, the Court explained that some "stronger indication" than existed there was necessary for a "seemingly mandatory" statute to effectuate a displacement. Such indicators are missing from the two provisions that the States rely on for their claims.

The States attempt, but fail, to show otherwise. Pls.' Post Trial Br. at 10-13. First, they contend that in *Castle Rock* the Supreme Court focused in particular on "the problem of arrest in 'cases in which the offender is not present to be arrested.'" *Id.* at 10 (quoting *Castle Rock*, 545 U.S. at 762). The States assert that Congress has somehow avoided that problem by providing for arrest "when the alien is released" from criminal custody.[2] Pls.' Post Trial at 10. Unfortunately, not so. Congress's appropriations allow for roughly 6,000 immigration officers within ICE Enforcement and Removal Operations. There are estimated to be over 11 million potentially removable noncitizens in the United States, including hundreds of thousands with final orders of removal and potentially tens or hundreds of thousands who are currently pending removal proceedings and who have a criminal conviction or criminal charges pending. *See* Thomas Homan Responses to QFRs, https://www.judiciary.senate.gov/imo/media/doc/Homan%20Responses%20to%20QFRs1.pdf, at 2 ("As of May 21, 2016, there were 950,062 aliens with final orders of removal on [ICE's] national docket"); 2/23 PM Trial Tr. 159:3-13, Testimony of Thomas Homan (acknowledging that there were at least 30,000 new noncitizens with criminal records in Texas over the course of a decade). Further, the States do not address the reality that many jurisdictions in the United States do not honor detainers, denying DHS the information it needs to be present when the noncitizen is released from state or local custody. *See* Decl. of Peter Berg ("Berg Decl.") ¶ 24 AR_DHSP_00006029 ("Many jurisdictions across the country neither honor ICE detainers nor notify ICE when inmates are released from custody"). There are thousands of jails or prisons in the United States from which a noncitizen might be released. This stark reality refutes the States' suggestion that Congress has somehow, by words, solved the practical problem of "cases in which the offender is not present to be arrested." *Contra* Pls.' Post Trial Br. at 10.

[2] The States have no comparable argument with regard to § 1231.

As *Castle Rock* explains, any presumption that "shall" imposes a judicially enforceable mandate is flipped when the statute touches on enforcement discretion. Cases like *Maine Community Health*, on which the States rely, therefore get them nowhere. *See* Pls.' Post Trial Br. at 10 (citing *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020)). *Maine Community Health* concerned the government's obligation to make certain payments, and had nothing to do with law enforcement. The same is true for *Hawkins v. HUD*. *See* Pls.' Post Trial Br. at 10 (citing *Hawkins v. HUD*, 16 F.4th 147, 156 (5th Cir. 2021)). *Hawkins* dealt with a statute that provided that the government "shall provide assistance" for displaced tenants—not a statute that dealt with enforcement. And it is not enough here, just as it was not enough in *Castle Rock*, that the statutes at issue use both "may" and "shall." *See* Defs. Post Trial Mem. at 9-10. In a footnote, the States concede that the Colorado legislature also contrasted "may" with "shall" in two subsections of the same statutory provision at issue in *Castle Rock*, but contend that here each use pertains to the same action. But Congress used entirely different words between § 1226(a) ("may be arrested and detained") and § 1226(c)(1) ("shall take into custody"). Even if these terms refer to similar acts, each provision is framed differently—one in the passive voice, one directive—and uses different words, which undermines the States' inference of an intentional, and meaningful, comparison. And the States have no similar argument with regard to § 1231, which does not contain any contrasting "may."

Nor does the Government's proffered interpretation—which has stood for 25 years—render § 1226(c) superfluous. *Texas v. United States*, 14 F.4th at 338 (noting that at the time of the decision, "in the quarter century that [the statute] has been on the books, no court at any level previously has held that sections 1226(c)(1) or 1231(a)(2) eliminate immigration officials' discretion to decide who to arrest or remove"); *see also* Considerations Memo at AR0018-19

(discussing longstanding interpretation of 8 U.S.C. § 1226(c), as well as 8 U.S.C. 1231(a)(2)); Meissner Memo at AR0032 (providing the Executive's interpretation in 2000 of prosecutorial discretion and 8 U.S.C. § 1226(c)). Rather, under the government's reading, § 1226(c)(2) has the clear function of proscribing release for certain noncitizens once they are in ICE custody, that is, once the government has committed resources to arresting them. And subsection (c)(1) not only provides the categories relevant for the release provision, it also clarifies that noncitizens are subject to arrest as soon as they are released (but not before), without regard to whether the noncitizen "is released on parole, supervised release, or probation." *See Preap*, 139 S. Ct. at 964 (explaining that subsection (c)(1) clarifies that the arrest authority "does not permit the Secretary to cut short an alien's state prison sentence" but that he "need not wait for the sentencing court's supervision over the alien to expire").

The States again turn to the Fifth Circuit's *MPP* decision for aid, but help is not forthcoming. There, the Fifth Circuit described a statute that provide that "the alien shall be detained" but that for some DHS "may return them to a contiguous foreign territory instead of detaining them." *MPP*, 20 F.4th at 994-95 (discussing 8 U.S.C. § 1225(b)(2)). The "shall" provision, the Court explained, set out a "default rule," while the "may" provision set out "an allowed alternative." *Id.* The express inclusion of some alternatives, which operated as a safety valve on DHS's resource constraints, the Fifth Circuit explained, precluded any other allowed alternative. *Id.* at 942; *see id.* at 996 ("[T]he four statutory alternatives described in the preceding section are exhaustive. Congress gave DHS no fifth choice."). Notwithstanding whether the United States agrees with that logic, that logic does not apply here, where the only alternative for DHS in the context of these statutory provisions is not to make the arrest in the first place.

In the end, the "stronger indication" required to override prosecutorial discretion in the manner advocated by the States is lacking in both 8 U.S.C. § 1226(c) and § 1231(a)(2).

B. The parties agree that the difference between "custody" and "detention" is immaterial to this litigation.

There is no dispute between the parties whether any distinction between the term "custody" and the term "detention" is relevant to this litigation. It is not. *See* Pls.' Post Trial Br. at 13-16; Defs.' Post Trial Mem. at 17. As Defendants explained, however, there is an important distinction between the status of being detained or in custody, and the decision to arrest or take into custody to begin with. *See* Defs.' Post Trial Mem. at 17-19; *see also Texas v. United States*, 14 F.4th at 337-40 (contrasting Executive's "deep-rooted tradition of enforcement discretion" over "who should be subject to arrest, detainers, and removal proceedings," with statutory restrictions on who can be released from detention).

C. Even if the statutes did create the mandate the States proffer, the September Guidance would not violate it.

The States assert that "adopting a rule that dispenses with [the] requirement" to "take into custody" and "detain" "certain criminal aliens," or "forbid[ding] agents of DHS from following those categorical commands" would be contrary to the law as they interpret it.[3] *See* Pls.' Post Trial Br. at 17-18. But the States fail to identify what, precisely, in the September Guidance "forbid[s]" or "prevent[s] agency staff from following that categorical command." The September Guidance, which applies in many contexts, expressly "does not compel an action to be taken or not taken." *See* September Guidance at 5 ("[This] guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel."). Put simply, the September Guidance does not exclude any

[3] The reference to "certain criminal aliens" indicates that the States are again referring only to § 1226(c). The States appear then to have abandoned their claim that the September Guidance is contrary to § 1231(a)(2). *See also*, *supra*, Section II.A. (observing that the States fail to argue that § 1231 contains a "stronger indication" necessary to overcome traditional discretion).

noncitizen from enforcement, whether that individual falls within one of the supposed "mandatory" categories or not.

Further, given that DHS undeniably lacks the resources to detain *all* noncitizens potentially subject to § 1226(c)(1) or § 1231(a)(2), the States themselves recognize that DHS should not be obligated to arrest all of the individuals subject to those provisions. 2/24 AM Trial Tr. 2-86:9-11 ("We're not seeking to say you can never make a particular enforcement decision or non-enforcement decision against a particular alien."). Thus, the States do not dispute Defendants' fundamental argument: that DHS lacks the resources to arrest and detain all of the noncitizens described in the various statutory provisions they cite and that DHS necessarily must and may exercise discretion not to take such enforcement actions in certain scenarios. *See, e.g.*, 2/23 PM Trial Tr. at 148:23-151:1, Testimony of Thomas Homan (describing examples where he would exercise prosecutorial discretion to decline to take an individual into custody). The States' central argument, then, is that DHS is precluded from acknowledging and sensibly responding to what both Defendants and the States agree on, and from issuing guidance to enforcement personnel on how to proceed in light of those constraints. But given that the Parties agree that DHS may exercise its discretion, and given that Congress expressly charged *the Secretary* with the responsibility to set national immigration enforcement priorities, 6 U.S.C. § 202(5), there is nothing unlawful in the Secretary's policy that provides guidance to immigration officials on the exercise of discretion that all parties agree they have.

Moreover, the States actually do recognize that the agency may not only exercise discretion but also issue guidance for prioritizing certain enforcement actions over others. *See* Pls.' Post Trial Br. at 28 (citing with approval the Kelly, J. Johnson, and Morton Memoranda). But, as discussed above, those memoranda approvingly cited by the States also recognized the propriety of using

case-by-case analysis—analysis that is the hallmark of the September Guidance. *Compare* September Guidance at 4 ("[O]ur personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly.") *with* Kelly Memo at AR0062 ("The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis . . ."); J. Johnson Memo at AR0057 ("requir[ing] DHS personnel to exercise discretion based on individual circumstances"); Morton Memo at AR0049 ("decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities").

In the end, it is difficult to identify what, precisely, the States find objectionable about the September Guidance. In fact, if this Court were to look beyond the Administrative Record and consider implementation of the September Guidance, ICE dropped only two detainers issued to the TDCJ purportedly because of the September Guidance in the seven weeks from December 29, 2021 to February 15, 2022. *See* Pls.' Trial Ex. C (showing three dropped detainers); Defs.' Trial Ex. 5 (showing one of the three was reinstated); 2/23 PM Trial Tr. at 52:17-53:4, Testimony of Robert Moore (conceding that three dropped detainers for the period from December 29, 2021, through February 15, 2022—"a month and a half"—would "be a small number" of dropped detainers); *see also id*. at 51:13-52:3 (conceding that the number of detainers ICE picked up from TDCJ from November 29, 2021, through February 15, 2022, potentially exceeded 200). Indeed, the States are noticeably quite quiet in their post-trial brief about the factual evidence they put forward at trial.

Thus, regardless of any purported judicially enforceable mandates, the September Guidance does not violate any such mandates.

III. This Court Should Reject the States' Arbitrary-and-Capricious Arguments.

The Secretary's September Guidance is a reasonable effort to prioritize limited resources in enforcing immigration laws. *See* Defs.' PI Opp'n at 36-40 (refuting the States' arbitrary and capricious argument); *see also* 2/23 AM Trial Tr. at 19-52 (Defendants' opening statement walking through the administrative record). Indeed, the September Guidance is informed by a comprehensive administrative record that includes a wide range of inputs and considerations. *See* Corrected Administrative Record Index, ECF No. 145-1; Administrative Record, ECF Nos. 146-153. There should be no dispute that "the agency has acted within a zone of reasonableness." *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (describing arbitrary and capricious standard) (quoting *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). This Court should reject the States' arguments to the contrary, many raised for the first time in their post-trial brief.

A. The Court should assess the complete administrative record.

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." *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) (quoting *Camp*, 411 U.S. at 142). In evaluating the administrative record, the Court is to consider the entire administrative record and contemporaneous explanations by the agency. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-74 (2019).[4] In this case, the administrative record includes Defendants' contemporaneous

[4] As Defendants have previously argued, this Court's review of the States' arbitrary-and-capricious claim is thus limited to the administrative record. *See, e.g.*, Defs.' Mem. in Opp'n to the Consideration of Extra-Record Evidence (ECF No. 189). Notwithstanding that the States were supposed to "denote any evidence outside of the administrative record on which they seek to rely for purposes other than standing or remedy," Order, ECF No. 218, the States made no such notation in their Findings of Fact and Conclusions of Law, ECF No. 225.

memorandum "contain[ing] a summary of the considerations informing the [September Guidance] being issued" on the same day. *See* Considerations Memo, at AR0002.

The States argue that this Court should bury its head in the sand and ignore this contemporaneous document included in the administrative record. *See* Pls.' Post Trial Br. at 18-19. In support, they appeal to the principle that "'[a]n agency must defend its actions based on the reasons it gave *when it acted*." *Id.* (citing *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020)). But that principle means only that an agency cannot develop a *post hoc* rationale in litigation. *See Regents*, 140 S. Ct. at 1909 (referring to the "prohibition on *post hoc* rationalizations" as a "problem [in] timing"). Indeed, *Regents* further emphasizes the value of "contemporaneous explanations" as "instill[ing] confidence that the reasons given are not simply convenient litigating positions." *Id*. (citation and alteration omitted).

As the States recognize, the Court cannot ignore the full administrative record in discerning the explanation for the agency action at issue. *See* Pls.' Post Trial Br. at 18-19 (citing *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 497 (2004) and *Bowman Transp., Inc. v. Ark.–Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974)). Here, the September Guidance itself largely lays out the agency *action*; it articulates the operational policy itself for thousands of DHS law enforcement officers. Although the September Guidance articulates its general rationale, the Considerations Memo—which, again, was created concurrently with the September Guidance and is indisputably part of the administrative record—elaborates on that rationale, thus better allowing the Court to discern the *reasons* DHS adopted the September Guidance. The States cite no authority for its contention that an agency's full explanation must be found on the face of the operative policy document—an operational document being provided to thousands of law enforcement officers.

That is because it is not the law. *See Alaska Dep't of Env't Conservation*, 540 U.S. at 497; *Bowman Transp.,* 419 U.S. at 286.

To the extent the States protest that the Considerations Memo was not publicly released concurrently with the September Guidance, they also cite to no authority indicating that the full administrative record must be released alongside the operative policy document. Rather, an administrative record, which frequently contains non-public documents, generally is not produced until a matter is in litigation. *See* Loc. Civ. Rule 7(n) (D.D.C) ("In cases involving the judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first."). In any event, Defendants produced the Considerations Memo to the States prior to the States even bringing their First Amended Complaint challenging the September Guidance. *See* Defs.' PI Opp'n at 38 (noting that Defendants provided the Considerations Memo to the States three days prior to their filing their amended complaint).

In assessing the States' arbitrary-and-capricious claim, this Court should give full credence to the Considerations Memo contained in the administrative record and contemporaneous to the September Guidance.

B. The September Guidance is based on an assessment of the relevant factors.

The States argue that Defendants considered two factors that Congress did not intend DHS to consider, *see* Pls.' Post Trial Br. at 19-21, and failed to properly consider another factor, *id*. at 21-22. Both arguments are wrong.

First, when crafting policies, agencies must consider "relevant factors." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). Both of the factors that the States take issue with here—the need for an individualized assessment of potential recidivism and humanitarian impacts—are

undoubtedly relevant to the Secretary's determination of how best to prioritize limited enforcement resources.

The States argue that DHS cannot consider the potential for recidivism at the individual level. *See* Pls.' Post Trial Br. at 19-20. In particular, the States claim that, by considering "the risks of recidivism of particular criminal aliens," DHS is exercising discretion that, in the States' view, Congress withheld from DHS. *Id*. at 19. But the States are simply re-packing their statutory claim as an arbitrary-and-capricious claim. *Id*. (discussing 8 U.S.C. § 1226(c) as purportedly removing discretion on who to arrest). In any event, the Secretary's September Guidance is not limited to individuals who are covered by 8 U.S.C. § 1226(c), and there can be no disputes that it is a relevant consideration for the agency to assess a particular individual's potential recidivism in determining whether the agency's resources should be focused on that individual as a public safety threat.

The States also argue that the agency improperly considered the humanitarian impacts of its policy. *Id*. at 20-21. Namely, the States critique the agency's consideration of a noncitizen's employment status since certain noncitizens may not be authorized to work here. *Id*. This argument is factually and legally flawed. First, the States incorrectly assume that noncitizens categorically may not secure employment in the United States; they overlook lawful permanent residents and those who otherwise have work authorization, all of whom could be subject to enforcement actions, including removal, informed by the September Guidance. The States do not dispute that whether such an individual is the sole provider for his or her family is a relevant factor DHS should consider when making an enforcement decision. Regardless, the policy at issue is a question of prioritization and the Supreme Court has explicitly held that the Executive can consider the humanitarian impact of its enforcement efforts. *See Arizona v. United States,* 567 U.S. 387, 396 (2012) ("Discretion in the enforcement of immigration law embraces immediate human

concerns."). The States seek to read out this humanitarian consideration blessed by the Supreme Court as a relevant factor. *See* Pls.' Post Trial Br. at 20 (critiquing the consideration of various humanitarian components of enforcement, including the effect on employment).[5]

Finally, the States argue that the agency did not give due consideration to the possibility of reprogramming or transferring funds from other DHS programs for purposes of increasing detention capacity. *Id*. at 21-22. But whether to reprogram funds to increase detention capacity is a separate decision from what is before the Court: a DHS policy concerning how it will utilize the detention capacity it has, whatever the capacity may be. And even significant increases in funding for detention operations would not provide anywhere near enough funds to detain the entire population potentially described in § 1226(c)(1) and § 1231(a)(2). Put another way, DHS would have had to operate under some prioritization scheme, and thus would have issued prioritization guidance even if it had made, or in the future makes, the separate decision to transfer funds to increase detention capacity. It is the fact of limited and insufficient resources, not the specific amount of resources available, that drives the need for prioritization. The question before the Court is whether the agency acted reasonably in establishing a prioritization framework for utilizing its current resources. *See* Considerations Memo. at AR0005 ("The need to make smart and strategic choices about how to utilize the limited resources provided by Congress is a common theme in

[5] Plaintiffs try to rely on district court decisions concerning DACA but Judge Hanen was addressing the *provision* of work authorization for certain individuals unlawfully present in the United States as a statutory matter. *See Texas v. United States*, 328 F. Supp. 3d 662, 717 (S.D. Tex. 2018); *Texas*, 549 F. Supp. 3d at 610. That discussion is inapposite to the question here: whether the agency may assess whether employment status should factor into a policy that prioritizes enforcement based on limited resources. Further, if this Court were to look beyond the administrative record, the States' own witness recognized humanitarian considerations in the exercise of discretion. *See* 2/23 PM Trial Tr. at 148:23-149:7, Testimony of Thomas Homan (providing examples of exercising discretion so an individual may attend a daughter's graduation or because someone has an upcoming medical procedure).

many of the Department's prosecutorial discretion and enforcement priorities guidelines across administrations"); *id*. at AR0006 ("But while prioritization is a long-standing practice in immigration and law enforcement, the resource constraints DHS and its components face in the civil immigration enforcement context have increased dramatically over the years"). The amount of resources available is the result of entirely separate decisions by Congress and department and component leadership.

In any event, although a separate issue, the administrative record does in fact contain DHS's position on transferring funds and how that could not solve the agency's significant resource limitations. *See* Declaration of Monica Burke ¶¶ 6-11, AR_DHSP_00006074. The States may believe that the amount Congress allocated for detention beds is inadequate, and that Congress should have provided less money for the Coast Guard or the Secret Service to redirect that money to detention space instead, but their quarrel in that respect is with Congress. And, in the end, the agency's decision whether to repurpose Congressionally allocated funds is not before the Court. But even if it were, DHS already gave it proper consideration. *See id.* ¶ 11 ("Any significant reprogramming or transferring of funds would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program."); *see also Bowman Transp., Inc.*, 419 U.S. at 286 (court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

This Court should enter judgment for Defendants on the States' arbitrary and capricious claim.

IV. This Court Should Reject the States' Request for Broad Relief.

The States request multiple forms of relief, all on a nationwide scale, to remedy a handful of speculative alleged injuries to Texas.[6] As explained in Defendants' supplemental brief, to the extent the Court enters judgment for the States on any of their claims, the Court should only remand the matter to DHS so the agency may determine how to proceed in light of the Court's opinion. *See* Defs.' Post Trial Mem. at 27-28. If the Court is inclined to grant additional relief, it should vacate the September Guidance only to the limited extent necessary to address any concrete harms established by the States that stem from any legal defect in the September Guidance identified by the Court. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (When "the relief sought produces a confrontation with one of the coordinate branches of the Government," the "framing of relief" may be "no broader than required by" the "the discrete factual context within which the concrete injury occurred or is threatened."); *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (relief must be "'narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order' as determined by the substantive law at issue.") (quoting *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)). The States, however, would not be entitled to any of the other forms of relief they request.

A. The States are not entitled to an order compelling agency enforcement.

The States recognize that DHS cannot identify and detain all noncitizens covered by sections 1226(c) and 1231(a)(2), and thus ask the Court to issue an ambiguous order requiring

[6] Louisiana did not even put forward any alleged harm from the September Guidance. *See* Defs.' Post Trial Findings of Fact and Conclusions of Law (ECF No. 222) ¶ 66.

Defendants to try, "*in good faith*," to identify and detain all of those noncitizens.[7] Pls.' Post Trial Br. at 28 (emphasis added). The Court should not enter this relief. "There is no question but that mandatory" relief is "to be sparingly issued and upon a strong showing of necessity and upon equitable grounds which are clearly apparent." *Fox v. City of W. Palm Beach*, 383 F.2d 189, 194 (5th Cir. 1967). When issued, mandatory relief "must be specific in its terms and must describe in reasonable detail the act or acts" required. *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387 (5th Cir. 1980).

Here, the States' requested affirmative relief is not "specific in its terms," and could embroil the Court in a series of compliance disputes, effectively requiring the Court to monitor discrete operational decisions within DHS. As a threshold matter, the States do not indicate whether their requested relief would impose a subjective requirement (DHS must simply believe its efforts are reasonable), an objective requirement (*the Court* must find DHS's efforts to be reasonable), or both. If the relief would impose an objective "good faith" requirement, it is unclear what, in particular, it would require DHS to do. Courts have repeatedly noted that the term "good faith" is vague. *See Woodard v. Gen. Motors Corp.*, 298 F.2d 121, 128 (5th Cir. 1962) (discussing the "immensely vague term 'good faith'"); *In re Fortney*, 36 F.3d 701, 707 (7th Cir. 1994) ("good faith is a term incapable of precise definition"); *In re Goeb*, 675 F.2d 1386, 1388 (9th Cir. 1982) (the term "'good faith' . . . by itself is sufficiently ambiguous to tolerate many interpretations"); *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1120 (10th Cir. 2010) ("any but the most vacuous general definition of good faith will . . . fail to cover all the many and varied specific

[7] To the extent that the States seek this relief under the APA, it is unavailable. *See* First Am. Compl., ECF No. 109, ¶¶ 116, 122. The APA permits courts to order only specific and "discrete" action, and does not permit a "broad programmatic attack" like the States' here. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). And, to the extent that they seek this relief outside the APA, they have not identified a cognizable cause of action.

meanings that it is possible to assign to the phrase" (quoting Robert S. Summers, "Good Faith" In General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 206 (1968)). And the States make no attempt to clarify what, for example, this standard would require DHS to do to "identify aliens who satisfy one of the criteria listed in Section 1226(c)(1)(A)–(D)"; would DHS have to allocate additional resources—including legal resources—to this task, and if so, how many resources? Further, would ICE have to arrest all noncitizens it knows are covered § 1226(c), and all noncitizens covered by § 1231(a)(2), even if it would exhaust ICE's limited detention capacity and preclude it from detaining other noncitizens who pose a public safety or national security risk? And given that DHS lacks the capacity to detain all of noncitizens covered by §§ 1226(c) and 1231(a)(2), it is unclear whether (and to what extent) DHS would have to shift funds away from other DHS initiatives and components to increase its detention capacity.[8] The States' requested relief could give rise to compliance disputes involving these questions, requiring the Court to effectively supervise operational and resource allocation decisions by DHS personnel.

The States contend that their proposed "good faith" standard is analogous to "good faith" clauses found in contracts and statutes. *See* Pls.' Post Trial Br. at 29-30. But the term "good faith" is not sufficiently precise for a Court order—the violation of which may give rise to contempt sanctions—simply because that term is used in other settings. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (judicial relief must be precise "to prevent uncertainty and confusion . . . and to avoid the possible founding of a contempt citation on a decree too vague to be understood"). Again,

[8] As noted in Defendants' post-trial memorandum, the evidence in the record shows that, even with a reallocation of resources, DHS likely cannot increase its detention capacity to a level sufficient to hold all noncitizens covered by sections 1226(c) and 1231(a)(2). *See* Defs.' Post Trial Mem. at 34. Although the States allude to recent "budget enhancements," they do not argue that those enhancements were sufficient. *See* Pls.' Post Trial Br. at 29.

as noted above, courts frequently stress the difficulty in giving meaning to "good faith" when that term is the subject of a dispute. The States also note that in the *MPP* case, the district court issued an injunction requiring DHS to "enforce and implement MPP *in good faith*." *Texas v. Biden*, ---F. Supp. 3d---, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098 (2022). But the States fail to explain how the term "good faith" is unambiguous simply because it was found in an injunction from another case. Regardless, even with the term "good faith," the *MPP* injunction was far more precise than the States' requested relief. The *MPP* injunction imposed a specific command on DHS—that it "enforce and implement" a pre-existing program, MPP—and it included the term "good faith" to address the concern that DHS "cannot restart MPP unilaterally" because "MPP requires cooperation with Mexico." *MPP*, 20 F.4th at 1002. Thus, the district court there used the term "good faith," not to describe the *conduct* DHS must engage in, but, as the court of appeals recognized, to clarify that DHS is not required to implement MPP in a fashion with which Mexico (which is not subject to the court's power) does not agree to supply its necessary cooperation. *Id*. Here, by contrast, the term "good faith" *would* be used to describe the conduct DHS would have to engage in; it would be describing, in vague terms, the measures DHS would have to adopt to try and identify and detain noncitizens covered by section 1226(c), and detain all noncitizens covered by section 1231(a)(2). Accordingly, the Court should not issue the States' requested affirmative relief.

B. The States are not entitled to injunctive relief.

In addition to relief under the APA, the States also seek an injunction preventing Defendants "from enforcing Sections II and VI of the September 30 Memoranda," the provisions

that define and implement the prioritization framework.[9] Pls.' Post Trial Br. at 28. The Court should not enter this relief. To start, if the Court is inclined to grant any relief beyond a remand to DHS, it can and should issue a vacatur order, which would render injunctive relief unnecessary and unjustified. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course . . . [i]f a less drastic remedy (such as partial or complete vacatur . . .) was sufficient to redress [plaintiffs' alleged] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted.").

Regardless, the States cannot satisfy the requirements for injunctive relief. For a permanent injunction, plaintiffs must show, among other things, that they have suffered, or will suffer, "an irreparable injury" and "that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *Id.* at 156–57. As explained in Defendants' supplemental brief, the States' injury theories hinge on a speculative causal chain concerning the behavior of noncitizens who (i) reside in the Plaintiff States, (ii) fall under section 1226(c) or section 1231(a)(2), and (iii) would have been detained but for the September Guidance. *See* Defs.' Post Trial Mem.at 29-30. And, with respect to detainers, the States have shown only that a modest number of detainers have been lifted due to the September Guidance. *See id*. at 35. The States thus cannot meet the high bar for injunctive relief.

Conversely, although the alleged harms to the Plaintiff States here are speculative, the harms that their requested injunction would impose on DHS are not. Again, as explained in detail in Defendants' supplemental brief, vacating the September Guidance's priority framework would

[9] As noted above, the States also seek an affirmative injunction, which would be improper for the additional reasons separately set forth above.

interfere with the Executive Branch's statutory and constitutional authority over immigration enforcement decisions, disrupt DHS operations, and preclude DHS personnel from following guidance that, in the Secretary's judgment, increases public safety. *See* Defs.' Post Trial Mem. at 31-36. The States assert that DHS can just adopt one of its prior enforcement memoranda—including the John Morton memoranda which, like the September Guidance, required a "totality of circumstances" analysis, *see* Pls.' Post Trial Br. at 28 (*citing* ECF Nos. 146-4–146-7)—but the States' requested injunction would still force DHS to abruptly change its policy, risking disruption, and it would still displace the Secretary's considered judgment over the policy that, in the current environment, would best promote public safety. The balance of the equities thus counsels against the States' requested injunction.

C. The Court should not issue nationwide relief.

The States reiterate their extraordinary request for nationwide relief, arguing that noncitizens can move across State lines and that immigration law should be uniform. As an initial matter, that argument ignores the interests of other states, who might find the September Guidance beneficial to them. Further, as explained in detail in Defendants' post-trial memorandum, neither of the States' arguments supports nationwide relief here. *See* Defs.' Post Trial Mem. at 28-30. First, once again, the States have submitted no evidence indicating that *any* noncitizen who is covered by section 1226(c) or section 1231(a)(2) and who lives outside of the Plaintiff States (i) will be spared from an enforcement action solely due to the September Guidance, (ii) plans to move into a Plaintiff State, *and* (iii) will commit a crime or use State health care or education resources. *See id.* at 29-30. The Court should not enter nationwide relief against an Executive agency based on the speculation that this causal chain will come to pass. Second, nationwide relief here would undermine uniformity in immigration enforcement. Any relief barring reliance on the September Guidance would result in individual immigration officers settling on their own, distinct

prioritization criteria. *See id*. at 30. Defendants respectfully direct the Court to their supplemental brief for a more detailed discussion of these points. *See id.* at 28-30. The Court should not enter nationwide relief and instead should limit any relief to, at most, Texas and Louisiana, although the latter did not even attempt to put forward any evidence of injury traceable to the September Guidance.

This Court should deny the States' expansive request for relief and, instead, enter judgment for Defendants.

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Respectfully submitted,

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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 April 6, 2022.

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